

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.109 OF 2014

OUMA ADEA;..... APPELLANT

VERSES

UGANDA;..... RESPONDENT

CORAM: HON.S.B.K KAVUMA, DCJ.

HON.ELIZABETH MUSOKE, JA.

HON.CHEBORION BARISHAKI, JA.

JUDGMENT OF THE COURT

This is a second appeal arising from the judgment of the High Court which upheld the conviction of the appellant by the Chief Magistrates Court for the offence of corruptly receiving gratification, contrary to Section 2(a) and 26 of the Anti-Corruption Act, 2009. The Chief Magistrates Court sentenced the appellant to pay a fine of UGX 2,000,000/= or to imprisonment for one year, in default of paying the fine, and the High Court upheld the trial Courts decision, hence this appeal.

Background to the appeal.

The appellant, who was the District Chairperson Busia District, was charged on four counts of corruption related offences as follows;

1. Corruptly soliciting for gratification, contrary to section 2(a) and 26 of the Anti-corruption Act, 2009.
2. Corruptly receiving gratification, contrary to section 2(a) and 26 of the Anti corruption Act, 2009.
3. Abuse of office, contrary to section 11(1) of the Anti corruption Act,2009.

4. Abuse of office, contrary to section 11(1) of the Anti corrupt Act,2009.

The appellant was tried by the Chief Magistrates Court and acquitted on counts I, III and IV. He was, however, found guilty on count II, and sentenced as mentioned above. He paid the fine of UGX 2,000,000/=.

The evidence which was led by the prosecution against the appellant in respect of count II, and which was accepted by the trial magistrate was that on 25th November, 2011, at Golf Course Hotel, Yusuf Lule Road, Kampala, the appellant received a gratification of US\$2000 from Paul Sherwen (PW6), the Managing Director of Busitema Mining Company. The money was received by the appellant as an inducement to enable Busitema Mining Company survey some land at Tiira Centre, Busitema Sub County, Busia District, for purposes of mining gold.

The evidence as adduced by Paul Sherwen (PW6) was that he met the appellant at the review of the Mineral Sector meeting that had been organized by the Government on 10th November, 2011, at Hotel Africana, Kampala. On the last day of the meeting, the appellant approached PW6 and asked him for US\$3000 to enable him travel to the United States of America. Further, that the appellant told PW6 that the US\$3000 enable the valuation and compensation process of the land at Tiir center to be pushed through. PW6 then called an IGG official (PW1) for the matter, and they both decided to set up a trap against the appellant.

On the 25th November, 2011, PW6 arrived at the Golf Course Hotel at 8:00AM and obtained an envelope from the hotel reception where he put the USD\$2000 that was meant to be advanced to the appellant.

Thereafter, the appellant also arrived at the hotel and sat next to PW6. When it was approaching 10:00AM, PW6 informed the appellant that he wanted to leave, and the appellant quietly inquired from him "whether he had his things", and PW6 answered in the affirmative. The appellant then followed PW6 to the front door of the hotel.

PW6 then handed over the white envelope containing the US\$2000 to the appellant, who in turn handed it over to his driver who was standing close by.

PW3, the driver of the appellant, testified that he received the money from the appellant, and PW2 also testified that he saw PW6 advancing the money to the appellant. Thereafter, the appellant and PW3 were arrested and the money tallying with a record of cash for trap was recovered from PW3.

At the trial, the appellant denied receiving the envelope containing the US\$2000. It was the case for the defence that on the 25th November, 2011, the appellant was at the Golf Course Hotel at a meeting with some LCV Chairpersons from the Eastern Region. The appellant then received a phone call from one of his colleagues (DW2) who had failed to find his way to the hotel, and the appellant moved out to meet him. PW6, earlier joined the appellant and his colleagues in the meeting then followed the appellant. The appellant, while greeting DW2 at the hotel

reception, was arrested on allegations that he had received US\$2000 from PW6.

The trial magistrate convicted the appellant of the offence as charged in count II. Being dissatisfied with the decision of the trial magistrate, the appellant appealed to the High Court against his conviction on the following grounds;

1.the trial magistrate grossly error inlaw and fact in her failure to consider and adjudicate upon the defences objection that the charge sheet in counts 1 and 11 was defective for failure to allege an essential ingredient thus erroneously convicting and sentencing the appellant as she did.

2.The learned trial magistrate grossly erred in law and fact in her failure to vigorously and exhaustively subject the entire evidence on count II to scrutiny thus erroneously convicting the appellant on that count.

3.The learned trial magistrate erred in law and fact in holding that the evidence of PW1 and the entire evidence proved that the money belonged to IGG whereas not.

4.The learned trial magistrate erred in law and fact in relying on;

- a. Accomplice evidence of PW3 to convict the appellant.
- b. The uncorroborated evidence of PW1, PW2, PW5 and PW6 evidence required corroboration since all the said witnesses, to have purportedly set up the trap leading to the arrest appellant together.

The High Court disallowed the appeal and upheld the decision of the trial Court. Dissatisfied with the decision of the High Court, the appellant has appealed to this court against his conviction on the following grounds;

1. The learned trial Judge erred in law and fact when he failed to reevaluate evidence on record thereby reaching a wrong conclusion.
2. The learned trial judge erred in law and fact when he held that the charge sheet in counts I and II was proper.
3. The learned judge erred in law and fact when he held that it was proper to convict the appellant on accomplice evidence of PW3 and the uncorroborated evidence of PW1, PW2, PW5 and PW6, which evidence needed corroboration.

However, when the appeal came up for hearing, Counsel for the appellant abandoned ground 2, and amended the remaining grounds to remove the word "fact". In essence, the appeal is only on grounds of law.

Counsel for the appellant opted to argue the two remaining grounds of appeal jointly. However, it appears to us that no arguments were made in support of the 3rd ground of appeal, and in our view, this ground was, in substance, abandoned.

Counsel for the appellant submitted that the main contention was that the High Court failed to re-evaluate the evidence on record by putting the evidence to fresh scrutiny as a 1st appellate Court. Further, that while it is the duty of a 1st appellate Court to consider the entire evidence, the appellate court herein did not do so and neither did it indicate its judgment that it had done so.

It was Counsel for the appellant's argument that while the money in issue, (\$2000), was recovered from PW3 and not the appellant, this was not put into consideration by the 1st appellate Court while re-evaluating the evidence yet the appellant was charged with receiving the money.

Counsel further contended that the evidence of PW3 and PW6 had grave contradictions which the High Court had the duty of putting into consideration while re-evaluating the evidence. PW6's evidence was that upon advancing the money to the appellant, he called his driver (PW3) who was close by and handed to him the envelope containing the \$2000. However, PW3 (appellant's driver) stated that he was called by the appellant before the money was advanced to him. In Counsel's opinion, the 1st appellate court should have made a finding on the above contradiction.

Counsel for the appellant also contended that while the trial Court had rejected the evidence of PW6 and PW1 for being doubtful and not credible on count 1, the same court, however, accepted the same evidence in Count II. If the High Court had put the above into consideration, it would not have reached a decision to the effect that the appellant received the money from PW6 and then handed it over to PW3.

It was the further contention of Counsel for the appellant that the 1st appellate court should have taken judicial notice of the fact that the whole setting took place at a hotel that has CCTV cameras and it involved two institutions of Government (IGG and Police) that are well facilitate investigations. There was no explanation from the prosecution as to why cameras were not used to capture the exercise.

Counsel for the appellant made reference to the evidence of the appellant, DW2 and DW3, which was in his opinion, not considered by either the trial Court or the 1st appellate court, it was the submission of Counsel that it was not clear whether such evidence was accepted or rejected by either of the two courts.

In reply, counsel for the respondent submitted that the appeal was wrongly before this Court because the arguments of counsel for the appellant on each of the grounds are on matters of fact and not on matters of law. Further, that ground 1 of the appeal does not raise any point of law for consideration by this Court, and this is against **Rule 66(2)** of the **Judicature (Court of Appeal Rules) Directions SI 13-10** that requires that grounds of appeal in a memorandum of appeal shall set out concisely under distinct heads, without argument or narrative the matter that has wrongly been decided.

With regard to the contention by counsel for the appellant that the trial Court had rejected the evidence of PW6 and PW1 for being doubtful and not credible on count 1, but the same court had accepted the same evidence in Count II,

counsel for the respondent submitted that the evidence was rejected specifically in regard to solicitation. However, the appellant was convicted on the charge of receiving gratification after the prosecution had proved the ingredients of the offence beyond reasonable doubt.

In explaining the discrepancy in the amounts of money mentioned evidence for the prosecution, Counsel for the respondent invited this court to take judicial notice of the fact that corruption cases are not always straight forward. For instance, a person may not ask for money directly, but for a cup of tea; in this instance, it was an air ticket. Originally, what was asked for was an air ticket and it later zeroed down to \$2000. It was the submission of Counsel that this was not a contradiction per se but a chronology of events.

In rejoinder, counsel for the appellant submitted that the point of contention is on the duty of the High Court to re-evaluate evidence as a matter of law and not as a matter of fact. The arguments advanced were to bring to the attention of this Court evidence that was not reconsidered by the 1st appellate court.

Counsel for the appellant contended that the evidence with regard to how the appellant received the envelope containing the money was by mere words from PW6 and PW3. There was no scientific or electronic evidence to justify the words of the prosecution witnesses. Therefore, Court should have given strong reasons for accepting the words of the prosecution witnesses against those of the defence witnesses.

Court's consideration of the appeal;

The duty of this Court in this case, as the second appellate Court, is to reevaluate the evidence resulting from the 1st appellate Court's failure in its duty to subject the evidence to that fresh scrutiny as is expected of a 1st appellate Court. It is trite law that a second appellate Court can interfere where the decision reached by the 1st appellate court was without sufficient evidence to support the findings of *Kifamunte Henry Versus Uganda (Supra)*, *Akbar Hussein Godi Versus Uganda (Supra)*].

First, we shall address the issue raised by counsel for the respondent that the 1st ground of appeal does not raise any point of law, and that therefore this appeal is improperly before this Court. The first ground of appeal reads as follows;

"The learned trial Judge erred in law when he failed to re-evaluate evidence on record thereby reaching a wrong conclusion?"

However, as has been established in a number of authorities, failure by a first appellate court to re-evaluate material evidence or to reconsider substantial facts constitutes a question of law that can be addressed on a second appeal. In *Bogere Moses & Anor Versus Uganda Ciminal Appeal No.1/1997*, it was stated as follows;

"...In our recent decision in Kifamunte Henry Vs Uganda we reiterated that it was the duty of the first appellate court

to rehear the case on appeal by reconsidering all the materials which were before the trial court and make up its own mind...Needless to say that failure by a first appellate court to evaluate the material evidence as a whole constitutes an error in law."

(Also See Kifamunte Henry Versus Uganda, Supreme Court Criminal Appeal No.10/1997, Akbar Hussein Godi Versus Uganda, Supre Court Criminal Appeal No.03/2013, Cheptuke Kaaye David Uganda, Supreme Court Criminal Appeal No.01/2013).

In our opinion, the point of law is that the 1st appellate court did not reevaluate the evidence. It is at the hearing of the appeal that arguments of the areas/facts that were not properly evaluated by the 1st appellate court can be raised. Otherwise the grounds of appeal may end up being argumentative, which would be contrary to the rules on the framing of grounds of appeal.

As rightly pointed out by counsel for the appellant, the question to be addressed by this Court is whether the High Court (1st appellate Court) properly re-evaluated the evidence as required by law.

In considering the appeal before him, the High Court judge first reminded himself of his duty as the first appellate court to make a thorough scrutiny of the evidence and record of the trial court so that he could reach his own independent conclusion, and the fact that he did not have the advantage the trial court had of having to see the witnesses testify. He cited *Pandya Versus Republic [1957] EA 336* as a basis for coming to the above approach.

The High Court judge then went ahead to make a review of the evidence on record showing how the money was allegedly advanced from PW6 to the appellant, and then to PW3. It was stated on page 3 of the judgment as follows;

"According to PW6 money was not paid immediately so kept asking for it Afterwards PW6 made arrangements to catch the appellant in the process of receiving the money Between PW6 and the Inspectorate of Government it was agreed the

sum of money be scaled down to US\$2000 and it is that sum PW6 testified he handed to the appellant in an envelope. The evidence is supported by that of PW3 whose testimony was that the appellant handed to him an envelope the appellant had received from PW6. In his evidence PW2 also said that PW6 handed the envelope to appellant who later handed it to someone else to keep. In this respect the evidence of the envelope issuing from PW6 to the appellant and from the appellant to PW3 is further corroborated by that of PW2 who was not a participant in the envelope handling exercise."

In essence, we find that the contention of counsel for the appellant that the 1st appellate court did not take into consideration the fact that the money (\$2000) was recovered from PW3 and not the appellant, must fail. It is apparent from the above extract from the judgment that the 1st appellate court was alive to this fact while reaching its decision to uphold the trial courts conviction of the appellant. It was not mandatory that the 1st appellate court should have specifically mentioned that it was PW3 who was found with the envelope since the facts as evaluated and stated in the judgment directly imply so. In ***Cheptuke Kaaye David Versus Uganda, Supreme Court Criminal Appeal No. 1 of 2013***, court held as follows:-

"The learned Justices of Appeal could perhaps have/given & more detailed evaluation of the evidence in their judgment but as we stated in the case of Margaret Kato and Anor Versus Nuulu Nalwoga (SCCA No. 03 of 2013), there is no prescribed form laid down which the appellate court should follow. What is important is that the evidence touching on key issues of the case is re-evaluated by the appellate court, and we are satisfied that the Court of Appeal did so in this case"

It also appears to us that the 1st appellate court addressed its mind to the contradictions that were present in the prosecution case and chose to treat the same as minor. At page 5 of the High Court judgment, the 1st appellate court, while reaching its decision to agree with the trial courts findings stated as follows;

"Turning to the case at hand I find no ground to fault the findings of the trial court. No deliberate lies or untruthfulness are evident The record shows money issuing from PW6 to the appellant and then to PW3 at the scene of the trap. In essence appellant received the gratification from PW6 and it is of no import what the source of the money was"

This Court, as the second appellate court is precluded from delving into the sufficiency or rationality of the findings of fact of the 1st appellate court or the trial court. (See *Kifamunte Henry Versus Uganda (Supra)*). For the case herein, the appellate court addressed itself to the contradictions and decided to disregard them. We cannot fault the 1st appellate court for specifically stating the contradictions one by one; as stated above no prescribed format that must be followed in re-evaluation, significant is that the court made its re-evaluation and reached its decision that the contradictions were not cogent.

One of the contradictions pointed out by Counsel for the appellant is that while PW6's evidence was that upon advancing the envelope containing to \$2000 to the appellant, the appellant called his driver (PW3) who was close by and handed to him the envelope containing the \$2000, in contradiction to the above evidence however, PW3 (appellant's driver) stated that he was called by the appellant before the money being advanced to the appellant. In our opinion, at what point PW3 was called by the appellant was not of so much importance and we do not think the inaccuracy in the prosecution evidence in this regard really reflects on the credibility of the witnesses.

Further, we also observe that the contradictions raised by counsel for the appellant as stated above are minor and do not in any way raise any doubt in our minds about the cogency evidence presented against the appellant; that is to say that the appellant corruptly received gratification as charged.

We also accept the view expressed by counsel for the respondent that the evidence that was rejected by the trial court was specifically in reference to solicitation. The court accepted the prosecution evidence with regard to receiving gratification. The evidence that was adduced on the 1st count of soliciting for gratification was different from that on the 2nd count of receiving gratification. The trial court chose to believe the evidence of and PW6 in regard to the aspect of receiving and to reject that of the witnesses in regard to the aspect of soliciting. At page 5 of the High court judgment, the court agreed with the finding of the trial court and stated as follows;

"In essence appellant received the gratification from PW6 and it is of no import what the source of the money was."

It is our finding that the two lower courts accepted the prosecution evidence on the aspect of receiving and we do not find any reason for deciding otherwise.

Counsel for the appellant also raised a concern that the two lower courts did not take into consideration the evidence of the defence witnesses, nor were reasons given for the Courts accepting the evidence of the prosecution as opposed to that of the defence.

It is trite law that in a criminal trial, court is legally required to evaluate the prosecution case alongside the defence case, while weighing the strengths and weaknesses of one side against the other so that a decision is not taken until all the evidence has been considered .*(See Ngobi Versus Uganda Supreme Court Criminal Appeal No.10/1991).*

We have perused the judgments of both the trial magistrate and the High Court. We find that the trial magistrate did not indicate whether she had considered the defence case in reaching her finding, nor does the judgment refer to any of the evidence adduced by any of the defence witnesses. However, it is apparent from the High Court Judgment that court took into consideration the defence case although it does not detail the evidence adduced by the defence. At page 5 of the Judgment, the court stated as follows;

"For the record the defence contested evidence of the prosecution that appellant ever asked for money from PW6 or that PW6 ever handed the envelope containing the money in issue to appellant. Given the evidence above what stands to be resolved is whether a fair minded and informed observer, having considered the facts, would conclude that it was possible the appellant corruptly accepted a gratification. In the circumstances of this case, bearing in mind the defence evidence in the trial court alongside that of the prosecution of course, I find it was not farfetched for the trial court to find that the appellant received the envelope from PW6.

In our view, basing on the above extract from the judgment, the 1st appellate court was alive to its duty to weigh the prosecution case against that of the defence case, and it actually did so. The court went ahead to give reasons for believing the prosecution case as opposed to that of the defence case. In our opinion, the argument by Counsel for the appellant that the 1st appellate Court did not take into consideration the evidence of the prosecution alongside the defence case must fail.

Although a casual reading of the said extract may create the impression that the High Court lowered the standard of proof from that required in Criminal cases, the evidence on record satisfied us beyond reasonable doubt that the appellant corruptly received gratification as charged,

With regard to the issue raised by Counsel for the appellant that there was no explanation from the prosecution as to why cameras were not (used to capture the exercise, it appears to us that PW4 gave an explanation as to why CCTV cameras at the hotel were not used in this instance in capturing the event. PW4 testified (Page 36 of trial Courts proceedings) as follows;

"We have CCTV cameras at the hotel. At the place where the commotion was, there was no CCTV camera."

Besides the above, we find that there is no requirement at law that the prosecution should have captured the event using cameras in order to prove their case. Failure to capture the exercise using cameras was not fatal to their case as long as they had other sufficient evidence that could be relied upon by court. We find that there was enough evidence that the court based itself while convicting the appellant.

In view of our reasons given above, we find no merit in this appeal.

Accordingly, we uphold the decision of the high court and dismiss the appeal.

Dated at Kampala this 9th day of February 2016

SBK KAVUMA

DEPUTY CHIEF JUSTICE

ELIZABETH MUSOKE

JUSTICE OF APPEAL

CHEBORION BARISHAKI

JUSTICE OF APPEAL