

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL N0.08 OF 2010

BAIGANA JOHN PAUL;,,; APPELLANT

VERSES

UGANDA;,,; RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

**HON. MR. JUSTICE RICHARD BUTEERA, JA HON. MR.
JUSTICE KENNETH KAKURU, JA**

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[Appeal from the Conviction and Sentence of the Honourable Judge of the High Court of Uganda Holden at Kampala, His Lordship Hon. Justice Lugayizi dated 1st day of February 2010 in Criminal Appeal No. 61 of2008; Baingana John Paul Vs. Uganda and Buganda Road Court Criminal Case No. 197 of2006]

JUDGMENT OF THE COURT

This appeal is from the dismissal of the appeal of the appellant against his conviction and sentence by Hon. Mr. Justice Edmund Sempa-Lugayizi dated 1st February 2010 in High Court Criminal Appeal No. 61 of 2008. That appeal arose from Buganda Road Chief Magistrates' Court Criminal case No. 197 of 2006 whereby the appellant was convicted of obtaining money by false pretence on 18th August 2008 and sentenced to 4(four) years imprisonment in default of paying a fine of shs. 3,000,000/= (three million shillings).

He was also ordered to pay compensation of shs. 50,000,000/ = (fifty million shillings). He appealed to the High Court against both conviction and sentence. The appeal was successful in part.

The appellant was however, still dissatisfied with the decision of the High Court and made a second appeal to this court.

On 12th February 2013, the appeal was heard by a Coram consisting of Justices C.K Byamugisha JA, A. S. Nshimye JA (as he then was) and Remmy Kasule JA.

However, before a Judgment could be delivered, Honourable Justice C.K Byamugisha sadly passed away. It was found necessary to reconstitute the Coram and to re-hear the appeal.

The appeal was re-heard on 14th September 2015, by this present panel whereupon Judgment was reserved to be delivered on notice. This is the Judgment.

The grounds of appeal are set out in the appellant's memorandum of appeal as follows

- 1. The Learned Appellate Judge erred in law and fact to uphold the Trial Magistrate's decision to use a retracted extra-judicial statement of a co-accused against the Appellant.***
- 2. The Learned Appellate Judge erred in law and fact when he failed in his duty to re-evaluate the evidence thereby occasioning a miscarriage of justice***
- 3. The Learned Appellate Judge erred in law and fact when he upheld and confirmed the Trial Magistrate's decision to convict the Appellant of a fine of Ug. Shs. 3,000,000/- [Three million shillings only] or 4 years imprisonment and Ug. Shs. 50,000,000/= [Fifty million shillings only] as compensation to the said Complainant.***
- 4. The Learned Appellate Judge erred in law and fact when he found that the Appellant participated in the meeting of A2 and other persons.***
- 5. The Learned Appellate Judge erred in law and fact to hold that the Appellant, at the time of taking instructions to handle the civil suit, was aware that Okuku Martin would not represent and cater for the interests of the beneficiaries.***
- 6. The Learned Appellate Judge erred in law and fact to uphold the finding of the Trial Magistrate that the Appellant gave Okuku Martin Shs. 32,000,000/= [Thirty two million shillings only] and took the rest when Okuku acknowledged receipt of Shs. 62,000,000/= [Sixty two million shillings only] as per Exh. P.21.***
- 7. The Learned Appellate Judge erred in law and fact to uphold the decision of the Trial Magistrate that the Prosecution had proved all the ingredients of the offence against the Appellant beyond reasonable doubt.*** 2
- 8. The Learned Appellate Judge erred in law and fact when he misdirected himself when he found that there was misjoinder of the charges and a mistrial but went ahead to confirm the***

conviction of the Appellant. (The underlining is ours).

When the matter came up for hearing, the appellant was present and was represented by learned counsel ***Mr. Mohamed Mbabazi*** and ***Mr. Wycliffe Birungi***. ***Ms. Josephine Namatovu*** learned Principal State Attorney represented the respondent.

The grounds of appeal as set out above each faults the learned appellate Judge on issues of law and fact, as indicated by our underlining above. The whole memorandum of appeal clearly offends the provisions of Section 45(1) of the Criminal Procedure Code Act (Cap 116) which stipulates as follows;-

“45(1) Either party to an appeal from a Magistrate’s Court may appeal against the decision of the High Court _in its appellate jurisdiction to the court of appeal on a matter of law not including severity of sentence, but not on a matter of fact or mixed fact and law.” (Emphasis added)

This provision of the law is mandatory and must be complied with, is See: Mitwalo Magyengo vs Nedadi Mutyaba: Supreme Court Ciml Appeal No. 11 of 96, Kobusingye vs Nyakaana (2005) EA 110, Nalukenge Mildred vs Uganda: Court of Appeal Criminal Appeal No. 67 of 2008_and P.C Wabwire Anthony vs Uganda: Court of Appeal Criminal Appeal No. 152 of 2009.

Also, an appeal is a creature of statute and there is no such a thing as an inherent right of appeal See; Attorney General vs Shah No. 4 of [1971] EA P.50_and Baku Raphael Obudra and Obiga Kania versus The Attorney General (Supreme Court Constitution Appeal No. 1 of 2005).

The appellant therefore had no right of appeal in respect of issues of fact or issues of mixed law and fact. We were inclined to strike out all the grounds of appeal, however, we find that grounds 1 and 2 raise some issues of law, the poor drafting notwithstanding. We shall therefore proceed to determine them.

Grounds 4,5,6,7 and 8 raise only issues of fact and as such cannot stand as they offend Section 45 of the Criminal Procedure Code Act. They are all accordingly struck out.

Ground 3 is in respect of sentence. Under Section 45 of the Criminal Procedure Code Act (Supra), the appellant can only appeal against the legality /lawfulness and not severity of sentence. This ground does not at all state that appeal is against the legality/lawfulness of sentence. The ground clearly offends both the Criminal Procedure Code Act (Supra) and Rule 66(2) of the Rules of this Court which requires the memorandum of appeal to set forth concisely the grounds of the objection to the decision appealed from. Ground 3 is accordingly struck out.

This leaves only grounds 1 and 2 for resolution.

It must be noted that during the hearing of the appeal the Court brought to the attention of Mr. Mbabazi, learned counsel for the appellant, that the memorandum of appeal offended the law cited above. Nonetheless he chose to proceed without seeking leave to amend or substitute any of the grounds with those proper in law. Instead he asked court to sever the offending grounds.

Ground one:

This ground is set out as follows

“The Learned Appellate Judge erred in law and fact to uphold the Trial Magistrate’s decision to use a retracted extra-judicial statement of a co-accused against the Appellant

At the trial the appellant was jointly charged with one Okuku Martin Osebert herein referred to as A1 or the co-accused. The trial Magistrate in her Judgment stated as follows in respect of A1’s evidence.

“Turning to the question whether A2 had a fraudulent intent, I find as proven the following facts

1. He did not serve notice of change of advocates to P3

and 6.

- 2. He did not contact PW3 (Rutisya) who in the records A2 said he got from his clerk (Kiyimba) and Okuku was lead counsel in the matter.**
- 3. Acted in three days to get a settlement.**
- 4. Passed on costs and special damages to PW6 (Kasirye) upon Kasirye's demand.**
- 5. He acted without the file which contained in the matter.**
- 6. His evidence on how he disbursed the money is false.**

To crown it all, there is A1's charge and caution statement in which he said that A2 gave him 32ml=, and told him that the rest of the money was to be given to the people who helped him process the cases and that it was not for the children. (Emphasis added).

The defence assailed the charge and caution statement, saying it is not a confession, and that since it was made by A1 it cannot be used against A2.

I perused the document, exhibit P. 17. In the statement A1 admitted receipt of money. He admitted that he was just handpicked by unidentified persons who briefed him on how Bizu died and left children. Those persons connected him to A2 who drafted a letter that A1 was Next Friend of the children, which letter he (A1) signed. When it came to the sharing of the money A1 in his statement said that A2 told him the rest of the money was for the people who helped him process the cases and not for the children. In my view the above information is an admission of substantial facts which constitute the offences charged. It certainly amounts to a confession . The case of Swami v King Emperor 1939 1 AER 696 is relevant.

On the concern that A2 cannot be adversely affected by a confession by A1 the legal position as propounded in UGANDA V KAMUSINI S/o SEKU & 1 1976 HCB 160.

Is that the law permits a confession made by an accused implicating a co accused to be only admissible if the accused implicates himself substantially to the same extent as others and exposes himself to the same risk or even to a greater risk than others.

In this case, by the accused (A 1) saying that he was handpicked and he accepted to act as Next Friend, and even obtained money (32m/=), he implicated himself substantially with the offence of obtaining money by false pretences. When he said that A2 gave him 32m/= and said the rest was for other people, but not the children, he implicated A2 to the same extent as himself. The statement is therefore admissible against A2 as well.”

From the above excerpt we are satisfied that the trial Magistrate properly evaluated the evidence. She also correctly applied the law to the facts. The appellant who was A2 at the trial, was in A1's charge and caution statement to police, implicated to the same extent as A1. That confession was therefore admissible and could be used against the co-accused now the appellant.

However, such evidence is of the weakest nature against the co-accused who was not availed an opportunity to cross examine A1 to the extent that it implicated him. A1 gave unsworn evidence and therefore could not be cross examined. His evidence against the appellant as contained in the charge and caution statement was of the weakest nature and on its own could not have been sufficient to sustain a conviction as against the appellant.

The Supreme Court in *Oryem Richard and another vs Uganda (Criminal Appeal No 2 of 2002)* while discussing a similar matter stated as follows

“It is trite law, which in a case where two or more accused persons are jointly tried for the same offence, a confession by one implicating another, cannot be used as a basis for the conviction of that other. Under section 28 of the Evidence Act, it may only be used to supplement substantial evidence against the co-accused. Such confession is even not to be equated to accomplice evidence, as implied by the Court of Appeal in the instant case. See Gopa and others vs. R (supra), and Ezra Kyabanamaizi and others v R (1962) EA 309. Accomplice evidence, which is adequately corroborated, can be a lawful basis for a conviction. A confession, such as Exh.P2 in the instant case, cannot be. Indeed, it is a weak form of evidence, because it is made in absence of the implicated co-accused, and its veracity is not tested through cross-examination. See also the decision of this Court in *Thomas Nkulungira versus Uganda: Court of Appeal (Criminal Appeal No. 168 of 2011) (Unreported)* However, in this case the appellant's conviction was not solely or even largely based on A1's confession or testimony. In the excerpt of the trial Magistrate's Judgment reproduced above, it is clear that there was other substantial evidence relied upon to convict the appellant. In the trial Magistrate's own words the evidence of A1 was “to crown it all.. This clearly indicates

that the confession was not the sole or the main basis for the conviction. We find that even without the evidence of A1 there was sufficient evidence adduced by the prosecution to sustain a conviction against the appellant and we so hold. Some of this evidence was appellant's non service of notice to PW3 and PW6 that he was taking over the process, reaching a settlement in the suit within three days, his agreeing to pass on costs and special damages to PW6 thus confirming he was not entitled to those costs and that he irregularly took over the matter, the inconsistency in the disbursement of the money and where it was disbursed and the fact that the beneficiaries did not receive the said money. We also hold that the learned trial Magistrate was justified when she accepted A1's confession having been satisfied that it was true. However, that acceptance ought to have been with caution. In Tuwamoi vs Uganda [1967] EA P.4 the Court of Appeal for East Africa held as follows

"A trial court should accept with caution a confession which has been retracted or repudiated or both retracted or repudiated and must be fully satisfied that in all circumstances of the case that the confession is true (Emphases added).

In the circumstances of this case, we find that the appellant's case was not in any way prejudiced by the trial Magistrate failing to caution herself before she accepted this confession.

We accordingly have no cause to interfere with the decision of the learned appellate Judge on this issue. We find no merit in this ground of appeal and the same is accordingly dismissed.

Ground 2:

The Learned Appellate Judge erred in law and fact when he failed in his duty to re-evaluate the evidence thereby occasioning a miscarriage of justice

This ground offends the provisions of Rule 66(1) of the Rules of this Court. It is too general whereas the Rule requires grounds of appeal to be specific.

Be that as it may, we have listened carefully to the submission of all counsel. We have also carefully perused the record of appeal. We are satisfied that, as a matter of law, the learned appellate Judge of first instance, properly re-evaluated the evidence and the law before coming to the decision that he did.

On a second appeal, this court is required to determine whether or not the first appellate court carried out its duty of re-evaluating the evidence. The duty of a court entertaining a second appeal was set out in *Kifamunte Henry Vs Uganda: Criminal Appeal*

No. 10 of 1997 when the Supreme Court while discussing this very issue stated as follows

Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the court of first appellate Court has wrongly held that the trial Court correctly directed itself yet, if the Court of first appeal has correctly directed itself on the point, the second appellate Court cannot take a different view; R. Mohamed Ali Hasham vs. R (1941) 8 E.A.C.A. 93.

On second appeal the Court of Appeal is precluded from questioning the findings of fact 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: R. vs. Hassan bin Said (1942) 9 E.A.C.A. 62."

The above position of the law has not changed.

We are persuaded that the learned appellate Judge did properly reevaluate the evidence before coming to the conclusion that he did.

We therefore find no merit in ground 2 of the appeal which is also accordingly dismissed.

This appeal therefore fails as it has no merit and it is hereby dismissed.

The Court record indicates that upon conviction by the trial Court the appellant was sentenced to pay a fine of shs. 3,000,000/= in default of which he would serve 4 years imprisonment. He was also ordered to pay shs. 50,000,000/= as compensation to the complainants.

We have found no evidence on record to indicate that the appellant even paid the fine or compensated the complainants. We have also not found any order by any Court staying the execution of the sentence imposed and or payment of the compensation that was ordered.

We find therefore that in the circumstances the trial Court ought to have ordered the appellant to commence serving his prison sentence until such a time as the fine was paid if he chose to pay the same.

In this case the appellant since his conviction and sentence by the Chief Magistrate's Court Buganda Road on 2nd September 2009, has neither paid the fine nor served the sentence imposed by that Court. As already stated, there is no evidence that the execution of the sentence was ever stayed.

It is trite law that an appeal does not operate as a stay of execution or sentence. Rule 6(2) of the Rules of this Court stipulates that;-

“6(2) the institution of an appeal shall not operate to suspend any sentence or to stay execution...”

The appellant was given an option to pay a fine which he declined to take. It is now more than 8 years and 3 months since his conviction. We find that the option of a fine would now no longer serve the purpose for which it was intended and we hereby invoke Section 11 of the Judicature Act and revoke it.

We make the following orders

- 1. The appellant commences to serve the sentence of 4 (four) years imprisonment.***
- 2. The appellant is also to pay compensation of shs. 50,000,000/= (fifty million shillings) with interest at 20 percent per annum as from the date of sentence of 2nd September 2008 till payment in full.***
- 3. All the money is to be paid to the Registrar of this Court who shall pass it on to the orphans/beneficiaries through their lawyers, messrs Kasiryе and Byaruhanga Co. Advocates, to whom a copy of this Judgment is to be served by the Court Registrar.***
- 4. Should the appellant fail to pay in full within 7 (seven) days from the date of this***

Judgment the said compensation sum of shs 50,000,000/= (fifty million shillings) with interest thereon, maybe recovered as a civil debt by the Registrar of this Court and or M/s. Kasirye and Byaruhanga Co. Advocates, the advocates for the beneficiaries.

Before we take leave of this matter, we direct that a copy of this Judgment be served upon the secretary to the Law Council, for the Law council, if it sees it fit to commence investigations against the appellant and any other advocates named in this Judgment and that of the High Court as having played some role in the mishandling of the beneficiaries money for possible professional misconduct.

Dated at Kampala this 25TH day of MAY 2016.

HON.REMMY KASULE

JUSTICE OF APPEAL

HON. RICHARD BUTEERA

JUSTICE OF APPEAL

HON. KENNETH KAKURU

JUSTICE OF APPEAL