THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL No. 17 of 2021

(Arising from Buganda Road Criminal Case No 625 of 2019)

MUKASA SHAMIL :::::::::::::::::::::: APPELLANT

vs

UGANDA :::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE MICHAEL ELUBU

JUDGMENT

The Appellant, **MUKASA SHAMIL**, filed this appeal against the Judgment, orders and sentence of **HW MANGENI MARION, Magistrate Grade I,** at The Chief Magistrate's Court of Buganda Road, who convicted him on 4 Counts namely: 1. *Installation of Electrical Wiring without an Installation Permit* c/ss 88 (1) & (2) of The Electricity Act, Cap 145 2. *Interference with Electrical Installations c/ss 87 (1) & (2)* **The Electricity Act** 3. *Obtaining Money by False Pretence c/s 305 of the Penal Code Act (PCA),* 4. *Conspiracy to Commit a Misdemeanour C/SS 391 of* ***the Penal Code Act.*** The appellant was sentenced to 24 months on the 1st, 2nd and 3rd Counts and to 1 year of imprisonment on the 4th Count.

The Background to this appeal is that that the appellant was working as a lines assistant with Mutico, a company sub contracted by UMEME, to do lines

installation. It is alleged that the appellant was approached by one Lydia Baako, the complainant, to connect electricity to her residence in Kaddu Kaliti in Mende Wakiso District. The entire neighbourhood where the complainant was staying had no electricity. The appellant negotiated with the whole group collectively and told them he could do the connections at 8.5 million shillings. He was paid 6,750,000/. He brought poles to the site and started planting them. The electricity however was never connected and the appellant became elusive and disappeared. When the complainant inquired with Mutico, she learnt that the appellant had once been only a part time employee. It also emerged that he had not obtained an installation permit from UMEME to do the installation. A Safety Manager from Mutico visited the site and found that the appellant had planted untreated poles that were already termite infested. That he had not followed standard procedure when he planted the poles. They were not upright or supported by stay assemblies. The appellant was arrested and charged as earlier stated. Prosecution led evidence from 6 witnesses while the appellant opted to keep quiet. The learned trial magistrate believed the prosecution case, convicted and sentence the appellant.

Being dissatisfied with the findings of the trial court, the appellant filed this appeal with four grounds namely,

1. That the learned Magistrate erred in law and fact when she found that the prosecution had proved all the ingredients for the alleged offences whereas not
2. That the learned Magistrate erred in law and fact by failing to subject the evidence to a thorough appraisal and evaluation thereby causing a wrong decision that prosecution had proved its case beyond reasonable doubt.
3. That the learned Magistrate erred in law and fact when she imposed a manifestly harsh, excessive and illegal sentence on the appellant.
4. That the learned Magistrate erred in law and fact by failing to take into account the time the appellant had spent on remand.

   He prayed for orders:

a) To set aside the judgement of the learned trial magistrate and substitute it with orders of acquittal
b) In the alternative, but without prejudice to the appellant, to quash the sentence and substitute it with a more lenient sentence
c) To arithmetically deduct from the sentence the period the appellant spent on remand.

Submissions

The parties were directed to file written submissions which are on record and will not be reproduced here.

This is a first appeal. The duties of a court acting on 1st appeal were stated by the Supreme Court in **Kifamunte Henry vs Ug SCCA 10 of 1997** where it 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 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; which 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 2 jointly,

1. That the learned Magistrate erred in law and fact when she found that the prosecution had proved all the ingredients for the alleged offences whereas not

2. That the learned Magistrate erred in law and fact by failing to subject the evidence to a thorough appraisal and evaluation thereby causing a wrong decision that prosecution had proved its case beyond reasonable doubt.

It was the appellant's submission that the elements of the offences charged were not proved. This Court shall examine each in turn.

On the first count, the appellant was charged with Installation of Electrical wiring without an installation permit contrary to section 88 (1) and (2) of **the Electricity Act.**

Section 88, The Electricity Act Stipulates as follows:

> (1) No person shall install any electrical wiring or extension to existing wiring on any premises without first obtaining an installation permit issued by the authority.
>
> (2) Any person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding twenty currency points or to imprisonment for a term not exceeding two years or to both.

The elements of this offence as this Court sees them are,

i. Installation of electrical wiring on premises
ii. Without a permit
iii. By the appellant

The evidence is that Lydia Baako the first appellant was staying in an estate in Kadudu Kaliti where the entire neighbourhood had never had electricity connected. The appellant told her he worked with Mutico. That he could connect the power for her. That he came to the site and held a meeting with all the residents. It was agreed that the job would cost 8.5 million shillings with the residents making a down payment of 1 million shillings on that first day. That appellant brought poles and wires. He connected the wires to poles and then to the various homes but not electricity. He told the residents that he was finalising documentation but then

disappeared after a while. The complainant reported to the Mutico office and was told that the appellant was a former lines assistant. That the works were not authorised by Mutico. In the meantime the appellant contacted PW 2 Yiga Richard who was Operations and Safety Manager at Mutico who stated that the appellant had absconded from duty at Mutico and been terminated. When PW 2 and the appellant met, the appellant told PW 2 that he had been contracted by someone to do a job but that things had gone wrong. PW 2 visited the site with the appellant. He found that the appellant had made wiring installations by planting poles and connecting electrical wires to houses. PW 2 did an assessment and advised PW 1 on how the job could be rectified. At that point the appellant asked whether the job could be corrected.

It was also stated by one Samson Tendo Semakula, a Service Engineer with Umeme, that he was in charge of technical operations in Umeme. That he had never issued a permit for the connection of power to Kaliti village.

The above evidence shows that by his own admission to the PW 2 the appellant stated that he made the wire connections. His admissions to PW 2 are admissible evidence. Secondly the connections were made to the home of PW 1 who contracted the appellant and saw the appellant make the connections. Lastly PW 3 the Service engineer had never issued a permit.

While this court is mindful of the presumption of innocence and the burden of proof, it is pertinent that the above evidence remained unchallenged. This court finds that it meets the standard of proof and that all the elements of the first count are proved.

Count 2

Interference with electrical installations contrary to Section 87 (1) and (2) of **the Electricity Act**

> (1) No person shall, without the lawful permission of the authority or the licensee, as the case may be, undertake any work or engage in any activity in the vicinity of any electrical installation or part of the installation in a manner

likely to interfere with any electrical installation or to cause danger to any person or property.

(2) Any person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding twenty currency points or to imprisonment for a term not exceeding two years or to both.

The elements of this offence are that:

a) Doing anything to or near any electrical installation
b) In a dangerous manner
c) Without lawful permission
d) By the accused

The first element of this offence requires that there should have been installations made near or to an existing electrical installation. From the record the evidence shows that there was no electricity connected in the area where PW 1 lived. It was also true that the appellant did not connect the electricity supply to the area. In light of that, the first element of the offence cannot stand because there was never an installation of whatever kind made.

In light of this the second count cannot stand and the appellant is acquitted on this account.

Count 3

The third Count the appellant was charged with was obtaining money by false pretence c/s 305 **of Penal Code Act.**

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.

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

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 evidence is that the appellant held out to be an employee of Mutico. PW 2 testified that that was not true. The appellant led PW 1 to believe that he had the technical expertise to install electricity when in fact he did not. He promised to obtain a permit for the installation but again did not.

All the above were false but the appellant led PW 1 to believe that they were true. For that reason the first element, that there were false pretences, is proved.

The intent to defraud is an act done with the intention to trick, deceive or cheat. Here the appellant made the false pretences with the intention to deceive PW 1 into parting with money which she in fact did. He was paid 6,750,000/-. He disappeared shortly after he was paid. The appellant induced PW 1 into parting with the money which was never recovered.

In light of the above, the Court finds that the elements have been proved.

The Last offence is Conspiracy to commit a misdemeanour c/s to Section 391 of **the Penal Code Act**.

The elements are,

i. The existence of two or more persons in the act
ii. The agreement and meeting of minds of these two people to commit a misdemeanour
iii. The failure to commit the crime is not an offence.

The first ingredient is that where there is a conspiracy, then of essence there must be a minimum of two persons. A conspiracy involves the participation of two or more persons and therefore all the persons involved would be correctly charged together and joined in one count (see **Mattaka & Ors 1971EA 495 at 501**).

In the instant case however, the appellant was charged on his own. The person(s) he is alleged to have conspired with are neither named nor charged. A conspiracy cannot be proved where only one perpetrator is named.

In light of the above the 4th Count cannot stand. The appellant is therefore acquitted on the 4th Count.

Ground 3

> **That the learned Magistrate erred in law and fact when she imposed a manifestly harsh, excessive and illegal sentence on the appellant**.

The appellant argued that he was a young 25 year old man who was a first offender. Secondly he should not have been sentenced to the maximum sentence as such. For this reason it was submitted that the charges against him cannot stand.

I agree with the arguments of the Appellant as far as his conviction for the offence of installation of wiring without a permit c/s in Section 88 of **Electricity Act** is concerned.

As a first offender he should not have received the maximum sentence. In light of that the sentence is reduced to 6 months imprisonment.

With regard to the offence of Obtaining Money by False Pretences, the appellant was convicted and sentenced to 2 years imprisonment. The maximum sentence for this offence is 5 years.

The money stolen 6,750,000/-. On two occasions the appellant disappeared when apprehended and asked to pay up. There was an unequivocal intention to defraud. In light of that, the sentence of two years was appropriate. This Court therefore confirms it.

Ground 4

> **That the learned Magistrate erred in law and fact by failing to take into account the time the appellant had spent on remand**.

In sentencing the appellant the trial magistrate stated *inter alia*,

> '… Considering everything and the period spent on remand and the circumstances of this case, the Court sentences the convict as follows '

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.

In this case the trial magistrate clearly took the period spent in remand into consideration. As seen from the wording of the sentencing. The remand period was operating on the mind of the Court during sentencing. I find therefore that the period spent on remand was credited to the appellant in his sentencing. In light of the above it is clear that the sentence in this case is lawful and should not be interfered with except with the modification already made in the first count.

In the result the orders of this court on this appeal are

A. The appellant is acquitted on counts 2 and 4.
B. The Convictions on Counts 1 and 3 are confirmed.
C. The Sentence on Count 1 is reduced to six months.
D. The Sentence on count 3 is confirmed.

…….

Michael Elubu

Judge

2.5.2021