

Nuwagira v Uganda (Criminal Appeal No.8 of 2014) [2014] UGHCCRD 102 (2 June 2014)

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- 2) The learned trial Chief Magistrate erred in law and fact when she convicted the accused basing on a trial riddled with serious procedural errors and inconsistencies and this occasioned a miscarriage of Justice.
- 3) The learned trial Chief Magistrate erred in law and fact when she held that the prosecution had proved its case beyond reasonable doubt whereas not.

1.4 It is proposed to this Court by the appellant, that:-

- (a) This Court allows this appeal.
- (b) This Court quashes the conviction and set aside the sentence.
- (c) In the alternative and without prejudice to the foregoing, if

Court is inclined to uphold the judgment and finds the appellant guilty, reduce the sentence.

2. Facts of the appeal.

2.1 The appellant was charged on three Counts with: on count 1; obtaining money by false pretences Contrary to Section 305 of the Penal Code Act; on count 2; conspiracy to commit a felony contrary to Section 208 of the Penal Code Act; and count 3, forgery contrary to Section 342 of the Penal Code Act. The appellant denied all the charges.

The prosecution called two witnesses and it was compelled to close its case. The appellant was acquitted on count 2 and count 3 on a no case to answer. The judgment of the trial Court is in respect to Count 1; obtaining money by false pretences Contrary to Section 305 of the Penal Code Act.

2.2 The appellant appealed to this Court against the whole decision and orders of the trial Chief Magistrate, Her Worship Oliva Kazaarwe Mukwaya given at Kampala on 13th day of January, 2014, by which the appellant was convicted on Count 1 of obtaining money by false pretence and sentenced to 4 (four) years imprisonment.

3. When this appeal came up for hearing on 26th May, 2014, Counsel for the appellant, Mr. Chris Bakiza argued the three grounds of appeal together. He submitted that the said grounds of appeal are on the evaluation of evidence, inconsistencies and whether the prosecution case was proved against the appellant beyond reasonable doubt.

Counsel for the appellant submitted that the evaluation of the evidence by the trial Court commences with the appreciation of the elements of the offence charged. That in this case, the trial Chief Magistrate never appreciated the ingredients of the offence of obtaining money by false pretence. He submitted that at page 22 of the record of appeal (page 2 of the judgment), that the way the ingredients of the offence charged were framed by the trial Chief Magistrate creates a suspicion that she had already made up her mind that the accused (appellant) was guilty. That, that assumption by the trial Chief Magistrate was wrong.

He further submitted that the prosecution had an obligation to prove with certainty that Shs. 80,000,000/= (Shillings eighty million shillings) was obtained by the appellant from the complainant. He referred Court to page 23 of the record of appeal, middle paragraph where the trial Chief Magistrate made a finding that the appellant received all that money from the complainant. That the trial Chief Magistrate relied on Exhibit P3, that the contents thereon were not proved by the prosecution. That nowhere in her judgment, does the trial Chief Magistrate make a finding on the contents of Exhibit P3 in order to be satisfied that UGX 80,000,000/= (Shilling eighty million) was received from the complainant by the appellant. That to that extent, the trial Chief Magistrate failed to properly evaluate the evidence on record and that thus she erred both in law and fact.

On ground 2 of appeal, Counsel for the appellant submitted that there are serious procedural errors and inconsistencies. He argued that the trial Chief Magistrate failed in her duty when she did not warn the unrepresented appellant the consequences of his failure to cross-examine the witness who tendered in Court Exhibit P3.

He further submitted that the evidence of PW1 which starts from page 11 of the record of appeal, that nowhere does she mention that the appellant obtained Shs. 80,000,000/= (Shillings eighty million) from her. That PW1 mentioned in her evidence that she sent money to various people such as Mbaine, Hanita and Alex on the advice of the appellant amounting to Shs. 80,000,000/= (Shilling eighty million). And that the aforesaid people were not called by the prosecution to give evidence to corroborate PW1's story. That in a form of a contradiction in evidence, the money PW2 referred to in evidence does not amount to Shs. 80,000,000/= (Shillings eighty million).

On ground 3 of appeal, Counsel for the appellant submitted that owing to the trial Chief Magistrate's failure to evaluate the evidence on record and that for the fact that she relied on the prosecution evidence full of serious procedural errors and inconsistencies that, therefore, the prosecution never proved the charge of obtaining money by false pretence against the appellant beyond reasonable doubt. That this was so because she mis-framed the ingredients of the offence charged.

Finally, Counsel for the appellant prayed to this Court to allow the appeal, quash the conviction and set aside the sentence. That the appellant be acquitted of the charged offence.

4. In reply, Counsel for the respondent Ms. Sarah Babirye, State Attorney vehemently opposed this appeal. She supported in her submissions both the conviction and sentence. She, too, argued grounds 1, 2 and 3 of appeal together. In her submissions, she does not agree with the submissions by Counsel for the appellant. In her submissions in reply, she endeavoured and evaluate the evidence on record as a whole.

5. Resolution of the appeal by Court.

5.1 I am alive at the law regarding the duty of the 1st appellate Court in appeals of this nature. In the case of Bogere Moses and Another vs Uganda, Supreme Court Criminal appeal No.1 of 1997, it was held that:-

“A first Appellate Court must bear in mind that it did not have the opportunity to see and hear the witnesses and should where available on record, be guided by the impression of the trial Judge on the manner and demeanor of the witnesses. What is more, care must be taken not only to scrutinize and re-evaluate the evidence as a whole, but also to be satisfied that the trial Judge had erred in failing to take the evidence into consideration.”

Further, Counsel for the appellant referred to the case of Kifamunte Henry vs Uganda, Supreme Court, criminal appeal No. 10 of 1997 in support of his submissions. In that case it was held that:-

“A first appellate Court had a duty to rehear the case, consider the material evidence and give it (evidence) a fresh and exhaustive scrutiny.”

I respectfully identify myself with the position of the law as stated in the above quoted authorities.

In resolving this appeal I will handle all the grounds of appeal together as they were argued by Counsel for both parties.

Counsel for appellant faulted the trial Chief Magistrate that she mis-framed the ingredients of the offence charged. At page 22 of the record of appeal, 5th line, what Counsel for the appellant mistook as ingredients of the offence charged, they are issues the trial Chief Magistrate framed to guide her in her judgment.

They are:-

“To secure a satisfactory conviction against the accused, the state had to prove that:-

- 1. The accused obtained UGX. 80,000,000/= (shillings eighty million) from the complainant.**
- 2. He did so using deceitful means.**
- 3. That the accused intended to defraud the complainant.”**

With due respect to Counsel for the appellant, the above three items are not ingredients of the charged offence, but they are the issues the trial Chief Magistrate framed in order to resolve the case that was before her. The trial chief Magistrate properly formulated at page 1 of the judgment, last paragraph, (that is page 21 of the record of appeal,) the ingredients of the offence charged, when she stated that:-

“This judgment is in respect of obtaining money by false pretences Contrary to Section 305 of the Penal Code Act.”

Then at page 2, of the judgment 1st paragraph, (that is page 22 of the record of appeal,) the trial Chief Magistrate stated that:-

“State alleged that the accused between the month of May and July, 2012 at Kampala in Kampala District with intent to defraud obtained UGX. 80,000,000/= (Shillings eighty million) from Adong Doris by falsely pretending that he was going to sell her 7 motor vehicles whereas not.”

Underlining is mine for emphasis only.

The allegations containing the ingredients of the offences of obtaining money by false pretence Contrary to Section 305 of the Penal Code Act were formulated. I, therefore, make a finding that the complaint of Counsel for the appellant about misframing the ingredients of the charged offence is more from form than on being on substance.

Consequent to the above, I evaluate the evidence on record, read her judgment; and I am certain that in convicting the appellant the trial Chief Magistrate erred at all the ingredients of the charged, which are well embodied in the issues she framed for the determination of the case that was before her.

Further, I read the judgment of the trial Chief Magistrate and evaluated the evidence on record and I am convinced that the trial Chief Magistrate looked at various testimonies of the prosecution witnesses and that of the defence.

At page 12 of the record of appeal, 9th line from bottom, PW1 made an initial payment of UGX. 5.8m/= (shillings five million and eighty thousand shillings) to the appellant. At the same page, line 2 from the bottom, PW1 sent to the appellant UGX. 2 m/= (Shillings two million). Then on the last line, at the same page, the appellant introduced to PW1 another person called Mbaine (see at page 13 of the record of appeal). After that introduction, more money was sent to Mbaine to be taken to the appellant (see page 13 of the record of appeal) lines 10-11 from bottom. In cross-examination, the appellant never challenged the said prosecution's evidence.

More still, I perused the appellant's evidence at page 20 of the record of appeal; the appellant in his testimony does not deny receiving from the complainant UGX.80,000,000/= (Shillings eighty million). His contention in his defence is that the money he received from PW1 was for the supply of motor vehicle tyres to UNRA (see page 20, line 6 from top) where he says that:-

“She thinks that I squarded the money.”

Then at the same page 20, line 8 of the record of appeal, the appellant says that PW1 refused to give him more money saying that she had invested a lot of money. Considering both the prosecution and the defence evidence, I make a finding that for the fact the appellant does not deny receiving UGX 80,000,000/= (Shillings eighty million) from PW1, puts the amount of UGX 80,000,000/= (Shillings eighty million out of contention. Therefore, the argument by Counsel for the appellant that there is an inconsistency in the evidence of PW1 in favour of the appellant does not hold water. There was no need, therefore, for the prosecution to call one Mbaine, Hanita and Alex who are well known to the appellant to come and give evidence for the prosecution. In cross-examination and in defence, the appellant never negative the prosecution evidence in regard to the said three people as being the appellant's conduits when he was receiving the money from the complainant (PW1).

It is important to note that the appellant never appealed against the sentence of 4(four) years imprisonment as being harsh and excessive in the circumstances. In his submissions, Counsel for the appellant never submitted on the nature of the sentence. I, therefore, see no reasons to disturb the sentence that was passed by the trial Chief Magistrate against the appellant.

Ms. Margaret Kakunguru the Clerk is in Court.

Court: Judgment is delivered in open Court. Right of Appeal explained.

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Joseph Murangira

Judge

2/6/2014

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Prepared on 13 October 2026 · Esheria