

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

CRIMINAL APPEAL NO.0036 OF 2012

BUSULWA BLASIO.....APPELLANT

V E R S U S

UGANDA.....RESPONDENT

**(An appeal from the judgment of the High Court of Uganda at Kampala in
Criminal Case No. 1028 of 2008 before Hon. Justice Rugadya Atwoki
dated the 25th January 2012)**

**CORAM: HON. MR. JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA**

This is a second appeal. The appellant appealed against conviction for intermeddling in property of the deceased contrary to section 11(1) of the Administrator General's Act and Fraud contrary to section 190(1) of the Registration of Titles Act.

The appellant was sentenced to imprisonment for two months on the count of intermeddling and to imprisonment for 30 months on the count of fraud ^{c/s} 190(1) of the Registration of Titles Act. The sentences of imprisonment were to run concurrently. He did not appeal against the sentences.

BACKGROUND.

The appellant was tried by a magistrate grade one, Sarah Mponye, at City Hall in Kampala. He was acquitted.

The DPP was dissatisfied with the decision and appealed to the High Court.

The background facts as found by the High Court Judge are the following and they are not disputed.

The respondent and another called Kyewalabye are sons of the late Aaron Sewakiryanga, who died intestate. Kyewalabye has since died. The allegation was that the two got registered as administrators of the estate of their father Aaron Sewakiryanga, vide administration cause No.29 of 2005 issued by the Nakawa chief Magistrates Court sitting at Kasangati.

As Administrators of the estate, the two sold 1.8 acres of the land to Odong Wilberforce and Charles Owere who have also since sold off part of the land to others. The family never appointed the two as administrators of the estate. On learning of the sale, reported to the police. By then Kyewalabye had died.

The respondent was charged with seven counts of intermeddling with the estate of a deceased person \% 11(1) of the Administrator Generals Act in the 1st count, theft \% 254 and 261 of the Penal Code Act in the 2nd count, forgery \% 345 of the penal Code Act in the 3rd, 4th and 5th counts and fraud \% 190(1) of the Registration of Titles Act in counts 6 and 7. At the close of the case by the prosecution, the learned trial Magistrate found the respondent with no case to

answer in respect of the 2nd, 3rd, 4th 5th and 6th counts and acquitted him of those offences.

The trial proceeded on the remaining two counts and at the end of the trial the court acquitted the respondent and set him free, hence the appeal by the DPP to the High Court and the subsequent conviction by the High Court. The appellant dissatisfied with the conviction by the High Court appealed to this Court.

According to the memorandum of Appeal, the appeal is on the following grounds:-

1. (a) **The learned Justice of the High Court erred in law when he failed to subject the evidence on record to fresh scrutiny and evaluation thereby arriving at a wrong decision.**

(b) **In the alternative the learned Justice erred in law when he failed in his duty of re-evaluating the evidence by considering only the evidence of the prosecution and disregarding the evidence of the defence.**
2. **The learned Justice of the High Court erred in law by holding that the evidence adduced by the handwriting expert against the accused was conclusive contrary to S.72 of the Evidence Act.**
3. **The learned Justice of the High Court erred in law by relying on the evidence of PW10 to convict the accused yet the impugned Statutory Declaration had been signed by a one Karuhanga who was not**

summoned by the prosecution to testify before court contrary to S.66 of the Evidence Act.

- 4. The learned Justice of the High Court erred in law by failing to hold that the prosecution had failed to discharge its burden of proving the guilt of the accused beyond reasonable doubt as stipulated by the law.**

The appellant proposed to this Court that the appeal be allowed and conviction and sentence be set aside.

Legal representation;

At the hearing of this appeal, learned counsel Mr. Nasser Lumweno, appeared together with learned counsel, Mr. Oscar Kambona for the appellant. Mr. Muwonge Emmanuel, a Principal State Attorney who was having personal conduct of the case, according to Ms Grace Nabaggaba, a Senior State Attorney, did not appear to defend the appeal. Court allowed counsel for the appellant to submit and the DPP's representative would in response file written submission by 24TH October 2014. Ms Grace Nabaggala undertook to inform Mr. Muwonge Emmanuel to file his submissions after reading the submissions by counsel for the appellant. No such submissions were ever filed on behalf of the DPP.

Submissions of counsel for the appellant.

Learned counsel, Mr. Oscar Kambona submitted on ground three of the appeal and his learned friend submitted on the other grounds.

Counsel Kambona submitted that the learned trial judge erred in convicting the appellant on a charge of fraud when there was no evidence of fraud and that is a point of law.

According to counsel for one to be convicted for a fraud under S.190 of the Registration of Titles Act there must be proof that that person willfully made a false statement or declaration to the Registrar of Titles.

Counsel contended that it was alleged that the appellant uttered an application to be registered on the title in issue and that this application was then effected by the Registrar of Titles in his names and it's that alleged application that is said to amount to fraud. Counsel submitted that the judge made a finding that the appellant actually signed this application relying on evidence of the hand writing expert's report.

According to counsel Kambona this was not proper as the handwriting expert's report did not talk about the application. The handwriting experts report reviewed only the original agreement of sale and not the application for transfer of title into the appellant's names.

Counsel contended that therefore there was no evidence upon which the judge would rely to convict the appellant on the count of fraud.

Counsel Kambona further contended that the appellant did not apply for the letters of administration. According to counsel, Kiwalabya who is registered on the title with the appellant is the one who was involved in the transfer transition because he had possession of the title. Kiwalabya could not be

prosecuted since he is dead. Nobody saw the appellant sign the application for transfer.

Counsel cited the following authorities in support of his contention:-

Muhwezi Jackson vs Uganda Civil Appeal No.149/2008 COA, Ongom
John Bosco vs Uganda, Supreme Court Appeal No.21 of 2007 and
Kifamunte Henry vs Uganda Supreme Court appeal No.10 of 1997.

He prayed Court to set aside the conviction on the ground that in absence of evidence to sustain the count of fraud the appellant should be acquitted of the same as a point of law.

Learned counsel, Mr. Lumweno also for the appellant submitted that the High Court Judge erred in law and fact when he convicted the appellant of intermeddling in property of the deceased.

Counsel contended that there was no evidence to prove beyond reasonable doubt that the appellant intermeddled in property of the deceased. According to counsel, the judge erred when he relied on the evidence of the handwriting expert as that evidence was evidence of an expert. It was only an opinion of an expert evidence and was therefore not conclusive. It was therefore wrong, counsel contended, for the judge to hold that the evidence was conclusive.

Counsel Lumweno, further submitted that there was no evidence that the appellant applied for the letters of administration and the prosecution failed to produce evidence that he did apply. According to counsel, the appellant

was never part and parcel of the application for the said letters of administration and when he learnt of the fraud that was perpetuated by people he did not know he took active steps and had the land caveated.

As stated earlier there were no submissions for the respondent.

The decision of the Court;

The Court has considered the court record from the lower courts, the Memorandum of Appeal, the submissions of counsel for the appellant and the available authorities to dispose of the appeal.

We find it appropriate to first remind ourselves of our duty as a second appellate court.

The general powers of this Court are set out in rule 32 of the Rules of this Court.

Rule 32(2) specifically provides for the courts duty as a second appeal court and states as below:-

“32 General powers of the Court.

(1)

(2) On any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence.”

The supreme Court has had occasion to consider and state the duty of a second appellate court rather elaborately in the case of Ongom John Bosco versus Uganda Criminal appeal No.21 of 2007 as follows:-

“A second appellate court is precluded from questioning the concurrent findings of facts by the trial and first appellate courts, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have come to the same conclusion.

A second appellate court can only interfere with such finding where there was evidence to support the finding because this is a question of law. Inference legitimately drawn from proved facts by the trial and first appellate courts must establish the guilt beyond all reasonable doubt.

The above principles were echoed by the former Court of Appeal for East Africa in Okeno vs Republic (1972) EA 32, where it said: *‘It is appropriate on a second appeal only to decide whether a judgment can be supported on the facts as found by the trial and first appellate court as this is purely a question of law.’*

This court has had occasion to re-state the principles of Kifamunte Henry vs Uganda, an appeal No.10 of 1997, when it said:

“On second appeal, the Court of Appeal is precluded from questioning the findings of facts of the trial court provided that there was evidence to support those findings though it may think

it possible or even probable that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact this being a question of law.”

Having stated our duty above, as a second appellate court we shall proceed to consider whether there was evidence in the instant case to support the findings and inferences drawn by the first appellate court.

Intermeddling:

We shall consider whether there was sufficient evidence and whether there was proper evaluation of the available evidence for the first appellate court to convict the appellant on the charge of intermeddling, under section 11(1) of the Administrator General's Act. The first appellate judge on this count considered the evidence of PW1 Haji Ali Nsereko, Head of the clan and cousin of the respondent and Kyewalabye. He was entrusted with the safe keeping of the Certificate of title to the Land, Block 190 Plot 7 at Magere, Kito, Wakiso District. The title was eaten by termites and he handed it to the appellant who was to return it to him after processing a new one.

The Land Title was eventually changed into the names of the appellant and his late brother Kyewalabye.

There was evidence that the said land was sold to Wilberforce Odongo by Kyewalabye and the appellant. The first appellate court considered that evidence as follows:-

“Odong told court that he went to the offices of lawyers and signed the agreement of sale. Kiwalabye also signed the agreement as did the LC1 Chairperson PW4, Kigozi George William. The group then moved to Makindye to the home of the respondent who also signed the Sale Agreement. That Agreement was exhibited in court. Once the sale was executed, Odongo took possession.”

There was also the evidence of PW9 D/CPL Malinga Patrick and PW10, Dan Oundo, Assistant Registrar that a Special Certificate of Title was issued to the appellant and his brother Kiwalabye as Administrators of the estate of the late Aaron Sewakiryanga on the authority of letters of administration in Administration No.29 of 2005 issued by Kasangati Magistrates’ Court.

There was evidence that the Court never issued any Letter of Administration in respect of the estate of Sewakiryanga to Kiwalabye and the appellant or to anyone for that matter. The appellant denied intermeddling in the estate and signing the Sale agreement.

The first appellate court re-evaluated the evidence of this matter as follows:-

“The evidence of the handwriting expert PW7 was corroborated by eye witnesses. Odongo PW2 and Owere PW3 were eyewitnesses to the signature. The LC1 Chairperson was present and witnessed the respondent signing. He knew the respondent. This was one of his subjects. He had no interest in the matter this evidence dully corroborated the evidence of the handwriting expert. I did not see the inconclusiveness.”

Considering the above analysis of the evidence by the first appellate Court, we do not accept the contention by counsel for the appellant that the judge convicted on the basis of uncorroborated evidence of the handwriting expert. There was available other corroborative evidence which the judge considered together and as a whole to come to the conclusion and the decision he reached.

The judge found that there was evidence that proved beyond reasonable doubt that there was unauthorized interference with the property of the deceased by the respondent. He convicted him on that evidence.

We find that the judge properly considered and analysed the available evidence correctly. The finding he reached was justified.

The appeal therefore fails on the count of intermeddling.

Fraud

The evidence on fraud as observed by the first appellate judge is closely intertwined with that of intermeddling discussed earlier in this judgment.

In addition to that evidence the judge observed that Kiwalabye and the appellant knew they had not been appointed administrators of the estate of Sewakiryanga. There was no record or file of either Kyewalabye or the appellant seeking letters of administration for the estate of their father. By signing a false representation that he was appointed as an administrator to

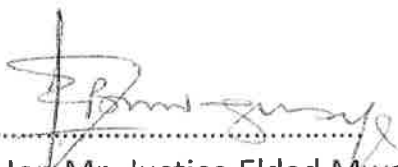
the estate of his father which representation he knew was false, that was a fraudulent act on his part. The judge found that there was evidence that the appellant knew he was not a legal representative of his father. He knowingly pretended to be an administrator of the estate and sold part of it.

We do find that the first appellate court properly re-evaluated the evidence on the count of fraud and reached a justified conclusion that the appellant committed the offence and convicted him on the bases of available evidence.

We do find that the whole appeal fails and we hereby dismiss the appeal.

We confirm the conviction and sentence imposed by the lower court. The appellant should serve the remaining part of his sentence of imprisonment.

Dated at Kampala this 24th of March 2015.



Hon Mr. Justice Eldad Mwangusya
JUSTICE OF APPEAL



Hon Mr. Justice Richard Buteera
JUSTICE OF APPEAL



.....
Hon Mr. Justice Kenneth Rakuru
JUSTICE OF APPEAL