

**Mubiru and Another v Uganda (Misc.
Criminal Application No. 30/94)
[1994] UGHC 120 (29 April 1994)**
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It was alleged by the prosecution that between 19th and 22nd August 1992 at Nalukolongo Kabusu Lubega Division both appellants obtained shillings 650.000/= from Kimeze on the pretext that they were going to lease land to the said Kimeze for the purpose of digging out sand.

The Appellant have filed in the following grounds of appeal namely:-

That the trial magistrate erred in law and in fact in convicting the accused persons of a civil matter whose facts does not disclose a criminal offence. That the trial magistrate erred in law and in fact in failing to properly and efficiently evaluate all the evidence adduced before convicting the accused persons. And finally that the trial magistrate erred in law and in fact in passing an excessive sentence on the accused parsons.

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Before proceeding to consider this appeal I am of mindful of the duties of this court to subject the appeal to fresh and exhaustive scrutiny by evaluating the evidence on record and arrive at its own conclusion bearing in mind that this court as an appellate court did not have the opportunity to see the witnesses give their evidence as was the case in the trial court. See Peters vs. Sunday Fost 1958 EA CAP 424, Solle vs. Associated Motor Boat 1968 EA 128.

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Perhaps at this juncture it is fit and proper to spell out the evidence as given by the prosecution in proof of this said proceeded
 \$\tau\$ / to consider the memorandum of Appeal. charge before \$\overline{I}\$ / The evidence of PW1 Samwiri Eugulusi was to the effect that he knew both Appellants. The first Appellant together with his servant PW2 Eugerwa went to PW1 and intimated that he wished to let his land to whosoever wanted to get sand from it. They went and inspected the land. PW1 took Kimeze PW4 and one Kyeyune Hawnington TW3 to the first appellant since both of them (TW3) and IW4) had expressed interest in the matter. They were accompanied by TW2. The appellants agreed to lease their land at Katoro to both TW3 and TW4 so that they could dig sand from it. The verbal agreement was made in the presence of TW1 and TW2 the rents were agreed at Shs. 2.500.000/= for 3 years. \$\rm{In}\$ pursuant of the said agreement PW4 made advance payment of

..480.000/= shillings. The money was received by the first appellant later the appellants received a further deposit of Shs. 170.000/= in the presence of PW1, PW2, PW3 and PW4. The first appellant then permitted Kimeze 1W4 to dig the sand. When the latter had just commenced his work a caretaker of the first appellant's land one Katende stopped the tenants from exploiting the land on instructions of the second appellant. The first a appellant was contacted about the allegations and denied knowledge of the same. PW3 and TW4 were permitted to go ahead and dig

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the sand hut according to the latter they did not find sand there but only clay.

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I'W2 ASugerwa Bale was employed by the 1st Appellant and used to look after his land. The latter instructed him to get bin customers to take away sand from his land on payment of a certain fee. He secured people who were ready and willing to buy the sand in the names of PW3 and IW4. FW1, FW2, PW3 and TW4 inspected the land. They orally agreed at the price of 2.5 million shillings and shillings 750,000/= was to be paid before 1W3 and TW4 began digging out the sand. The complainant paid shs. 650.000/= cash and they were allowed to dig the sand but PY73 and PW4 were urged to pay the balance of Shs. 100.000/= before the agreement could be reduced in writing.

Later Katende stopped. PW3 and PW4's men from digging out the sand on the instructions of the landlords. Wasswa the 2nd Appellant said was vailing to refund their money the deposit.

The evidence of PW3 Kyeyune was similar to that of PW1 and PW2. He emphasized that payment was to be done through instalments of Shs. 750,000/= ^s 1.000.000/=. And that they paid cash 650,000/= shillings and they were to pay shillings 100.000/= on being shown the title deeds of the respective land. That the Appellants became evasive and did not show then the title deeds.

The testimony of Kimeze PW4 confirmed what the previous witness had told the lower court but on being stopped from digging the sand they approached the first Appellant who told him that they were no longer interested in the agreement and actually promised to refund their money. I'W2 and PW3 demanded for the return of that money. On that occasion the first appellant informed them, that he had not received back: the share taken by the 2nd appellant. The complainants went back to T. Tubiri's home. They found him at home when contacted about the matter the 1st appellant informed them that he had sent one Katende to collect his cheque

from Gayaza and that he had not returned. They went away but on their subsequent return they did not find Mubiru at home.

In his evidence the first Appellant told the court that the complainants never saw the title deeds and that they paid only Shs. 650.000/= instead of 1.250.000/= which had been agreed upon as deposit. He reiterated that certificate of title vol. 939 in the names of Nalika Wasswa was tendered in court. That 15 lorry trips of sand had been taken away and that they had never agreed on any conclusive rents. He never saw the complainant again after receiving the money.

Whereas the 2nd Appellant told court that they agreed that the first deposit would be shillings 1.250.000/= after making a written agreement with the complainants. He said that whatever transpired were mere proposals the complainants had carried away sand about 15 trips/sand from his land.

Besides recording evidence while at Mengo the court also did record evidence from the witness at the locus in quo. That was done immediately after the first Appellant had testified at Mengo. That meant the evidence of the second appellant was taken at the locus in quo together with the rest of the witnesses including the first appellant.

I now turn to consider the first ground of appeal which was that the learned trial magistrate erred in law and in fact on convicting the Appellants of a civil matter whose facts do not disclose a criminal matter. I was addressed very strongly on this matter by both Mr. Neambu Nsubuga and the learned state I will comment on their submissions whenever attorney Mr. Elobu. necessary during the course of my judgment.

To begin with section 288 of the Penal Code Cap 106 gives the definition of what amounts to false representation as meaning-

> "Any representation made by words writing or conduct of a matter of fact either past or present,

which the person making it knows to be false or does not believe to be true is false pretence."

Whereas under section 289 of the same code. The offence is committed by any person who by any false pretences and with intent to defraud, obtains from any other person anything capable of being stolen, or induces another person to deliver to any anything capable of being stolen.

There are indeed decisions by this court and the defunct court of the Eastern African court of Appeal about the question of obtaining money by false pretences. In dismissing the Appeal in *Kaggwa vs. Uranda* EAIR page 458 at P. 472 Row 1 delivering the judgment of the court had this to say-

"It is abundantly clear that a person cannot be convicted of the offence of obtaining goods or money by false pretence unless the mind of the prosecutor has been misled by the false pretences."

For other decisions on this charge of obtaining money by false pretence. See also *Chamba vs. Republic* 1970 EAP 280 R. vs. *Rootes Kenya Limited and B. S. Dobbs* 1958 EAIR page 13. *Shantilal Maneklal Euwala vs. R.* 1957 EA P 570.

In *Uranda vs. James Bitambire* 1983 HCB page 17. There it was held that S. 288 of the Penal Code defines of false pretence as a representation of a matter of fact either past or present. A future representation or promise as was in that case, therefore could not amount to false pretence. Also See *Uganda vs. John Kategaya* 1977 HCB page 283, *Uganda vs. Batatonda* 1978 HCB page 225. And also see Archbold Criminal pleadings Evidence and practice Thirty Sixth Edition by Butter and Carsia page 707 para 1943 (Evidence to the pretences).

What could be deduced from the law in connection with this charge of obtaining goods by false pretences is that the false pretences must be of the past or present and not future and of which the person making it knows to be false. And there must be an intent to defraud which induces the complainant to part with his money which of course is capable of being stolen.

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In the instant case there is no doubt that there was a verbal agreement entered between the appellants and Kimoze where by the latter on payment of a certain fee was allowed to extract sand from the piece of land belonging to the Appellants. The agreed rent/price for the transaction was fixed at 2.5 million shillings to run for 3 years. FW1 was required to deposit shillings 750.000/= before they could enter into a written agreement. In fact he paid only 65.000/= and there was a balance of shillings 100.000/= to be paid and the mode of payment would be included in the agreement therein. To begin with I do not see any false pretences here on the part of the Appellants and their intent to defraud the complainants. The former had the pieces of land which was inspected by TW1, TW2, TW3 and TW4. There was evidence at the locus in quo from TW2 that in fact he dug the sand and made two heaps. He pointed at the heaps of sand to the court at the locus in quo and was emphatic that the lorry which carried away the Some took only one trip. That was a witness called by the prosecution in proof of its case. There was also further evidence from TW1 Rugalasi secretary for information that one trip of sand was taken by a lorry Bedford ti per and that he was present. All that evidence stand unchallenged by PW4.

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The learned trial magistrate in his judgment had this to say:-

"Whereas it is true that A2 had land at Katereke and there is sand in the land as per exhibit P III land title in his own names. A1 represented a land title in the names of Juyina Martin entitled Mailo Register Volume 939 folio 2 instrument No. 15834." Whereas court reserves its doubt about mailo register having volume and folio, the striking fact is that the title deed was in somebody else's name considering that A1 and A2 refused to show this title deeds to the complainants so that the latter could complete payment of the first instalment as per PW3 FW4 and FW2. Then the anomaly of tendering Martin Juyima's title deed by A1 is not negligible and as such cannot be ignored as

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to points to the fact that A1 had not title deed to show and knew he did not have it yet he and A2 was to show title deeds before the complainants could complete payment with the salesman. Representing to the complainant that he A1 had title deeds whereas he did not therefore amounted to false pretence on part of A1."

With due respect the judgment of the learned trial magistrate dealing with the evidence as regards title deeds showed plainly that he had overlooked the real weakness of the prosecution's case. If the first ampellant had not produced title deed which was in the names of Martin Luyima it was incumbent on the prosecution to adduce evidence to show that the land in question did not belong to the Appellant by calling as a witness the person whose name appear in the title deed. The prosecution has the burden to prove its case beyond reasonable doubt. And this burden lies with the prosecution and did not shift in the present circumstances See Woolmington vs. D. P. P. 1935 AC P. 43. There was a possibility that the title deeds had not been transferred in the names

of the first appellant, I say so because he took the complainants to the site showed them the piece of land where sand was dug out and removed without any complainant from a third part. Besides that I am of the view that Timeze was only permitted to extract the said sand on payment of the balance of shillings 100.000/= after which a written agreement was to be entered into between the Appellants and Kimeze. The alleged false representation if it exists at all was of the I view the evidence of the 2 key prosecution witnesses future. hotch (Kyeyune and Kimeze) as potch of prevarication and lies. The $\mathcal{L}$ learned trial magistrate should have rejected their evidence.

The learned state Attorney however referred me to Granville Willams learning the law Eleventh Edition page where it/stated.

> "The distinction between a crime and civil wrong
though capable of giving rise to some difficult,
legal problems is in essence quite simple. The
first thing to understand is that the distinction between crime and civil does not reside in the nature of the wrongful act itself. This can be proved quite simply by pointing out that the same

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act may be both a criminal and civil wrong".

He submitted that the question whether the facts as they stand amount to an offence and that offences against the criminal law of Uganda, it did not matter where the same fact disclose a civil which his learned frie submitted as a breach of contract.

With due respect, that was a good exposition of the law by Granville William, I seem to agree with Mr. Neubuga Nsambu that Granvill William did not quote in his article the equivalent of section 288 of our penal code lot alone S.289 of the same Act. His argument whether the matter could either be treated as civil or criminal is in my humble opinion rather academic and has no relevancy to the matter before the court.

In the end what had been discussed above disposes of the first ground of appeal that the learned trial magistrate erred in convicting the Appellants of a civil matter whose fact do not disclose $\frac{\text{cririnal}}{a}$ offence. In fact there was uncertainty about the amount of money agreed upon between the Appellants and PW4 before sand was dug out.

Each side accused each other. The appellant's said they could not refund the money because. PW4 had taken some trips of sand which he had not paid for. I am of the view this is a matter that could well be cartered for in civil court. That ground of Appeal therefore succeeds.

As regards the second ground of appeal. I am of the view that this ground has been covered while evaluating the evidence for both the prosecution and defence supra. It is the firm of view of this court that had the learned trial magistrate properly evaluated the evidence on record he could have found the offence of false pretences was not proved by the prosecution witnesses as required by law beyond reasonable doubt.

The last ground of appeal was that the learned trial magistrate erred in passing an excessive sentence.

For a person convicted under section 289 of the penal code he is liable to imprisonment for a maximum of five years imprisonment.

The trial magistrate before sentencing the appellants took into account the ages of the Appellant. The first appellant was stated to be 68 years of age whereas the 2nd appellant was aged 65 years. They were sentenced to 10 months imprisonment whereas the maximum punishment for any one convicted of obtaining money by false pretences would as I stated earlier be sentenced to the maximum of 5 years imprisonment. I am of the view that the sentences imposed on the accused/appellants were retained in all the circumstances excessive if only the prosecution had proved the charge against the appellants beyond reasonable doubt. It was therefore not necessary for the trial magistrate to have invoked the provisions of section 202 of the magistrates courts Act 1970. This ground of Appeal partly succeeds.

The other aspect of this case was that the learned trial magistrate visited the locus before the defence closed. In fact the evidence of the second appellant was taken at the locus in quo.

I am of the view this was not the proper procedure because the purpose of the visit to the locus in quo by court is for people who testified in court to clarify what they had testified to in court. The said procedure however was not prejudicial to the trial since the judgment did not solely rely on what had happened at the locus in quo. However during the course of writing the judgment on this particular matter I was able to look at the following authorities which assisted me very greatly viz *Desonza vs. Uganda* 1967 EA P. 784, *J. W. Onango v. Okallang* 1986 HCB P. 63, *Yeseri Wambi vs. Edias Lusi Byandala* 1982 HCB page 28 and *Nsihambi vs. Mankya* 1982 HCB.

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In the end result this appeal is allowed. The conviction is quashed and the sentence of ¹⁰ years imprisonment imposed on each appellant is set aside and so is compensation shillings 200.00/= payable to the complainant by each appellant and unless the appellants are being held for any other cognisable offence I order for their immediate release.

I. MUKANZA ^/ JUDGE 29.4.1994.

29.4.1994-

Both Appellants Before court Mr. Rsubuga Nsambu for the Appellants - present. The Republic not represented..

Court: Judgment is read and signed.

I. J

29.4.-1994.

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