

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
CRIMINAL MISCELLANEOUS APPLICATION NO. 029 OF 2023

SUNDAY UMARU.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

Before Hon Lady Justice Rosette Comfort Kania

Ruling

This application was brought under section 17 of the Judicature Act, sections 48 and 50 of the Criminal Procedure Code Act against the Respondent seeking the following orders;

- a) That the proceedings of the Learned Trial Magistrate and all orders made therein be called, revised and set aside.
- b) That a new magistrate be appointed to handle the above case.

The application is supported by an affidavit which in brief states that;

- The applicant together with a one Lule Santosi alias Matovu Deo and others still at large were arrested and charged before the Grade one Magistrate Buganda Road Court of the offence of obtaining money by false pretences contrary to Section 305 of the Penal Code Act.
- The trial is at the stage of hearing evidence for the defence.
- The trial has been characterized by a lot of irregularities, illegalities and bias.
- The applicant has been coerced by the trial Magistrate to pay a total of UGX 18,000,000 (eighteen million Uganda shillings only) before the conclusion of the case.
- The trial Magistrate made it clear to the applicant that unless he pays the remaining balance UGX 11,000,000 (eleven million Uganda shillings only) to make total amount paid UGX 29,000,000 (twenty nine million Uganda shillings only) as stated on the charge sheet, the applicant will suffer a harsh judgment.
- The charge sheet is defective in that the statement of the offence is obtaining money by false pretences while the particulars of the offence state the offence of theft.
- The subject matter was a money lending transaction of UGX 15,000,000 (fifteen million Uganda shillings only) which was turned into a criminal offence of stealing UGX 29,000,000 (twenty nine million Uganda shillings only)

- The trial Magistrate is based in Standards, Utilities and Wildlife Court but continues to handle this case which is outside her jurisdiction.
- It is just and equitable that this application is granted.

Brief facts:

It is alleged that the applicant together with Lule Santosi alias Matovu Deo, on 10th September 2019, 19th September and 8th day November at Conrad House Jinja Road Kampala District, borrowed money from the complainant. It is noteworthy that the loan agreements indicate that the loans were interest free loans. The documents on the lower court file indicate the three loans were for a total sum of UGX 19,500,000 (nineteen million five hundred thousand shillings only). However, the charge sheet mentions the sum of UGX 29,000,000 (twenty nine million shillings only), in court the complainant mentions that the loan sum was UGX 20,000,000 (twenty million shilling only) while PW3 stated that the sum borrowed was UGX 29,000,000 (twenty nine million Uganda shillings only.) PW3 also mentioned that the sums borrowed were UGX 6,500,000 (Six million five hundred thousand Uganda shillings), UGX 6,000,000 (six million Uganda Shillings) and UGX 6,000,000 (six million Uganda shillings only) as stated on page 19 of the record of proceedings. On the other hand, PW2 informed court that he had prepared loan documents in respect of the sum of UGX 15,000,000 (fifteen million Uganda shillings only). That as security for the loan, the applicant gave the complainant a certificate of title which turned out to be forged. Consequently, the complainant reported the matter to the police. The applicant was charged with four offences which include, obtaining money by false pretences contrary to section 305 of the Penal Code Act, forgery contrary to section 342 of the Penal Code Act, uttering a false document contrary to section 351 of the Penal Code Act and conspiracy to commit a felony contrary to section 390 of the Penal Code Act. During the course of the trial, the applicant paid a total of UGX 18,000,000 (eighteen million Uganda shillings only) in court ostensibly as a result of having reconciled with the complainant. The applicant's co-accused paid the sum of UGX 3,000,000 (three million Uganda shillings only). The applicant alleges that he paid the sums following coercion and threats of harsh punishment from the trial magistrate.

Representation

Mr. Issa Kavuma Kavuma appeared for the applicant while the respondent was represented by Hope Mutoni, a Senior State Attorney in the Office of the Director of Public Prosecutions.

Submissions of the Parties

Counsel for the Applicant submitted that there were irregularities during the trial which affected the legality of the proceedings and these include,



1. The applicant pleaded not guilty on a defective charge. He further submits that Count 1 of the charge was obtaining money by false pretence contrary to Section 305 Penal Code Act, however the particulars of the offence are that Sunday Umar, Lule Santosi alias Matovu Deo and others at large on the 10th day of September 2019 at Conrad House Jinja Road in Kampala District Stole Ugx 29,000,000/= (Twenty nine million shillings) the property of Nakayenga Marion. Counsel cited the case of **Kaketo Farouq v Uganda Criminal Revision No.18 of 2023**, where the High Court ordered the release of the accused person from prison because he was charged and convicted on a defective charge, where he was charged with stealing of a motor cycle yet the particulars of the offence disclosed another offence of theft. The High Court held that the charge sheet statement was in breach of the mandatory requirements of section 85 and 88 of the Magistrate Court's Act.

2. Irregular handling of reconciliation. Counsel cited Article 126(2)(d) of the 1995 Constitution that mandates court to promote reconciliation between parties while administering justice. He submitted that on the 20th day of March, 2023 the State Attorney informed the trial magistrate of a development relating to the relatives of the applicant approaching the complaint for reconciliation. That the trial magistrate on the issue of reconciliation, adjourned the matter and advised the applicant to commit to the reconciliation terms agreed upon if reconciliation is to succeed. The reconciliation process was not properly conducted because no terms of reconciliation were recorded by the trial magistrate on the court record. On 18th April, 2023, prosecution informed court that the complainant had so far received UGX 5,000,000 (five million Uganda shillings only) out of the UGX 29,000,000 (twenty nine million Uganda shillings) indicated on the charge sheet. The trial magistrate concluded that the reconciliation failed and ordered that the matter proceeds for *défense* hearing without commenting on the UGX 5,000,000 (five million Uganda shillings only) that the applicant had paid to the complainant.

The applicant applied to have the matter stood over to enable him talk to the complainant regarding reconciliation. Accordingly, the sum of UGX 10,000,000 (ten million Uganda shillings only) was to be paid on 28th April, 2023. On 2nd May 2023 the prosecution informed court that the applicant had paid UGX 10,000,000 (ten million Uganda shillings only) making a total payment of UGX 15,000,000 (fifteen million Uganda shillings only), leaving a balance of UGX 14,000,000 (fourteen million Uganda shillings only), (see pg 29 of the trial court proceedings.) Counsel further submitted that on 2nd June 2023, prosecution informed Court that the balance of UGX 14,000,0000 (fourteen million Uganda shillings only), was not yet paid. The applicant informed Court that he had paid an additional UGX 3,000,000 (three million Uganda shillings only) to make it UGX 18,000,000 (eighteen million Uganda shillings only). The co-accused also made a payment of UGX 3,000,000 (three million Uganda Shillings

only) with a commitment to pay another UGX 2,000,000 (two million Uganda Shillings only) (see page 27 of the record).

He further contends that the "reconciliation" was irregularly executed. The applicant was made to pay UGX 18,000,000 (eighteen million Uganda shillings only) in reconciliation without any agreement signed between the parties, the trial magistrate only noted the payments on the record of proceedings. He notes that the complainant in his evidence informed court that the Applicant took UGX 20,000,000 (twenty million Uganda shillings only) from her yet she did not produce documents to support that figure and yet PW2 Joseph Muganzi told court that he prepared documents for UGX 15,000,000 (fifteen million Uganda shillings only) Counsel therefore submitted that it is manifestly unjust to force the applicant to pay a total of UGX 29,000,000 (twenty nine million Uganda shillings only) in reconciliation yet the sums mentioned by complainant do not add up to that amount. Forcing the applicant to pay that sum through reconciliation amounted abuse of court process to extort money from him. Since the reconciliation was not done in accordance with the law, it was irregular and unjust and therefore should be quashed.

3. It was irregular and illegal for the trial magistrate to order the applicant to pay UGX 50,000,000 (fifty million Uganda shillings only) upon abscondment as one of the conditions to grant bail. Counsel submitted that the order to pay the sum of UGX 50,000,000 (fifty million Uganda shillings only) was outrageous and not supported by the law and unenforceable given the fact that the applicant had already paid UGX 1,500,000 (one million five hundred thousand Uganda shillings) cash and met the other bail conditions imposed by the trial Magistrate.

4. Bias. Counsel submitted that he complained of bias on the part of the trial magistrate in his letter to the Chief Magistrate dated 21st August 2023. That the letter was duly received by court on the same day but on 25th August 2023 the trial Magistrate continued with the case without addressing the applicant's complaint. There was no response from the Chief Magistrate. Counsel further states that the trial Magistrate did not have the jurisdiction to handle the matter since she was in charge of the Standards, Utilities and Wildlife Court. He therefore concludes that all the proceedings that were conducted by the trial Magistrate after being accused of bias were illegal.

Counsel prayed that this application be allowed, the proceedings and orders of the trial Magistrate be revised and quashed and the accused person be set free.

Counsel for the Respondent submitted that the application is brought under Section 17 of the Judicature Act, sections 48 and 50 of the criminal Procedure Code Act and stated that the Applicant is charged with 4 counts; obtaining money by false pretences, forgery, uttering a false document and conspiracy to commit a felony and that in the lower court the applicant is charged jointly with a one Lule Santosi alias

Matovu Deo. She submitted that this is purely a criminal case not a debt recovery case because of the elements which the facts disclose. The respondent further stated that the applicant has three complaints;

- a) The trial Magistrate has turned debt recovery into criminal proceedings
- b) The Applicant wants this matter to be reallocated to another Magistrate
- c) The warrant of arrest against the applicant and his sureties should be stayed pending reallocation of the court file.

She emphasized that this is a criminal case not a debt recovery proceeding, the applicant obtained a loan using forged documents as security and it is on that basis that a complaint was made. On the issue of the matter being reallocated to another Magistrate, that does not call for revision since this can be done by writing to the trial magistrate's supervisor who is the chief magistrate to have the matter reallocated to another Magistrate. This is abuse of the court process by the applicant, in paragraph (g) of the notice of motion which is the same as no.8 in the affidavit in support, the applicant states, he was charged under a defective charge sheet. The respondent avers that this is not a case for revision as the defect on the charge could have been rectified by amendment of the charge sheet under section 132 of the Magistrate's Courts Act. She further submitted that the Applicant raises the issue of the trial magistrate matter being based in the Standards, Utilities and Wildlife Court under paragraph (i) in the notice of motion while it is no. 10 of the affidavit in support. There is no law barring the trial magistrate from handling matters which are within her jurisdiction. All the counts with which the applicant is charged are within her jurisdiction and therefore the applicant did not note the law that bars the trial Magistrate from handling other matters that are not Standards, Utilities and Wildlife related.

On the issue of reconciliation, counsel for the respondent stated that that the matter was proceeding while the applicant refunded part of the amount he borrowed, the applicant states that he is being coerced to pay the money by the trial Magistrate. On pages 29 and 30 of the record of proceedings, the applicant informed Court that he was willing to pay the complainant and he went ahead and informed court that so far he had paid UGX 15,000,000 (fifteen million Uganda shillings only) and he informed court that he would pay the balance on the 1st June 2023 which he did not pay.

Furthermore, the respondent submitted that by the time the applicant committed himself to pay the complainant the matter was already on defence and therefore it is not true that he paid and then the defence case opened, rather when he got to the point when he was put on his defence he informed court that he was willing to pay and this is the basis on which he was granted bail again. The first time the applicant was granted bail he absconded bail was cancelled. He was arrested and he informed court that he had paid UGX 15,000,000/ (fifteen million Uganda shillings only) to the

complainant and stated that he was to pay the balance by 1st June 2023 and on that basis he was granted bail on 3rd May 2023. He again absconded until another warrant of arrest was issued on 4th August 2023. The respondent submitted that the applicant is using a delay tactic to delay the whole process because whenever he is apprehended, he is willing to pay and when released he abscond.

The respondent cited section 48 of the Criminal Procedure Code Act (CPCA) which provides that; "The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any findings of the Magistrate's Court. This provision is not available to one making an interlocutory order in a criminal trial. In **Uganda v Dalal 1970 EA 355** Justice Musoke held that it is obvious as Jones J remarked in **criminal revision No.81 of 1963 Geresomu Musoke –vs- Uganda** that, " on reading section 339 and 341 of the CPCA, which are partly the same as the current "sections 48 and 50 in the CPCA, on revision that ' only a final order can be the subject of a revision order of this court. In the instant case, the applicant has no locus to bring this application since there were no orders that were made by the trial Magistrate and that he had been on defence over a year because the applicant absconded when released on bail more than once. It is evident that the applicant is abusing the court process and trying to evade justice. State therefore prayed that the application is dismissed.

In rejoinder, Counsel for the Applicant emphasized 3 points which include;

1). There is no question that it is a defective charge where the statement of the offence is obtaining money by false pretence while the particulars of the offence disclose a case of the theft of UGX 29,000,000 (twenty nine million Uganda shillings only), it offends section 85 and 88 MCA. Counsel further cited the case of **Kaketo Farouq v Uganda Criminal Revision No.18 of 2023**, where court quashed a conviction which was based on a defective charge sheet. Under the circumstances of the case, the proceedings were conducted on a defective charge sheet up to the level of defence and the same cannot stand by way of amendment.

2) on the issue of reconciliation, great injustice was caused to the applicant where the complainant stated that she lent the accused person UGX 20,000,000 (twenty million Uganda shillings only) which is clear on pg 4 of the record of the proceedings. PW2 was the manager of the complainant and he informed court that he prepared documents of UGX 15,000,000 (fifteen million Uganda shillings only) however the applicant is being forced to pay UGX 29,000,000 (twenty nine million Uganda shillings only) which is reflected on the charge sheet and he has now paid UGX 18,000,000 (eighteen million Uganda shillings only). Being forced to pay UGX 29,000,000 (twenty nine million Uganda shillings only) would amount to extortion of money using court

process. This is especially considering that the applicant was threatened with a harsh judgment should he fail to pay.

3) On the issue of power of this Honorable court, sections 48 CPCA, section 17 and 33 of the Judicature Act provide that this court has power to call the records of the lower courts and examine them not necessarily against the end of the final judgment but this can be at any stage of the proceedings if something is done irregularly. Counsel therefore prays that the application be granted and orders made in the lower court be quashed.

Determination of Court;

The law

Section 17 (1) of the Judicature Act provides that the High Court shall exercise general powers of supervision over the Magistrate's Courts.

(2) With regard to its own procedures and those of the Magistrate's Courts, the High Court shall exercise its inherent powers:-

(a) To prevent abuse of process of the Court by curtailing delays of judgment including the power to limit and discontinue delayed prosecutions.

(b) To make orders for expeditious trial; and

(c) To ensure that substantive justice shall be administered without undue regard to technicalities.

Section 33 of the Judicature Act provides that; "The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to, in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided."

Section 48 of the Criminal Procedure Code Act provides that;

"The High Court may call for and examine the record of any criminal proceedings before any magistrate's court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of the magistrate's court."

Section 50 (1) of the Criminal Procedure Code Act provides for powers of the High Court on revision and states as follows; "In the case of any proceedings in a magistrate's court, the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, when it appears that in those proceedings, an error material to the merits of any case or involving a miscarriage of justice has occurred, the High Court may;



(b) in the case of any other order, other than an order of acquittal, alter or reverse the order.

Section 50 (5) of the same Act provides that; "Any person aggrieved by any finding, sentence or order made or imposed by a magistrate's court may petition the High Court to exercise its power of revision under this section; but no such petition shall be entertained where the petitioner could have appealed against the finding, sentence or order and has not appealed.

I have carefully considered the application and read the submissions of both counsel, perused the affidavits for and against this application. I have also perused the proceedings of the lower court. The written submissions filed by Counsel for the applicant and the respondent were adopted. I will now address the issues raised by the facts.


Issues.

1. Whether it was irregular and illegal for the trial magistrate to preside over a process by which the applicant paid a total of UGX 18,000,000 (eighteen million Uganda shillings in respect of the criminal charges against him.
2. Whether the charge sheet was defective.
3. Whether the subject matter was a transaction for a loan agreement which was turned into criminal charges.
4. Whether reconciliation in respect of the charges against the accused persons was properly conducted.
5. Whether the trial magistrate demonstrated bias and was obliged to recuse her self from the proceedings from the time the applicant raised the issue in court.
6. Whether the trial magistrate who is based in the Standards, Utilities and Wildlife Court found at Buganda Road Chief Magistrate's Court had the jurisdiction to preside over the case against the accused persons.

Resolution of the issues

(1) Whether the payments made by the applicant before determination of the charges against were properly made

The 3 agreements on record indicate that the sum of UGX 6,500,000 (six million five hundred thousand shillings only) was borrowed on 3 three different occasions ;10/09/2019, 19/09/2019 and 8/11/2019 which agreements state that the money borrowed was to be paid in instalments of UGX. 3,500,000 (three million five hundred thousand Uganda shillings only) and UGX 3,0000,000 (three million Uganda shillings



only) by the applicant and Luule Santosi alias Matovu Deo. The agreements state that the loans were interest free loans.

During proceedings, PW1- stated on page 4 of the record of proceedings that the accused persons borrowed a sum of UGX 20,000,0000 (twenty million Uganda shillings only) in instalments of UGX 3,000,000 (three million shillings only) there is no evidence to show that the applicant had borrowed the alleged amount of money. PW1 further stated that the applicant had borrowed the money to clear his goods from china in 2019 though it was not recorded any where in the loan agreement. PW3, testified on page 19 of the record of proceedings that the applicant and Luule Santosi alias Matovu Deo borrowed a sum of money totaling to UGX 29,000,000 (twenty nine million Uganda shillings only).

According to the record of proceedings, the Applicant paid to the complainant an amount of UGX 15,000,000 (fifteen million Uganda shillings only) and UGX 3,000,000 (three million Uganda shillings only) totaling to UGX 18,000,000 (eighteen million Uganda shillings only), while the applicant's co-accused paid UGX 3,000,000 (three million Uganda shillings only) and committed to paying another UGX2,000,000 (two million Uganda shillings only). These payments, the applicant's submit, were procured as a result of coercion by the trial Magistrate. It is alleged that the trial magistrate put it to the applicant that, unless the UGX 29,000,000 (twenty nine million Uganda shillings was paid), the applicant would not be released on bail. The applicant alleges that he was further told that unless he pays the balance of UGX 11,000,000 (eleven million Uganda shillings only) to make the total sum of UGX 29,000,000 (twenty nine million Uganda shillings only) he would get a harsh punishment. It is noteworthy that, according to the record the applicant had been released on bail thrice and absconded. Even going to the United Arab Emirates on at least one occasion when he was released on bail. On returning, he paid the aforementioned sum of UGX 18,000,000 (eighteen million Uganda shillings only).

The proper course of action in cases where an accused person jumps bail is not to coerce him to pay money against a charge on which he has not pleaded guilty or been found guilty, but to deny him bail should he reapply and to remand him until the case is disposed of by either an acquittal or a conviction. Indeed, following the payment of the sum, the applicant was released on bail in spite of him having jumped bail when he was released on bail, and unsurprisingly, he jumped bail again.

The testimony of the prosecution witnesses as far as it relates to the amounts borrowed by the applicant are contradictory. The agreements which are the basis of the criminal charges are for the total amount of UGX 19,500,000 (nineteen million five hundred thousand shillings only) the complainant testified that the amount borrowed was 20,000,000 shillings while PW3 stated that the amount borrowed was UGX 29,000,000 (twenty nine Uganda shillings only). There is no evidence on file to

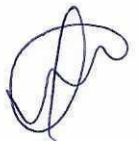


explain the discrepancies between the amount on the loan agreements and the various amounts mentioned by the prosecution witnesses. The trial magistrate gives no explanation as to why after extorting the sum of UGX 18,000,000 (eighteen million Uganda shillings only), she is still of the view that there is a balance of UGX 11,000,000 (nine million Uganda shillings only) owing to the complainant. According to the record of proceedings on page 31, the accused person prayed for 12-16th June 2023 to pay the balance of UGX 11,000,000 (eleven million Uganda shillings only).

This Honourable Court, on the basis of the facts revealed in the proceedings of the lower court finds that the learned trial magistrate erred in presiding over an irregularity process where the applicant paid the mentioned sums. This Court is persuaded that payment was procured by the aid of threats to deny him bail (after he had been granted bail and absconded three times) and passing a harsh judgment against him. Nowhere in the record of proceedings is it explained how the loan amount of UGX 19,000,000 (nineteen million Uganda shillings only) which as stated in the loan agreement was interest free, ballooned to the sum of UGX. 29,000,000 (twenty nine million Uganda shillings only.)

Although it was not raised as one of the issues by counsel for the applicant, I am duty bound to touch on the issue of bail because it has a bearing on the complaints of irregularities complained about in the case. According to the record of proceedings, the applicant always absconded whenever given bail, the first ruling of the trial magistrate granting the applicant bail was on the 6th/8/2020, the second ruling granting bail was on the 23rd/2/2021 and the third ruling granting bail was on 3/5/2023. It is important to note that on all these occasions the applicant was granted bail, he jumped bail. Paragraph 13(m) of the Constitution (Bail Guidelines for Courts of Judicature) (Practice) Directions, 2022 provides that the court shall consider whether the applicant has, on a previous occasion when released on bail, failed to comply with his or her bail terms, before granting bail. It is evident according to the record of proceedings that the applicant did not respect the bail terms. It beggars belief that the learned trial magistrate saw it fit to grant bail to a "serial absconder". There is no other reasonable explanation for this other than that, indeed as stated in the record of the proceedings the accused would be granted bail so that he can go and look for the money to pay to the complainant the sum of UGX 29,000,000 (twenty nine million Uganda shillings) stated in the charge sheet.

This Honourable Court is inclined to believe that the learned trial magistrate knowingly presided over an illegality with the aid of threats, to extort money from the applicant for the benefit of the complainant. Essentially, the magistrate already made up her mind that the applicant who is the accused in the case before her was guilty and therefore had to compensate the complainant. This was in total regard of the right of the accused person to be presumed innocent until proven guilty or until he pleads



guilty which is articulated in Article 28 (3) (a). The correct course of action would be to allow the criminal proceedings to conclude and if they resulted in a conviction, order that the accused persons pay back the borrowed money after serving his sentence.

(2) Whether the charge sheet was defective and the trial magistrate erred in law in not causing its amendment

The applicant states that the charge sheet is defective in that, in respect of count I, the statement of the offence is obtaining money by false pretences, while the particulars of the offence state the offence of theft. The details of the complaint do not disclose the offence of theft or obtaining money by false pretences. The facts of the complaint disclose the criminal offences of uttering a false document, forgery and conspiracy to commit a felony. The facts also disclose a breach of the undertaking to repay the amounts borrowed, which is a purely civil matter. The result of this was charging the accused person with an offence that is not disclosed by the facts of the case and therefore leading to a miscarriage of justice in respect of prosecuting the accused person on offences that do not relate to the particulars. Court finds that therefore the charge was defective.

Section 85 MCA states that every charge shall contain and shall be sufficient if it contains, a statement of the specific offence, or offences with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as the nature of the offence charged. In the case of *Kaketo Farouq v Uganda Criminal revision No.18 of 2023* Court ordered the release of the accused person from the prison because he was charged on a defective charge sheet.

The trial magistrate, because the particulars of the offence disclosed other offences including; forgery, uttering a false document and conspiracy to commit a felony, should have guided court to amend the charge sheet to reflect only the offences revealed by the particulars of the case. This would have necessitated the deletion of the offences of theft and obtaining money by false pretences from the charge. Parties voluntarily entered into a loan agreement, the problem was the document tendered as security for the loan. The offences therefore should have been limited to the forging and tendering a land title as security for the loan; forgery, uttering a false document and conspiracy to commit a felony.

(3) Whether a money lending transaction was turned into the basis for criminal charges.

It is stated that the applicant Sunday Umar, Lule Santosi alias Matovu Deo and others still at large on the 10th day of September 2019 at Conrad House Jinja Road in the Kampala District stole UGX 29,000,000/= (twenty nine million shillings) the property

of Nakayenga Marion. It is alleged that, the applicant and Lule Santosi alias Matovu Deo borrowed money from Nakayenga Marion, which she stated to be UGX 20,000,000 (twenty million Uganda shillings only) in installments of UGX 3,000,000 (three million Uganda shillings) and as a result the applicant was charged with the offence of obtaining money by false pretences contrary to section 305 of the Penal Code Act among other charges.

Court finds that, it is clear from the record of proceedings that, a money lending transaction (which is civil in nature) was turned into the basis of charging the accused persons with the offences of theft and obtaining money by false pretences. The correct course of action would have been to file a civil suit against the accused persons for recovery of the sums lent and then criminal proceedings would continue for the criminal elements arising from the forgery of the land title.

(4). Whether the correct procedure of reconciliation in respect of criminal charges was followed.

According to the record of proceedings of the lower court, on page 29, the applicant stated that having paid UGX 15,000,000 (fifteen million Uganda Shillings only) to the complainant, he requested to pay the balance of UGX 14,000,000 (fourteen million Uganda shillings only). The record shows that another UGX 3,000,000 (three million Uganda shillings only). The State Attorney stated that on 6th April 2023 (see page 27 of the proceedings) in respect of the second accused person that, the complainant indicated to the State Attorney that the relatives of the second accused person, approached her for reconciliation. She added that the reconciliation process was ongoing and that the accused person had paid UGX 3,000,000 (three million Uganda shillings only) to the complainant and that the relatives of the accused person were still willing to pay another UGX 2,000,000 (two million Uganda shillings only) to the complainant. There were no reconciliation agreements executed to this effect, which is the procedure in cases of reconciliation.

Moreover, a crime is a wrong against society, reconciliation between the accused and the complainant is not intended to absolve the accused from taking responsibility under criminal law for his criminal actions. It should be noted that it is only where the offences are of a private nature and relatively minor, that the law permits court to promote reconciliation, certainly not in respect of charges such as those preferred against the applicant.

Section 160 of the Magistrate's Court Act provides that; "in criminal cases, a magistrate's court may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault, or for any other offence of a personal or private nature, not amounting to felony and not aggravated in degree,



in terms of payment of compensation or other terms approved by the court, and may, thereupon, order the proceedings to be stayed.

In the case of Uganda -vs- Swaibu Mukidi and Another, (1995) III KALR it was held that, where reconciliation is reached on a case which is a felony, the prosecution may withdraw the case instead of moving court for reconciliation.

Accordingly, in the case of **Uganda-vs- D Kaya 1979 HCB**, it was held that Section 156 (now 160) is not applicable as reconciliation is permitted only in proceedings not amounting to a felony but the offences charged here were felonies"

The offences of obtaining money by false pretences contrary to section 305 PCA, Forgery contrary to section 342 PCA, uttering a false document contrary to section 351 PCA and conspiracy to commit a felony contrary to section 390 PCA with which the applicant is charged are felonies and as such, "reconciliation" cannot be an option in answering the charges as stated by section 160 of the Magistrates Courts Act.

As held in the case of **Uganda -vs- Swaibu Mukidi and Another, (1995) III KALR (Supra)**, upon the State Attorney learning that reconciliation had been reached in the instant case, prosecution should have withdrawn the case and moved court for reconciliation.

It was not only irregular but also illegal to continue extorting money from the accused person, ostensibly pursuant to a reconciliation while continuing to actively prosecute the case. Moreover, the charges against the accused persons were not the sort that can be resolved through reconciliation

(5) Whether the trial magistrate erred in not recusing herself from the case when a complaint imputing bias upon her was made

Regarding, bias, on 21st August 2023, counsel for the applicant submitted a complaint against the trial magistrate, which letter was received by the Chief Magistrate on the same day. Counsel for the applicant added that during the proceedings on 25th August, he raised an issue of bias but the trial Magistrate continued with the case without addressing the applicant. He therefore concludes that all the proceedings that were conducted by the trial Magistrate after being accused of bias were illegal.

Any complaint of bias against a judicial officer, implies that there is a perception that the judicial officer is not impartial. This strikes at the very heart of one of the tenets of our bill of rights which provides in Article 28 (1) of the Constitution of the Republic of Uganda 1995 as amended that, "in the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a public hearing before an independent and impartial court or tribunal established by law". Therefore, an allegation of bias against a judicial officer must never be taken lightly, it is a serious allegation which strikes at the heart of the constitutionally protected right to a fair

hearing. Needless to add, where bias is alleged there is no longer a guarantee of enjoyment of the right to a fair hearing unless the allegation is looked into and dispelled.

The Constitution (Recusal of Judicial Officers) (Practice Directions) 2019 in paragraph 4 defines bias, as follows;

“ bias is an inclination or prejudice for or against one person or a group of persons especially in a way considered to be unfair, whether actual , implied or apparent. In the case of **Law v Chartered institute of Patent Agents 1919**, Eve J discussed that the test for bias in the members of à Council making a decision,' if he has à bias which renders him otherwise that an impartial judge he is disqualified from performing his duty.

The same paragraph defines apparent bias as follows,” apparent bias means a scenario where a judicial officer is not a party to a matter and does not have an interest in its outcome but through his or her conduct or behavior, gives rise to suspicions that he or she is not impartial as was held in the case of **Mabirizi Kiwanuka v AG (Miscellaneous application 89 of 2022)**

Paragraph 7 (g) provides that any party to the proceedings may apply to court for a judicial officer to recuse himself or herself where a judicial officer has exhibited actual imputed or apparent bias.

Paragraph 8 (1) provides that the party seeking the recusal of the judicial officer may orally in open court in the presence of the parties request the judicial officer to recuse himself or herself. Paragraph 8 (4) goes on to provide that where the judicial officer declines to recuse themselves, the reasons for declining should be stated on the record and the matter shall proceed for hearing.

The trial magistrate did not cause to be placed on record, the reasons for her continuing to entertain the matter even when a complaint of bias had been made against her and she had been requested to recuse herself.

(6) Whether the trial magistrate who is based in the Standards, Utilities and Wildlife Court found at Buganda Road Chief Magistrate's Court had the jurisdiction to preside over the case against the accused persons.

Counsel for the applicant states that, the trial Magistrate is based in the Standards, Utilities and Wildlife Court and therefore did not have the jurisdiction to handle the matter. In the case of **Entec Electrical Equipment Company Limited v Uganda Criminal Revision cause No. 026 of 2022**, Justice Isaac Muwata defined jurisdiction to mean the power of court to hear and determine a cause to adjudicate and exercise any judicial power in relation to it. Jurisdiction further means the power conferred by law upon the court to try and hear the cases and give appropriate judgments and

therefore jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. In this case, the judge further states 3 categories of jurisdiction which include a) subject matter jurisdiction, that is to say, whether the particular court in question has the jurisdiction to deal with the subject in question, b) territory jurisdiction - whether the court can decide upon matters within the territory or area where the cause of action arose, c) pecuniary jurisdiction -whether the court can hear a suit of the value of the suit in question and these three categories of jurisdiction are prerequisite to the assumption of a court's jurisdiction.

In the case of **Owners of Motor Vessel Lillian v Caltex Oil Kenya Limited [1989] KLR 1**, Court held that jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

This court therefore finds that, Buganda Road Court where the proceedings were held was clothed with the jurisdiction to entertain the offences on the charge sheet. It is also the view of this court that the trial magistrate, who is a Grade 1 Magistrate had the jurisdiction to preside over prosecution of the offences in the charge sheet.

Accordingly, I allow this application with the following orders;

- (1) That the proceedings of the Learned Trial Magistrate and all orders made therein be called, revised and set aside.
- (2) That a new magistrate be appointed to handle the above case.



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ROSETTE COMFORT KANIA
JUDGE

9th November 2023