

UGANDA / JUDGMENT

Tweheyo v Uganda (Criminal Appeal 23 of 2020) [2021] UGHCCRD 73 (18 April 2021)

[2021] UGHCCRD 73

COURT

HC: Criminal Division (Uganda)

BEFORE

Elubu, J

CASE / FILE NUMBER

Criminal Appeal 23 of 2020

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL No 23 OF 2020 (Arising from Buganda Road Criminal Appeal No
248 of 2018)**

TWEHEYO WILSON**ATUTERAINE ::::::::::: APPELLANT*****vs*****UGANDA ::::::::::: RESPONDENT****BEFORE: HON. MR. JUSTICE MICHAEL ELUBU****JUDGMENT**

The Appellant, **TWEHEYO WILSON ATUTERAINE**, filed this appeal against the Judgment, orders and sentence of **HW AYO MIRIAM E. OKELLO**, Chief Magistrate Buganda Road Court, who convicted him on 6 Counts namely: 1. Obtaining Money by False Pretence c/s 305 of the Penal Code Act (PCA), 2. Personation Contrary to Section 381 of PCA, 3. Two Counts of Forgery c/ss 342, 345, 347 & 348 of the PCA, 4. Uttering False Documents c/ss 351 of the PCA. The appellant was convicted on all counts and received sentences ranging from 1 to 5 years imprisonment on each count. The sentences were to run concurrently.

The background to this appeal is that the appellant is alleged to have held out as the owner of land comprised in Kyadondo Block 189 Plot 664 located at Seeta in Kasangati Town Council Wakiso District. That he misrepresented himself to be one Simon Peter Mugisha, the registered proprietor of the land and bearer of an identity card of MSP Produce Stores in Kampala. That he also had in his possession a forged certificate of title for the land. On the 28th day of June 2017, he purported to sell 25 decimals of the land to one **Fred Mbugano**, the complainant. That he

obtained 35,000,000/- (Thirty Five Million Shillings) as the part payment for the purchase of the land. The total sum agreed was 48,000,000/-. The appellant is stated to have given the complainant a copy of the false certificate of title which the complainant used to effect a search at the Wakiso District Land Registry. In August of 2017 the complainant called up the appellant in a bid to pay off the outstanding sum on the purchase price. He failed to get a hold of him. He visited the land and found the entire parcel fenced off. His inquiries led him to another Simon Peter Mugisha. It was established that this was the legitimate holder of the name and the appellant a bogus fraudster. Efforts to trace the appellant were made and he was arrested in Mbarara in March 2018.

The appellant was subsequently charged as stated above, tried and convicted. Being dissatisfied with the findings of the trial magistrate, he filed this appeal with four grounds. They are,

- 1. That the learned chief magistrate erred in law and fact when she failed to properly evaluate the evidence on record and arrived at an erroneous decision thereby occasioning a miscarriage of justice.
- 2. That the learned chief magistrate erred in law and fact when she failed to find that the appellant had made a statement under duress.
- 3. That the learned chief magistrate erred in law and fact when she shifted the burden of proof to the appellant when she held that he never gave any defence in regard to the evidence adduced by the prosecution.
- 4. That the learned chief magistrate erred in law and fact in failing to account for the period the appellant had spent on remand.

This Court is agrees with the appellant as to what the purport of the first appellate Court is. The principle underpinning this was well laid out in the case of **Kifamunte Henry vs Ug SCCA 10 of 1997**,

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 arises as to which *witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses.*

It is also a tenet of criminal law that the burden of proof rests with the prosecution; and it bears a duty to prove all the elements of the charged offences to a standard beyond reasonable doubt.

This Court will deal with Grounds 1 and 3 jointly

- 1. That the learned chief magistrate erred in law and fact when she failed to properly evaluate the evidence on record and arrived at an erroneous decision thereby occasioning a miscarriage of justice.

- **3. That the learned chief magistrate erred in law and fact when she shifted the burden of proof to the appellant when she held that he never gave any defence in regard to the evidence adduced by the prosecution.**

As seen above, the 1st appellate Court is under a duty to re-evaluate all the evidence placed before the trial Court.

The 1st count charged was obtaining money by false pretences contrary to section 305 of the Penal Code Act.

It is alleged that the complainant, PW 1, spoke to a land broker called Kintu Rogers, PW 2, informing him of a desire to purchase land. It was PW 2 who sourced the suit land and introduced the appellant as the owner. He was said to be called Simon Peter Mugisha. Originally it was his desire that the land be sold as a single block at 200,000,000/-. The complainant pleaded that he could not afford that sum but would be willing to purchase 25 decimals. The parties settled on a figure of 48,000,000/-. The appellant accepted payment in instalments – the first to be 35,000,000/- and the outstanding sum of 6,000,000/- to be paid by the 31st of August 2017. On the 28th of June 2017 the complainant withdrew 30,000,000 from his account held with the Standard Chartered Bank, and a second sum of 6,000,000/- from Housing Finance Bank. His bank account statements were tendered as P Exh I and II respectively. They reflect the withdrawal of these amounts. The parties met at the Law Firm of one Nakato Deborah, PW 5, an advocate practising in the style of Ibaale Nakato and Co Advocates. The money was handed to the appellant who had an identification card of MSP Produce Stores and a National Identification Card all in the names of Mugisha Simon Peter, which he presented both to the complainant and the advocate. PW 5 drew up an agreement of sale of land, which was signed by both the appellant, as Simon Peter Mugisha, and the complainant. The agreement was tendered as PEXH III. The money was paid to the appellant by the complainant in the presence of PW 2 and PW 5.

It was later established that the seller was not Simon Peter Mugisha. The real/legitimate Simon Peter Mugisha testified as PW 3. He presented his National ID which was exhibited as PEXH V. He stated that he had acquired the land in 2010 and sold it off in 2013. He had given the purchaser PW V, Barijje Maurice, the original title and a sale agreement. However, his name still appeared in the certificate of title. PW V denied any knowledge of the appellant.

The above evidence was not discredited in cross examination. In his defence the appellant stated that he does not remember what happened on the 28th of June 2017. That he saw the complainant in Kibuli but does not know anything.

The submission of the appellant is that the elements of the offence have not been established. That there was no acknowledgement of any payment of money presented to court. That PW 2 who allegedly witnessed the payment does not state how much money there was or even give the location of the law chambers. It is the contention that the above shows contradictions in the evidence. That in light of these contradictions the elements of the offence have not been proved.

The respondent opposes this ground and submits that the evidence properly proved an intention to defraud by the appellant.

The Court shall turn to the merits.

The relevant provision is Section 305 of the PCA which stipulates,

Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, commits a felony and is liable to imprisonment for five years.

A false pretence is defined in Section 304 of the Act which says,

Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence.

The elements in this offence can be isolated as,

- a. The making of a false pretence
- b. The intention to defraud
- c. Obtaining or inducing the delivery of anything capable of being stolen
- d. That the accused is liable

In this instant case it is clear that appellant misrepresented himself to be the owner of land, produced a title in names he purported to be his. He produced documents of identification claiming to be Simon Peter Mugisha. The State rebutted this by producing the actual Mugisha. The evidence above shows that by deceit the complainant was induced to believe the appellant owned land for sale. He was tricked into withdrawing money and handing it to the appellant. The intention to defraud can be inferred from these facts. He received the money from the complainant. In fact once the money was handed over the appellant vanished and turned off the phone number he had been using to communicate with the complainant.

The above evidence positively placed the appellant at the scene and proved all the elements of the offence outlined above. It is my finding that there was sufficient evidence to prove the first count.

The 2nd Count was personation.

Section 381 of the PCA provides,

Any person who, with intent to defraud any person, falsely represents himself or herself to be some other person, living or dead, commits a misdemeanour.

The elements here are:

- i. A person falsely presenting himself to be someone else

- ii. With an intention to defraud
- iii. These actions were by the accused

The contention of the appellant is that the sales agreement was not referred to a handwriting expert and the identity cards were not originals and could have been retouched to trick the court.

The state opposed this ground and stated the respondent had produced the actual Mugisha and proved that the appellant was lying.

I shall deal with the elements jointly. The question of fraud has already been established. With regard to personation, the appellant was identified by PW1, PW 2 and PW 5 as the person who represented himself to be Simon Peter Mugisha. When he disappeared, the actual Mugisha Simon Peter was found and later presented to Court. He produced an original identity card and gave his particulars. The fact that the documents were not sent to an expert was immaterial in this case because there was other unrebutted evidence which overwhelmingly showed that the appellant was not Mugisha. In these circumstances I find that this Count was proved.

The Charges of Forgery and Uttering false documents

Forgery is defined by Section 342 of PCA

Forgery is the making of a false document with intent to defraud or to deceive.

Section 345 of PCA

Any person makes a false document who makes a document purporting to be what in fact it is not;

Section 348 of PCA

Any person who forges any will, document of title to land, judicial record, power of attorney, bank note, currency note, bill of exchange, promissory note or other negotiable instrument, policy of insurance, cheque or other authority for the payment of money by a person carrying on business as a banker is liable to imprisonment for life.

Section 351 of PCA

Any person who **knowingly and fraudulently utters a false document** commits an offence of the same kind and is liable to the same punishment as if he or she had forged the thing in question.

Section 2 of PCA

"utter" means and includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question

In this case it has already been shown that the appellant had an intention to defraud.

The prosecution adduced evidence to show through PW 6 that the certificate of title produced by the appellant was a forgery. PW 6 was the Registrar of Titles in Wakiso Land Office. Her routine duties were to receive certificates for registration. That the land title in the instant case was presented to their office by the police and she was able to establish that it was a forgery because of the detail on the title. The font, signature and deed plan differed from the copy they had on record. The details of the ownership on the forged title were also different from what they had in their records. The false title had the names Simon Peter Mugisha while the name listed on their record was Muhereza Edwin. The forged title was tendered in evidence as PEXH V.

The submission on the appellant's behalf is that PW 6 did not state who had forged the title. The other Count under this head was with regard to the Identity card which was tendered and showed the appellant was employed by MSP Produce stores.

In both instances the witnesses were not cross examined on veracity of these documents. The prosecution also proved that they were both in the possession of the appellant. That he intended for PW1, PW 2 and PW 5 to rely on them. That he left the forged title in the possession of PW 5. He therefore uttered the forged title to these persons to induce them into believing he was acting with good faith. They acted under this deception.

In the circumstances of this case, the fact of possession without explanation of origin raises the irrefutable inference that the person named in the document and who intended for it to deceive others was its creator. That person was the appellant.

In light of the forgoing I find the prosecution proved Counts 3, 4, 5 and 6.

The question of shifting burden of proof as alleged in ground 3 does not arise. The offence is proved on the weight of the prosecution case and not on the weakness of the defence. The outlined evidence clearly shows that, based on the evidence, this court has been presented with ample evidence, as a first appellate Court, to make the findings it has made.

These two grounds of appeal fail.

Ground 2

That the learned chief magistrate erred in law and fact when she failed to find that the appellant had made a statement under duress.

There is no evidence on record to prove this claim. In this case the matter of duress was raised by the defendant. There was however no evidence adduced to discharge the burden to show the alleged duress.

This ground of appeal has not been proved.

Ground 4

That the learned chief magistrate erred in law and fact in failing to account for the period the appellant had spent on remand.

The appellant challenged the sentence meted out to him. It was submitted on his behalf that the trial magistrate did not consider the period the appellant had spent on remand. It was the contention that the Court should make it clear that it was deducting the period spent on remand from the sentence. He relied on the decision in **Rwabugande vs Ug SCCA 25 of 2014**.

Turning to the merits of this ground it should be noted that Article 23 (8) of the Constitution stipulates,

Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment.

In a recent decision handed down on the 19th of April 2018, **Abelle Asuman vs Uganda S. C. C. A 66 of 2016** the Supreme Court has guided on the matter as follows,

What is material in that decision is that the period spent in lawful custody prior to the trial and sentencing of a convict must be taken into account and according to the case of **Rwabugande** that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This Court used the words to deduct and in an arithmetical way as a guide for the sentencing Courts but those metaphors are not derived from the Constitution.

Where a sentencing Court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict, the sentence would not be interfered with by the appellate Court only because the sentencing Judge or Justices used different words in their judgment or missed to state that they deducted the period spent on remand. These may be issues of style for which a lower Court would not be faulted when in effect the Court has complied with the Constitutional obligation in Article 23(8) of the Constitution.

When handing down the sentence The trial Magistrate in the instant case held as follows

'... I have considered the days accused spent on remand and I am mindful of the maximum sentence for the 6 counts and the sentencing guidelines...'

Clearly the trial magistrate shows from the above that she was alive to the mandatory requirement to take the period spent on remand into account. The sentence is not illegal simply because she did not apply a formula and subtract. In the result I find that the sentence in this matter is not illegal. It is hereby confirmed.

Ground 4 fails.

In the result this appeal is hereby dismissed.

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Michael Elubu Judge 18.4.2021

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