

UGANDA / JUDGMENT

Kyeyune v Uganda (Criminal Appeal 21 of 2024) [2024] UGHC 1180 (31 October 2024)

[2024] UGHC 1180

COURT

High Court of Uganda

BEFORE

Oyuko Anthony Ojok, J

CASE / FILE NUMBER

Criminal Appeal 21 of 2024

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MPIGI

HCT-15-CR-CN-0021 OF 2024

(ARISING FROM CRIMINAL CASE No- NSA-CR-CO-0523 OF 2023) KYEYUNE MOSES
alias KAVUMA ISMAIL :::::::::::::::::::: VFRSUS

UGANDA::::::::::::::::::

BEFORE HON. MR. JUSTICE OYUKO ANTHONY OJOK JUDGEMENT

This is an Appeal from the decision of Her Worship Proscovia Nsaire, Magistrate GI of the Chief Magistrate of Mpigi at Nsangi Criminal Case No. 0523 of 2023 in which the Appellant was convicted of obtaining money by False Pretence Contrary to Section 305 of the Penal Code Act and sentenced to three (3) years' imprisonment and compensation of twenty million Shillings \$(20,000,000/=)\$. .

Brief Background

It was alleged that Kyeyune Moses alias Kavuma Ismail and others still at large in the month of November, 2020 at Kyengera Town Council in Wakiso District with intent to defraud obtained UGX 20,000,000/= (Twenty Million Shillings) from a one Nabatanzi Fatuma by falsely pretending that he was to make the same amount multiply to a double amount whereas not.

The appellant being dissatisfied with the Judgment of the lower court, appealed to this court against the Sentence and Conviction whose grounds are;

1. That the learned trial Magistrate erred in law and fact when she relied on insufficient evidence to convict the appellant that resulted into miscarriage of justice.
- 2. That the learned trial Magistrate erred in law and fact when she handled a matter that was not in the Court's jurisdiction which resulted into miscarriage of justice.
- 3. That the learned trial Magistrate erred in law and fact on imposing a harsh and severe sentence of three (03) years imprisonment and compensation of Twenty Million Shillings \$(20,000,000/=)\$ to the Appellants.

Representation

Counsel Kyobe William represented the Appellant and State Attorney Kansiime Drare Bireije for the State represented the Respondent. Both Advocates filed written submissions

Duty of the first Appellate Court

In Kifamunte Henry Vs. Uganda ((Criminal Appeal No. 10 of 1997) it was held;

"The first Appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The Appellate Court must then make up its own mind, not disregarding the Judgment appealed from but carefully weighing and considering it. When the question turns on manner and demeanor, the Appellate *Court must be guided by the impressions made on the Judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanor,* which may saw whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on the credibility of witnesses which the appellate court has not seen."

Counsel for the Appellant's submissions

Ground 1 That the learned trial Magistrate erred in law and fact when she relied on insufficient evidence to convict the appellant that resulted into miscarriage of justice.

Counsel submitted on this ground that in the case of Simon Musoke V Uganda (1958) EA 715, the Court quoted that on a case relying exclusively on circumstantial evidence, the Judge must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

He further submitted that in the instant case, PW1 (the complainant) did not tell Court which mobile number she used to communicate with the accused. Furthermore, the investigating Officer (PW3) stated that in his investigation the number belonged to a one Kavuma Ismail and not the accused person Kyeyune Moses.

DW1 testified that he is Kyeyune Moses Kwagala and he also availed a copy of his National ID which the Learned Trial Magistrate never considered. All the evidence adduced before Court including telephone printouts and the KYC (Know Your Customer) printout all proved that the alleged offence was committed by a one Kavuma Ismail not Kyeyune Moses, the Appellant.

He further submitted that this all leads to a circumstantial Judgment since the evidence adduced above shows that the offence was committed but a one Kayuma Ismail and not Kyeyune Moses hence occasion a miscarriage of justice.

He went to submit that in *Bogere Moses & Anor Vs Uganda SCCA NO. 1 of 1997*, it was held that it is incumbent on the court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of that acceptance per se the other version is unsustainable.

Further that in the instant case, all the evidence adduced by the prosecution unequivocally proved that the offence was committed by a one Kayuma Ismail and not Kyeyune Moses, the Appellant. furthermore, PW3 testified that all the evidence he had gathered proved that the offence was committed by a one Kavuma Ismail. He emphasized the same during his cross examination. Even in her judgment, the trial Magistrate on page 8 of her judgment stated that the image on NIRA documents are not that of the Appellant but those of a one Kavuma Ismail. This points to misidentification of who committed the offence and all shows it was not Kyeyune Moses the Appellant.

He submitted that all this leads to one conclusion that the Trial Magistrate failed to properly evaluate evidence when she relied on insufficient evidence to convict the Appellant that resulted into a miscarriage of justice.

Ground 2 That the learned trial Magistrate erred in law and fact when she handled a matter that was not in the Court's jurisdiction which resulted into miscarriage of justice.

On this ground counsel submitted that section 34 Magistrate Court's Act Cap 19 provides that Magistrate's Courts are enjoined to inquire and try such offence which was committed within the local limits of jurisdiction of that Court.

In *Ankwatsa Mary Vs Uganda HCT-00-CR-CV-004 of 2013*, Justice Lameck N. Mukasa while relying on *Kasibante Moses Vs Katongole Singh Marwana & Anor Kampala Election Petition No. 23 of 2011* wherein Hon. Justice Musoke Kibuuka stated;

"the term jurisdiction is not a term of art. It is a term of law. It is a term of very extensive legal import. It embraces every kind of judicial action. It confers upon the court the power to decide any matter in controversy. It pre-supposes the existence of a duly, constituted court with full control over the subject matter under adjudication. It also presupposes full control by the court of the parties to the subject matter under investigation by it. Jurisdiction defines the power of a court to inquire into facts, to

apply the relevant law, to make decisions and to declare the final outcome of the *subject matter under its inquiry*"

His Lordship further stated;

"it is trite law that no court can confer jurisdiction upon itself. It is equally trite that no court can assign or delegate jurisdiction vested in it"

He further submitted that in the instant case, since the alleged case was committed in various areas which include; Nabbingi, Nankuwadde, Senge, Kasengejje, Kakiri, Kyengera, Wakiso and so many other places. This means that the courts in any of those places had jurisdiction to try the matter but instead, the matter was tried in Nsangi Magistrate Court that did not have jurisdiction to try this offence. It is now trite that a Court that exercises the jurisdiction it does not have operates in vain since the judgment passed is null and void.

Counsel prayed that this Honourable Court overturns the decision of the lower Court on grounds that the judgment so passed was null and void.

Ground 3. That the learned trial Magistrate erred in law and fact on imposing a harsh and severe sentence of three (03) years imprisonment and compensation of Twenty Million Shillings \$(20,000,000)=\$ to the Appellants

Counsel submitted that Article 28(8) of the 1995 Constitution of the Republic of Uganda provides that in convicting and sentencing an accused person to a term of imprisonment, Courts are obliged to take into account the period that the accused has been on remand.

Furthermore, in *Rwabugande Moses Vs Uganda SCCA No. 25 of 2014 (2017)*, the Supreme Court held that in Sentencing of an accused person, court must deduct the time spent on remand.

He went further to submit that in the instant case, the Magistrate did not consider the time spent on remand when she sentenced the accused to 3 years without deducting the 6 months in prison hence occasioning a miscarriage of justice

Counsel prayed that the appeal be allowed and the sentenced and conviction be quashed by this Honourable Court.

Counsel for the Respondent's submission

Ground 1 That the learned trial Magistrate erred in law and fact when she relied on insufficient evidence to convict the appellant that resulted into miscarriage of justice.

Counsel submitted on this ground that the evidence on the file is that of the complainant Nabatanzi Fatuma as PW1 and that of PW2 Nakimuli Harriet the mobile Money Lady whom she used to send most of the money. The Respondent also relied on the evidence of O/C Otoyoy Patrick pW3 the police Officer who did the tracking and obtained call data as well as statements from the phone numbers that sent and

received the money from the evidence of PW1, she had seen the accused multiple times and could not have mistaken him for another person. Furthermore, she spent some time with him and had conversations of all which put her in a position to know him very well. The law relating to identification by an accused by a single witness was expounded on and guidelines set in the case of Abdalla Bin Wendo and Another Vs. R. [1953], 20 EACA 166 cited with approval in Roria V R. (1967) EA 583 and the following guidelines were set;

- (a) The testimony of a single witness regarding identification must be tested with the greatest care.
- (b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult.
- (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.
- (d) Otherwise subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge adverts to the danger of basing a conviction on such evidence alone.

Counsel further submitted that indeed the conditions in Abdalla Bin Wendo were fulfilled. There was cogent and independent evidence to support the assertion of the complainant that she was indeed conned of her hard earned money some of which was obtained through the proceeds of sale of property.

She went on that at the arrest of the accused person, the complainant was able to identify the Appellant from a pool of three suspects as the one that took her money without any doubt in her mind as to the correctness of her sight, memory and recollection.

She further submitted that the provisions of S.133 of the Evidence Act of Uganda which is to the effect that for the proof of any fact, plurality of witness is not necessary. In the instant case, the money sent from the mobile money agent PW2 was sent to a sim card registered in the name of Kavuma Ismail and yet the accused identified himself as Kyeyune Moses but this does not disprove the theory that he was using the sim card in question as many people in Uganda use sim

cards registered in other people's names and prayed that this honourable court takes judicial notice of the same.

Ground 2 That the learned trial Magistrate erred in law and fact when she handled a matter that was not in the Court's jurisdiction which resulted into miscarriage of justice.

State submitted on this ground that the law governing Magistrate's Court is very clear and unambiguous especially when it comes to Geographical Jurisdiction Section 31,32 and 37 of the Magistrates Court Act as well as Section 5 of the Penal Code Act provide for the jurisdiction in which a Magistrate's Court can try a matter, specifically section 37 provides for offences that have occurred in more than one local area;

37. Trial where place of offence is uncertain

When

- (a) It is uncertain in which of several local areas an offence was committed;
- (b) An offence is committed partly in one local area and partly in another;
- (c) An offence is a continuing one and continues to be committed in more local areas than one; or.
- (d) An offence consists of several acts done in different local areas.

The offence may be inquired into or tried by a court having jurisdiction over any of those local areas.

She further submitted that this offence was committed in different areas for example Nabbingo, Nankuwadde, Kakiri, Wakiso, Kyengera and others two of which fall within the jurisdiction of Nsangi Magistrate's Court being Nabbingo and Kyengera. This brings this matter within the ambit of Section 37 of the Magistrate Court Act. It is against this background that I find this ground weak, without merit and as such be dismissed.

Ground 3. That the learned trial Magistrate erred in law and fact on imposing a harsh and severe sentence of three (03) years imprisonment and compensation of Twenty Million Shillings \$(20,000,000/=)\$ to the Appellants

State submitted on this ground also that this offence is one that was committed against an elderly woman who has no substantial source of income and the consequence is that she sold her piece of land from which she derived sustenance.

In addition to that, the appellant took advantage of the uneducated and indigent status of the complainant to deceive her and brought great health complications as a result of the realization that she has been defrauded of her hard earned money.

It was further submitted that the Appellant was neither remorseful nor was he repentant at any one time during the process of this trial and maintained his allegations that the complainant was mistaken all throughout the trial.

State went on to submit that this honourable Court is enjoined and enshrined to protect the vulnerable members of the community as well as the public at large from people that perpetrate such heinous and merciless acts of fraudulent behaviour through promotion of justice. This appeal is baseless

Resolution of Court

Duty of the first Appellate Court

In Kifamunte Henry Vs. Uganda ((Criminal Appeal No. 10 of 1997) it was held;

"The first Appellate Court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The Appellate Court must then make up its own mind, not disregarding the Judgment appealed from but carefully weighing

and considering it. When the question turns on manner and demeanor, the Appellate *Court must be guided by the impressions made on the Judge who saw the witnesses. However, there may be other circumstances quite apart from manner and demeanor,* which may saw whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on the credibility of witnesses which the appellate court has not seen."

Ground 1 That the learned trial Magistrate erred in law and fact when she relied on insufficient evidence to convict the appellant that resulted into miscarriage of justice.

PW1 had dealt with the person physically regardless of the name of the person. She was able to recognise him. He told her to send money using a different Mobile No. 0758265669 which number had a different name and photos the number could not be traced, PW2 corroborated the information that money was wired on that line. This was further corroborated by the Investigating Officer PW3.

DW1 just denied the offence. I find that the trial Magistrate properly evaluated the evidence and there was no mistaken identity. This ground fails

Ground 2 That the learned trial Magistrate erred in law and fact when she handled a matter that was not in the Court's jurisdiction which resulted into miscarriage of justice.

In Ankwatsa Mary Vs Uganda HCT-00-CR-CV-004 of 2013, Justice Lameck N. Mukasa while relying on **Kasibante Moses Vs Katongole Singh Marwana & Anor** Kampala Election Petition No. 23 of 2011 wherein Hon. Justice Musoke Kibuuka stated:

"The term jurisdiction is not a term of art. It is a term of law. It is a term of very extensive legal import. It embraces every kind of judicial action. It confers upon the court the power to decide any matter in controversy. It pre-supposes the existence of a duly, constituted court with full

control over the subject matter under adjudication. It also presupposes full control by the court of the parties to the subject matter under investigation by it. Jurisdiction defines the power of a court to inquire into facts, to apply the relevant law, to make decisions and to declare the final outcome of the subject matter under its inquiry"

His Lordship further stated;

"it is trite law that no court can confer jurisdiction upon itself. It is equally trite that no court can assign or delegate jurisdiction vested in it"

S. 37 Magistrate Courts' Act Cap 19 states that trial can be done when place of offence is uncertain, tried by a court having jurisdiction over any of these local areas. This offence took place in Senge, Kasengejje, Nabbingo, Nankuwadde, Kakiri, Wakiso, Kyengera which falls both in Nsangi ro Wakiso Court but Nsangi being near, the matter was tried in Nsangi Court inline with S.37 that gives it power to handle the matter.

This ground also fails.

Ground 3. That the learned trial Magistrate erred in law and fact on imposing a harsh and severe sentence of three (03) years imprisonment and compensation of Twenty Million Shillings \$(20,000,000)=\$ to the Appellants

The sentence was reasonable given the nature of the offence maximum sentence is 5 years' imprisonment the sentence of 3 years' imprisonment is reasonable given the aggravating and mitigating factors.

Rwabuganda Moses V Uganda SCCA No. 25/2014 Court stated that in convicting and sentencing an accused person to a term of imprisonment, courts are obliged to take into account time spent on remand.

Furthermore in the Sentencing Guidelines Regulation 16, period spent on remand should be deducted. I agree that the trial Magistrate did not deduct the 5 months the convict spent on remand i.e, 3 years less 5 months leaving the convict to serve 2 years and 7 months in prison from the date of Judgment 29th day of April, 2024 and compensation of UGX 13,914,500/= (Thirteen Million Nine Hundred Fourteen Thousand Five Hundred Shillings) he obtained fraudulently from the complainant within a period of \$1\$ year after serving his sentence.

This ground succeeds and the appeal succeeds in part.

Right of Appeal explained.

Dated this 31st day of October 2024

Oyuko Anthony Ojok

Judge

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