THE REPURBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

CRIMINAL APPEAL NO. 504 OF 2015

(Arising from the Criminal Appeal No. 33 of 2015)

And

(Arising from Anti-Corruption Court No. AS-SC. 0217/2011)

KARAKIRE STEPHEN.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

Coram: **Hon. Lady Justice Elizabeth Musoke, JA**

Hon. Justice Stephen Musota, JA

Hon. Lady Justice Percy Night Tuhaise, JA

[Arising from the judgment of Hon. Justice Gidudu, J in the Anti-Corruption Division High Court Criminal Appeal No. 33 of 2015, dated 7th December 2015]

JUDGMENT OF THE COURT

The appellant, Karakire Stephen, was a Grade II Magistrate attached to Kyazanga and Lyantonde Magistrate Courts. He was charged before the Chief Magistrate at the Anti-Corruption Division Kololo, on two counts of soliciting and receiving gratification contrary to sections 2(a) and 26 of the Anti-Corruption Act 2009, convicted and sentenced to three years' imprisonment to run concurrently.

He appealed both conviction and sentence to the High Court. His appeal was dismissed and the conviction and sentence were upheld. He now appeals to this Court against both conviction and sentence.

The brief facts leading to this appeal are that the appellant, while doing his work at Kyazanga Court, was approached by Taremwa George (PW3) to help him delay the issuance of a warrant of arrest against him (PW3) where Prossy Nakaweesi had filed a complaint against him for obtaining money by false pretences contrary to section 308 of the Penal Code Act. The appellant who was known to PW3 offered to delay the case by one month if PW3 gave him two million shillings, but after bargaining, he agreed to take one million shillings from PW3.

PW3 reported the matter to the office of the Inspector General of Government (IGG) which set a trap. The appellant was arrested when he received the money from PW3. He was found with the one million Uganda shillings, serial numbers of which were matching those previously recorded by the IGG, which led to his arrest and prosecution.

He raised two grounds in the memorandum of appeal to this Court as follows:-

1. That the learned Judge erred in law when he failed to properly re-evaluate the evidence on record and thus came to a wrong conclusion.
2. That the learned Judge erred in law when he held that the appellant was properly convicted, whereas the prosecution case had not been proved beyond reasonable doubt.

At the hearing of this appeal the appellant informed Court that he had just procured new Counsel, namely, Mr. Kabega from M/S Tumusiime, Kabega & Co. Advocates, having previously been represented by Counsel Rwakafuuzi. The respondent was represented by Mr. Thomas Okoth, a Senior State Attorney with the Inspectorate of Government (IGG). Both Counsel filed written submissions as directed by court.

Submissions of the appellant's counsel

The appellant's counsel argued the two grounds of appeal concurrently.

He submitted that none of the 5 prosecution witnesses were cross examined by the appellant's former counsel or by himself. He referred Court to page 92 of the record where the trial Chief Magistrate stated that the evidence of the complainant (PW3) and that of PW4 was not challenged in cross examination and concluded in the last paragraph that going by the definition of solicitation, it was complete at the point when the accused asked the complainant for something so that he relaxes the case and that something after negotiation was the Uganda shillings 1,000,000/= (one million). She then concluded that the 2nd ingredient had been proved.

Counsel argued that while it is true that PW3 and the rest of the witnesses were not cross examined, the court nevertheless needed to go a further step to subject that evidence to the test, whether it could be assailed as inherently incredible or possibly untrue. He relied on **Woolmington V DPP (1935) AC 463,** where the court set out the guiding principle placed upon the prosecution that it must prove the case against an accused beyond reasonable doubt, and if there is any slightest doubt, it must always be resolved in favour of the accused.

The appellant's counsel submitted that at page 91 in the first paragraph, the court alluded to the fact that it was true that telephone printouts were not exhibited. He contended that the appellant had denied in his defence the assertion by PW3 that he had called him with a view to meet him and discuss his case. He argued that while the trial Magistrate accepted that vital piece of evidence not being before court, she did not go any further to examine it and to perhaps show why it was not important. Counsel submitted that the learned Judge on first appeal also did not allude to this important

piece of evidence or make any attempt to examine it to see the effect it had on the case. He submitted that this was a fundamental failure by the learned Judge.

Counsel referred Court to page 54 of the record showing that PW3 at the beginning of his testimony talks of a debt to Nakaweesi Prossy, which according to Prossy had accumulated to Uganda shillings 2,000,000/= (two million). That PW3 told Nakaweesi he was not paying the money and she said she was taking him to court. That the appellant alludes to it at page 83 during his cross examination.

Counsel submitted that at page 55, PW3 said he got criminal summons (exhibit P.5) to go to answer in court a charge of obtaining credit by false pretences. That he then decided to go and look for the Magistrate/appellant. He wondered why PW3 would look for a Magistrate to tempt him to stop the criminal summons. He submitted that there is a well-known maxim that he who goes to equity must do so with clean hands. He argued that the complainant in his own admission did not state why he never wanted to go to court to explain away the charge against him. Instead he canvased his evil intent to rid himself of the charges by also influencing the Magistrate. Counsel concluded that had the trial Chief Magistrate and the learned 1st appellate Judge addressed this issue they would not have admitted the evidence of the complainant as gospel truth.

Counsel referred Court to page 56 of the record in the 1st paragraph where PW3 stated that he was given money Uganda shillings 1,000,000/= (one million) and a tape recorder for purposes of recording the conversation between him and the appellant. He submitted that the prosecution did not adduce evidence of the recording or what happened to the recording. That neither the trial Chief Magistrate nor the learned Judge alluded to this very vital piece of evidence. He submitted that the failure to have this evidence denied court of corroboration of PW3's story, which was necessary

in the circumstances to test his veracity and credibility as a truthful witness.

Counsel submitted that it is not in dispute that the appellant was found in possession of around Uganda shillings 1,700,000/= (one million seven hundred thousand) when he was arrested and searched. He stated that this money was exhibited as exhibit **P3** together with the appellant's phone which was exhibit **P4**; and that the appellant in his defence stated that this was his money. He maintained that nowhere did the learned trial Judge make an evaluation, apart from dismissing the appellant's assertion that the money was not from his tenant. There is no explanation from the prosecution as to why they exhibited Uganda shillings 1,700,000/= in Exhibit **P3** yet money for the trap was allegedly one million. He argued that this aspect of the money being over and above what was used as a trap was never resolved by the court. There is therefore no way the court could have convicted the appellant when the monies they found on the appellant were not in tandem with the alleged money for the trap.

Counsel further submitted that the telephone exhibit **P4** found with the appellant on arrest was not used as valuable evidence by the prosecution, that is, it was never taken for examination. He submitted that the phone was not examined and no printouts were made because that evidence would have been adverse to the prosecution case.

Counsel submitted that if both the trial Chief Magistrate and the learned first appellate Judge had alluded to the fact that no phone printouts were produced before court, and that no recording evidence was before court as to what transpired between the complainant and the appellant, they would have come to the conclusion that PW3's story was not inherently truthful. He

contended that the conclusion they reached to accept PW3's evidence was a failure to make an evaluation of his evidence.

Counsel submitted that throughout his judgment, the learned first appellate Judge made no evaluation of the evidence of PW1, PW2, PW4 and PW5 apart from partly looking at the evidence of PW3; that at page 21 of his Judgment, he restated the law relating to failure to cross examine, then looked at the evidence of the complainant leading to the handing over of the money to the appellant, then asked the question in the last paragraph whether the prosecution evidence was inherently incredible and whether it should be believed.

Counsel for the appellant cited **Oketh Okale V R [1965] EA 555** stating that in a trial evidence must be looked at as a whole; and **Sekitooleko V Uganda [1967] EA 531** stating the defence case being incredible did not take away the prosecution's duty of proving the case beyond reasonable doubt.

He concluded that the learned first appellate Judge failed to subject the evidence to a fresh scrutiny; that had he done so, he would have come to the conclusion that the prosecution case had gaps which had not been explained away; and that therefore the prosecution failed to prove the charges against the appellant beyond reasonable doubt. He prayed this court to allow the appeal and quash the conviction.

Submissions of the respondent's counsel

The respondent's counsel, in his reply, referred Court to page 55 paragraphs 1, 4, and 6 on the record of proceedings and submitted that there was uncontroverted evidence of solicitation. He referred to the appellant's submissions which attacked the credibility of the evidence of PW3 on the ground of character. He contended that as rightly conceded by the appellant, PW3, just like all the other respondent's witnesses, were not cross examined because the appellant kept telling court that he was not participating in the trial,

as indicated in the 3rd paragraph on page 42. That the appellant was given several opportunities to cross examine the witnesses but he declined until the trial Chief Magistrate was forced to put him to his defence. Counsel submitted that the appellant, having served for long as a Judicial Officer, knew the legal effect of failure to cross examine witnesses.

The respondent's counsel contended that where the evidence of the respondent was not challenged in cross examination, the court is entitled to infer that such evidence is true against the accused except if it is inherently incredible or possibly untrue. He submitted that PW3 was truthful, honest, and consistent throughout his testimony. He invited court not to interfere with the finding of the learned Judge.

Counsel also referred to the appellant's counsel's submissions that evidence of a tape recorder which PW4 gave to PW3 should have been tendered in court. He referred to the evidence of PW3 and PW4 to the effect that PW3 did not follow instructions on how to manage the recorder when he met the appellant and therefore the recorder did not record anything; that this was the reason why the recorder was not used.

Counsel further submitted that the appellant misguided this Court in his a submission that Uganda shillings 1,700,000/= (one million seven hundred thousand) was tendered in evidence as exhibit **P3** yet the trap cash was Uganda shillings 1,000,000/= (one million), and that this matter was not resolved by the learned Judge. He referred to the testimonies of PW1 at page 41 paragraph 5, and of PW4 at page 59 paragraph 4 which explained that besides the trap cash of one million the appellant was further found with Uganda shillings 1,700,000/= (one million seven hundred thousand) which was his personal money. He submitted that there was no need for the lower court to resolve the issue of Uganda shillings 1,700,000/= (one

million seven hundred thousand) because it was not the subject of the bribe; that what was relevant was the one million shillings which was solicited for by the appellant and recovered from his body.

Counsel submitted that the appellant has tactically avoided making submissions regarding reasons for receiving the one million shillings; he had testified that he knew PW3 very well; he admitted he received the money but stated it was from one Frank Baine his tenant; and that the appellant also stated that PW3 had stolen his cows and he was due to prosecute him had it not been troubles in the Judiciary.

Counsel wondered why the appellant would gladly usher PW3 into his chambers and receive money from a suspected thief whom he was due to prosecute for the theft of his cows; why he would have taken money from somebody he was not in good terms with; and why Baine was not called by the accused as a witness to substantiate his allegation.

Counsel submitted that solicitation is an act done "under the table", and it is only in the actions that follow that can reveal what was discussed in secret; that the events of 17th November 2010 proved that there was prior solicitation for the one million shillings. He submitted that the learned Judge did not only consider the respondent's evidence in the absence of the appellant, that both sides were considered which renders the authority of **Okethe Okale V R [1965] EA** cited by the appellant distinguishable and inapplicable to the instant appeal. He invited this court to dismiss this appeal and uphold the decision of the lower court.

Court's consideration of the appeal

This is a second appeal. Rule 32(2) of the Judicature (Court of Appeal Rules) Directions provides that on any second appeal from a decision of the High Court acting in the exercise of its appellate jurisdiction,

this court shall have power to appraise the inferences of fact drawn by the trial court but shall not have discretion to hear additional evidence. In addition, section 11 of the Judicature Act cap 13 provides for the Court of Appeal to have powers of the court of original jurisdiction. Also see **Beatrice Kobusinge V Fiona Nyakaana & Another SCCA No. 18/2001.**

Section 45(1) of the Criminal Procedure Act which applies to second appeals also stipulates as follows:-

> *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 of mixed fact and law."*

In **Kifamunte V Uganda SCCA No. 10/1997** the Supreme Court discussing the duty of the second appellate Court had this to say at page 11 of the judgment:-

> *"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."*

Also see **R. Mohamed Ali Hasham V R [1941] 8 EACA 93.**

In **R V Hassan bin Said [1942] 9 EACA 62** it was stated that 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; that it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law:

The gist of the two grounds of appeal, which were argued as one ground by both counsel, is that the learned first appellate Judge erred in law and came to a wrong conclusion when he failed to properly re-evaluate the evidence on record and held that the appellant was properly convicted yet the prosecution case had not been proved beyond reasonable doubt.

The principle in law, which has been alluded to by both counsel in their submissions, is that where the prosecution evidence is not challenged in cross examination, the court is entitled to infer that such evidence is true against the accused except if it is inherently incredible or possibly untrue. This principle was well expounded by the Supreme Court in **James Sewaabiri & Another V Uganda Criminal Appeal No 5/1990**. The question to address as a second appellate court is whether the first appellate Judge was alive to the said principle expounded by the Supreme Court when he was analysing the evidence adduced before court.

The questions posed by the first appellate court were, *"Is the prosecution evidence inherently incredible? Is it unbelievable? Is it possibly false?"* The record shows the lower court concluded that the prosecution evidence was unchallenged because the appellant did not exploit the opportunities availed to him to cross examine the prosecution evidence. The issue at stake is, was this evidence inherently incredible or possibly untrue?

The record shows that the appellant was given several opportunities to cross examine the prosecution witnesses but he declined. In respect of PW1, the court record on page 42, third paragraph shows that when the accused was called upon to cross examine PW1, he

informed court that he was not participating in the trial. Regarding PW2, the record on page 48 shows that the accused stated he had no questions for the witness. Regarding PW3 and PW4, the record at pages 57 and 61 shows that the accused indicated to court that his lawyers would cross examine the witnesses later. The record shows the appellant kept on insisting on waiting for his lawyers, including refusing to individually cross examine when no lawyer was forthcoming, until the trial Chief Magistrate was forced to put him to his defence.

The prosecution evidence in a nutshell is that PW3 sought to solve his problem with the appellant who was handling his case. PW3 knew the appellant very well and contacted the appellant who would only give him a favour if he paid him one million shillings. PW3 reported the matter to the IGG and a trap was set. PW3 gave the appellant the money which had been marked by the IGG. He was immediately arrested by the IGG staff after receiving the money from PW3.

The defence side (appellant in this case) offered no rebuttal evidence to contradict the prosecution evidence or render it incredible or possibly untrue. The appellant admitted he received the money from PW3 whom he knew very well. He stated the money was from one Frank Baine his tenant. He then alleged that PW3 stole his cows and he was due to prosecute him had it not been troubles in the Judiciary.

The appellant did not call Frank Baine to substantiate his claims. Nor is it plausible that the appellant would receive his tenant's money from PW3 who he was due to prosecute for the theft of his cows. We find the appellant's version unsubstantiated, unbelievable and incredible. This left the prosecution evidence consistent, unchallenged, and credible.

We accept the respondent's counsel's submissions that the appellant who served for long as a Judicial Officer ought to have known the legal consequences of failure to cross examine witnesses. The law is clear that where the evidence of the respondent is not challenged in cross examination, the court is entitled to infer that such evidence is true against the accused except if it is inherently incredible or possibly untrue.

The appellant's counsel's submission is that while it is true the prosecution witnesses were not cross examined, the court nevertheless needed to go a step further to subject that evidence to the test, whether it could be assailed as inherently incredible or possibly untrue; that the burden was on the prosecution to prove the case against an accused beyond reasonable doubt; and that if there be any slightest doubt, it must always be resolved in favour of the accused.

The appellant's counsel pointed out in his submissions that there is evidence the prosecution should have adduced but which it failed to do, for instance, that the evidence of a tape recorder which PW4 gave to PW3 should have been tendered in court. The record on page 58 (paragraph 5) however shows that PW4 in his testimony pointed out that PW3 did not follow instructions on how to manage the tape recorder when he met the appellant and therefore the recorder did not record anything. This explanation was also made by PW3 on page 57 of the record of proceedings where he testified that:-

> *"I put the tape recorder on and I was with it but I did not use it because I failed to operate."*

This evidence was not challenged by the defence. It is a valid reason why the recorder was not used. We do not see it as a flaw in the prosecution evidence.

The other aspect of evidence the appellant highlighted as flawed is the allegation that Uganda shillings 1,700,000/= (one million seven hundred thousand) was tendered in evidence as exhibit **P3** yet the trap cash was one million and that this matter was not resolved by the learned Judge. PW1 and PW4 testified on this matter at page 41 paragraph 5, and page 59 paragraph 4 respectively. Their combined evidence explains that besides the trap cash of one million the appellant was further found with Uganda shillings 1,700,000/= (one million seven hundred thousand) which was his personal money. This money was not marked and was not the subject of the bribe.

The money in issue in as far as this case is concerned is the one million shillings which was solicited for by the appellant, marked by the IGG, and recovered from the body of the appellant by officers from the office of the IGG on a tip off by PW3. We accept the respondent's counsel's submission that there was no need for the lower courts to resolve the issue of the Uganda shillings 1,700,000/= (one million seven hundred thousand) which was the appellant's personal money.

In our considered opinion, the learned first appellate judge did not only consider the respondent's evidence in the absence of the appellant, he considered both sides. This renders the authority of **Okethe Okale V R [1965] EA** cited by the appellant distinguishable and inapplicable to the instant appeal.

All in all, having perused the entire record and analysed the relevant laws expounded above, we find that the learned trial magistrate and the learned first appellate Judge properly evaluated the evidence on record and correctly applied the legal principles and tests applicable to the circumstances of this case. The learned first appellate Judge correctly upheld the conviction and sentence of the learned trial magistrate.

We accordingly dismiss this appeal and uphold the decision of the first appellate court. The conviction and sentence are upheld.

Dated at Kampala this.....12th.....day of.....March.....2019.

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Hon. Lady Justice Elizabeth Musoke

Justice of Appeal

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Hon. Mr. Justice Stephen Musota

Justice of Appeal

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Hon. Lady Justice Percy Night Tuhaise

Justice of Appeal.