THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

ANTI-CORRUPTION DIVISION

HOLDEN AT KOLOLO

CRIMINAL APPEAL 9 OF 2022

(Original criminal case 94 of 2017)

ISMAIL MUKIIBI ::APPELLANT

VRS

UGANDA :::RESONDENT.

BEFORE GIDUDU, J

JUDGMENT

The appellant, a former **UNRA** station manager at Kitgum was jointly charged with two others in the lower court on four counts.

Count one was corruption **C/S 2(h) and 26 of the ACA, 2009**. They were accused of illicitly obtaining UGX.16,920,000= from **UNRA** for their personal benefit purporting it was for the purchase of gravel for road construction whereas not.

Count two was **Abuse of Office C/S 11 of the ACA, 2009**. They were accused of doing an arbitrary act to wit illicitly processing fictitious payments of UGX. 16,920,000= purporting to purchase gravel for road construction whereas not.

Count three was causing financial loss **C/S 20 of the ACA, 2009**. They were accused of processing fictitious payment of UGX. 16,920,000= knowing or having reason to believe that the same would cause financial loss to **UNRA**.

Count four was **conspiracy to defraud C/S 309 of the Penal Code Act, 120.** They were accused of conspiring to defraud the Government of UGX. 16,920,000= purporting it was for purchase of gravel for road construction whereas not.

All the offences are said to have been committed between September and October 2016. The appellant and his co-accused were found guilty and convicted on all counts. They were sentenced to pay fines or serve terms of imprisonment in default. The appellant was also ordered to refund UGX. 7,610,000=.

The brief facts from the record are that in 2016 **UNRA** required to do maintenance road works on Kitgum-Kalongo –Paimol road. They needed gravel or murram. Ambayo James (A3) a former maintenance technician with **UNRA** was detailed to source murram.

A3 contacted Labeja Raymond (PW5) who agreed and supplied murram at 1,700,000=. An agreement was effected to that effect. (Exhibit P1). Later Muhumuza Joseph, (A2) a **UNRA** Inspector of Works advised A3 to prepare payment documents in the names of David Nyeko (PW12) as supplier at a high rate of 16,920,000= after withholding tax.

Money was processed and PW12 was paid but since it was a deal A2 pestered PW12 to withdraw money and give it to him. A2 promised to return PW12s share after the appellant who was the Kitgum **UNRA** station manager had endorsed the sharing. The documentation to pay PW12 were prepared by A3 and A2 and approved by the appellant. It is a fact that PW12 did not supply any murram to **UNRA** to merit payment.

According to PW12, he complained to the appellant why he was not given a share of the money that had been paid to him for murram but he was ignored. A3 also complained that he was not given a share. When the appellant became difficult, PW12 decided to report to an official of UNRA about the bogus deal to supply murram using his name. Investigations were done by police attached to UNRA hence the trial in the lower court.

The appellant insisted he relied on A3 to make payment to PW12 and believes it is PW12 who supplied the murram. A2 denied knowledge of the deal or receiving money from PW12. A3 admitted working under instructions of A2 and the appellant to strike the deal with PW12.

The appellant who was A1 during the trial, filed four grounds of appeal against the judgment of the lower court. During the hearing, ground one was abandoned. The rest of the grounds are summarised below.

1. That the learned trial magistrate erred in law and fact when he relied on hearsay, unsworn and uncorroborated evidence to convict he appellant thereby occasioning a miscarriage of justice.
2. That the learned trail magistrate erred in law and fact when he held that the offences had been proved beyond reasonable doubt.
3. That the learned trail magistrate erred in law and fact when he made an omnibus evaluation of evidence on all counts against all accused causing a miscarriage of justice.

M/S Henry Kuunya and Keneddy Lule appeared for the appellant whilst Ms Lydia Katami represented the respondent (UNRA). Ground three was argued first while grounds one and two were argued jointly.

Ground 3.

Mr. Lule criticized the trial magistrate for an omnibus evaluation of the offences charged which in his view violated section 136(3) of the MCA, Cap 16. He submitted that the four counts charged have different ingredients which cannot be evaluated omnibus as indicated at page 3 of the judgment.

He faulted the trial magistrate for failing to treating each count separately making findings on each ingredient before going to the next. He asked court to quash the conviction and set aside the sentence because of this error in the judgment.

In reply Ms Katami supported the judgment contending that at page 3, the trial magistrate chose to treat the counts concurrently because they relate to the same story. She submitted that at pages 4 to 5, the judgment stated ingredients of each count which, in her view, was in compliance with **section 136(1) of the MCA**.

She argued that there was no miscarriage of justice because the trial magistrate dealt with specific offences. She asked me to uphold the judgment.

Grounds 1 and 2.

Mr. Kuunya criticized the trial magistrate for relying on evidence of Ambayo James Okudi (A3) who made an unsworn statement in his defence. It was his view that A3's unsworn evidence required corroboration especially so when he was an accomplice with Muhumua Joseph (A2). He faulted the trial magistrate for relying on evidence of a co-accused (A3) to convict the appellant without other evidence to confirm it.

Mr. Kuunya submitted further that the appellant had delegated A3 to source for the gravel for paving roads and that when A3 engaged the suppliers, he kept the appellant in the dark. Learned counsel argued that the appellant was not aware of the agreement A3 had made with Labeja (PW5).

Mr. Kuunya conceded that Nyeko was paid as the supplier of gravel but passed the payment back to Muhumuza (A2). However, there was no evidence that A2 passed the money back to the appellant. He referred to page 7 of the judgment where A3 and PW12 were said to have grumbled that A2 never gave them a share of the money. He referred to A2's reference to A1 as hearsay which the trial magistrate should have ignored as such.

He distanced the appellant from payments made to PW5, Labeja contending that A2 and A3 manipulated the process.

Lastly, Mr. Kuunya submitted that there was no proof of the essential elements of the offences charged in order to sustain the conviction of the appellant. He argued that there was no proof that

the appellant acted arbitrarily, or in conspiracy with A2 and A3 or that the appellant had knowledge that by paying PW12, he was causing financial loss. In short, counsel submitted that the charges against the appellant were not proved beyond reasonable doubt. He asked court to quash the conviction and set aside the sentence and orders made by the lower court.

In reply, Ms katami supported the convictions of the appellant contending that all prosecution witnesses took oath and gave evidence implicating the appellant. She argued that even A3 gave unsworn evidence, it was his right and it was not illegal to rely on it.

She invited court to treat evidence against the appellant as circumstantial. She referred to money (500,000=) that the appellant paid to A3's account on 16/11/2016 as evidence to confirm that it was for PW5

She also referred to **exhibit P8** which is a charge and caution statement of A2 in which he admitted participation of the appellant in the deal to pay PW12 for no supplies made. Besides, at pages 68 to 69 PW12 testified about how the appellant had warned him not to frequent his office. This means that the appellant was privy to the false payment.

My duty as a first appellate court is to subject the evidence to fresh and exhaustive scrutiny and to draw my own conclusions without ignoring the judgment appealed from but taking into account the fact that I neither saw nor heard witnesses testify. See **Pandya V R (1957) E.A.336**.

I will start with ground three which in my view is a technical ground of appeal. The gist of it is that the trial magistrate made an incurable error when he failed to comply with the provisions of **section 136(1) of the MCA, Cap 16** which for ease of reference provides thus.

136. Form and contents of judgment.

(1) Every judgment delivered under section 135 shall, except as otherwise expressly provided by this Act, be written by, or reduced to writing under the personal direction and superintendence of the magistrate in the language of the court, and shall contain the point or points for determination, the decision thereon and the reason for the decision and shall be dated and signed by the magistrate as on the date on which it is pronounced in open court.

I understood the appellant's complaint to be that the trial magistrate departed from this provision when at page 3 of his judgment noted as follows.

"I have decided to resolve the issues from all counts concurrently due to their connectivity"

Learned counsel for the appellant criticized this approach contending it was an omnibus treatment of four different counts which had different ingredients thereby occasioning a miscarriage of justice. It was submitted that the conventional way is for the court to set out each count separately, state the ingredients and evaluate evidence for both sides before deciding if the case has been proved against each accused on each count or not.

The import of **section 136(1) of the MCA, Cap 16** is that a judgment must contain.

(a) The points for determination
(b) The decision on the points, and
(c) The reasons the decision

This provision is mandatory for any judgment following a criminal trial in a Magistrates' Court. It is necessary for the trial magistrate to state the essential elements/ingredients of the offences charged and make clear findings of fact on those ingredients. He or she should then apply the law and reach a reasoned decision.

What happens when the provisions of **section 136(1) of the MCA, Cap 16** are not complied with? Case law is to the effect that failure to comply with the provision will not necessarily invalidate a

conviction if there is sufficient material on the record to enable the appeal court to consider the appeal on its merits; but if there is insufficient material on the record to enable the appeal court to consider the appeal on the merits, the conviction will be quashed. **See Willy John V R (1956) 23 E.E.C.A. 509 ; Kagoye Bundala V R (1959) E.A 780**.

In **Kagoye Bundala (supra),** the conviction was quashed because there was insufficient material on the record for the appellate court to consider the appeal on the merits. Similarly, where evidence turns on circumstantial evidence then the appeal court will quash the conviction and refer the matter for a retrial because that is a matter for the trial court to decide. An appeal court has no opportunity to see and hear witnesses testify. It is disadvantaged except in the clearest of cases to make a finding based on circumstantial evidence.

Even where there may be sufficient material for the appeal court to consider the merits, if the judgment is riddled with non-directions and mis-directions in that, inter alia, the trail court did not evaluate evidence of each of the witnesses and made no findings on the contested issues, a retrial would be ordered. The Tanzanian Court of Appeal in the case of **Stanlaus Kasusura and AG V Pharase Kabuye (CAT Civil Appeal 26 of 1981)** made the following observation.

"In our judgment the judgment is fatally defective; it leaves contested material issues unresolved. It is not really a judgment because it decided nothing, in so far as material facts are concerned. It is not a judgment which can be up-held or up-set. It can only be rejected. It is in fact a travesty of a judgment"

This appeal is from a joint trial of three accused persons on four different counts as stated in my opening paragraph. It is the duty of the court to consider the case against each accused separately. This principle was re-affirmed in the case of **Efurani Ndyayakwa & others V Uganda, Cr Appeal 2 of 1977 where the COA (U)** held

"We agree that each accused was entitled to have his case considered separately. The evidence against such appellant ought to have been assessed and scrutinized in light of the evidence as a whole"

Odoki, J (as he then was) applied the principle in **Ndayakwa and ors** (supra) in **Uganda V Akai s/o Eloloyi and 6 ors Cr Rev 67 of 1978** and justified it as follows:

"I respectfully agree and would add that this is necessary because criminal liability is basically individual, it is not collective nor is it joint and several except in certain cases where common intention is proved against the accused. A joinder of offenders is a practice of convenience for trial of accused persons who have participated in the commission of the offence. It is not intended to imply that all the accused tried jointly must be convicted or acquitted. It is still the duty of the prosecution to prove their case against each accused to the required standard"

Applying the principle of separate evaluation of evidence, the decision by the trial magistrate **to resolve the issues from all counts concurrently due to their connectivity** is, with respect, faulty and unorthodox. Criminal liability is individual. The prosecution must prove each charge against each accused beyond reasonable doubt. **Section 136 (1) of the MCA, Cap 16** requires that each point for determination is stated, a decision taken on each point and reasons for each decision given.

Further examination of the judgment shows that after stating the ingredients of each count at pages 4 and 5, the trial magistrate made an omnibus evaluation of the evidence without making specific findings of fact against each of the three accused persons on each of the four counts in the charge sheet. The only ingredient where he made a specific finding was the un-contested matter of employment. Specific ingredients such as illicitly obtaining UGX 16,920,000= by the appellant in count one and the participation of

the appellant in the conspiracy in count four were not specifically evaluated and no specific findings of fact were made against him.

Instead at page 10 of the judgment the trail magistrate held thus;

"In totality and in light of the foregoing evidence and exhibits on court record with special reference to the standard of proof in criminal matters, I am convinced that, the prosecution proved all the essential elements of the offences charged. I accordingly convict each of the three accused persons on each count as charged"

With respect this is an omnibus conclusion. Pages 6 to 9 the trial magistrate is making a general discussion of evidence without specific focus to any specific count/issue. This assessment originates from his error in approaching the evaluation of evidence in general terms without addressing himself to the requirement that charges must be proved against each accused in each count charged because criminal liability is individual and where a conspiracy is alleged, the participation of each conspirator should be proved beyond reasonable doubt.

Ms. Katami asked me to find that there was no miscarriage of justice. With respect, I find on the contrary that there was no justice because no specific findings were made against the appellant especially on count one and count four. Ms. Katami also referred to circumstantial evidence to connect the appellant to the charges. This fact was not resolved by the trial court. It is a matter that requires examination of the demeanor of witnesses during the trial. An appeal court cannot search for this evidence on the record.

The trial court should have made a specific finding on the participation of the appellant in generating an agreement with David Nyeko (PW12) to get free money. Evidence whether direct or circumstantial should have been evaluated to connect the appellant to the sharing of the money. This is because he denied it. The appellant's prior knowledge of the agreement with Labeja Raymond PW12) should have been resolved by the trial court through direct or circumstantial evidence.

In short, the judgment appealed from is not sufficient to merit being up-held or up-set. I am unable as an appeal court to review the evidence and write a judgment out of the material on record because essential evidence adduced requires examining circumstantial evidence which I cannot do because it requires seeing the demeanor of witnesses such as A3, PW5 and PW12.

I am fortified in this holding after reviewing the reasoning in the case of **Jean Charles Confiance V R (1960) E.A. 567** at pages 569-570. The East African Court of Appeal considered the judgment in ***R. v. Ali Abdulla Shirazi and Another* (2) (1956), 23 E.A.C.A. 550 at 551** where it was held thus:

"It is well settled now that the question whether a defective judgment is a curable or an incurable irregularity can only be answered after a consideration of the record and the circumstances of each case. The guilt of the accused may be so apparent that no other verdict than guilty is reasonably possible; *Lute*, 1 E.A.C.A. 106; *Derego*, 20 E.A.C.A. 266 at p. 268.

On the other hand, if there has been no evaluation of conflicting evidence and necessary findings of fact do not appear on the record, the conviction will not stand: *Derego (supra)*; *Samwiri Senyange V R (1953) 20 E.A.C.A 277*"

In the trial below, the participation of the appellant in illicitly obtaining money from **UNRA** and conspiring to defraud **UNRA** were not resolved by the trial magistrate yet he convicted him of those crimes. An appeal court is not well positioned to interrogate evidence which essentially turns on the demeanor of witnesses it has not seen or heard testify.

In the result I find merit in ground three of the appeal. The appellant is entitled to a resolution of the issues concerning his guilt after the trial. There are no findings of fact on his involvement. The judgment fell short in resolving the issues relating to the criminal participation of the appellant. It cannot be up-held or up-set on appeal. The conviction cannot stand.

On the basis of this holding, the conviction of the appellant is quashed and the sentence and orders made against him are set aside. A re-trial is ordered. The resolution of ground three of the appeal, renders grounds one and two inconsequential.

I notice that the trial before the lower court took almost four years to conclude! That is a very long time for this nature of case. The crimes are alleged to have been committed in September 2016. The matter has been in court for unnecessarily long.

In view of this sad history of a sluggish trial, I direct the Chief Magistrate to take over the re-trial expeditiously. With guidance from our **Case Management Rules (Legal Notice 11 of 2021),** the re-trail should be concluded within this year (2023)

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Gidudu Lawrence

JUDGE

17th May 2023.