THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0020 OF 2015 AND CRIMINAL APPEAL NO. 164 OF 2015

(Arising from HCT Anti-Corruption Division Criminal Appeal Nos. 004 of 2014 and 005 0f 2014)
(Arising from Criminal Session Case No. 138 of 2010 and Criminal Session case No. 139 of 2010)

ODONGO CHRISTOPHER :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

UGANDA :: RESPONDENT

CORAM:

HON. LADY. JUSTICE HELLEN OBURA, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. LADY. JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF COURT

The appellant filed two criminal appeals to this court vide Criminal Appeal No. 20 of 2015 and Criminal Appeal No. 164 of 2015. We note that both criminal appeals are one and the same but filed differently because the appellant was charged for the same offences but in different trials. The offences arose from the same transaction and set of facts. During hearing of the appeal, since they were argued before us separately, we did not see the necessity of consolidating these appeals but at judgment level we found it necessary to write one judgment in respect of the two appeals given the same grounds of appeal. We are of the view that there was an error of creating 2 files at trial because the offences charged were from the same transaction

which could be tried in different counts in one file. For clarity, this is the judgment of this court in both Criminal Appeal No. 20 of 2015 and Criminal Appeal No. 164 of 2015.

Introduction

This is a second appeal from the judgments of the High Court which upheld the judgments of the Chief Magistrates' court. The appellant was charged and convicted of several offences of Causing Financial Loss c/s 20, and several counts of Fraudulent False Accounting c/s 23(b) of the Anti-Corruption Act.

In the High Court criminal Appeal 05 of 2014, the sentences to 3 years imprisonment on each of the alternative counts of causing financial loss and 2 years imprisonment on each of the 59 counts of fraudulent false accounting, which were to be served concurrently were confirmed. He was also ordered to refund shs. 41,612,000= by the trial magistrate but on appeal the refund order was increased to shs. 67,145,500=.

In High court criminal Appeal 004 of 2014, the sentences of 30 months imprisonment in 24 counts of causing financial loss and 10 months imprisonment in 26 counts of fraudulent false accounting which were to be served concurrently were also confirmed. He was also ordered to refund shs. 118,424,000= by the trial magistrate but on appeal the order for refund was increased to shs.179, 718.000=.

The appellant was dissatisfied with the judgments and orders of the High Court and filed these appeals.

In Criminal Appeal No. 20 of 2015, the grounds of appeal are;

1. That the learned appellate Judge erred in law when she upheld a convictions and sentences based on wrong principles of the law that resulted into unfair trial and prejudiced the accused when;
   (a) She held that the witnesses took oath whereas not.
   (b) She relied on the adopted testimonies of witnesses and exhibits from another separate criminal case file No. 139 of 2010.

2. That the learned appellate Judge erred in law when she upheld a convictions secured through guilt by omission of producing crucial accountability documents hence occasioning a miscarriage of justice.
3. That the learned appellate Judge erred in law when she sustained convictions and sentences based on findings that were not supported by evidence to wit;
   (a) That appellant paid non-existing hotels
   (b) That she failed to appreciate the RALNUC accommodation policies.

In Criminal Appeal No. 164 of 2015 the grounds of appeal were are;

1. That the learned appellate Judge erred in law when she upheld a conviction and sentence based on wrong principles of the law that resulted into unfair trial and prejudiced when she;
   a) Held that the witnesses took oath whereas not,
   b) Held that the adoption of testimonies of witnesses and exhibits from another separate criminal casefile No. 138 of 2010 was not wrong.
2. That the learned appellate Judge erred in law when she upheld a conviction secured through guilt by omission of producing crucial accountability documents hence occasioning a miscarriage of justice.
3. That the learned appellate Judge erred in law when she sustained a conviction and sentence based on findings that were not supported by evidence to wit;
   a) That the appellant paid none-existeing hotels.
   b) The learned Judge failed to appreciate the RALNUC accommodation Policies.

Background

The appellant was the national advisor of Restoration of Agricultural Livelihoods for Northern Uganda Component (RULNUC). In the exercise of his work, he was charged with the duty of implementing RALNUC policies as prescribed by the National Steering Committee. The policies to be implemented were documented in the policy

manual DEXH 4 and DEXH 8. The policies specifically dealt with the aspects of empowering the internally displaced persons (IDP) communities in the north whose livelihood had been extensively damaged by the war. The policy focused on the organization of the IDP's, financing, training and accommodation during training and clearly spelt out how each should be dealt with.

The appellant was responsible to ensure that the trainings were conducted and accountability made in form of reports, vouchers and receipts and would take the accountabilities to the finance officer in the Program Coordination Unit (PCU) based in Kampala who would check it. The audit which was completed in March 2009 showed that there were invoices and receipts from non-existent hotels and other fake accountabilities. As a result, the appellant's employment was terminated.

Representation

At the hearing of the appeals, Mr. Ochieng Evans and Ms. Sandra Namigadde appeared for the appellant while Mr. Senoga Mawano appeared for the respondent.

Submissions of the appellant

In regard to ground 1, counsel submitted that PW1, Oyet Ojele Patrick was said to be already on oath and yet it was not shown anywhere on record that an oath was administered to him. He submitted that PW5, PW17 and PW22 did not take oath as required under the law. The state opened two different cases and opted not to join the counts and the particulars of the charges were stated to be distinct, it was erroneous for witnesses not to take oath and this contravened Section 101 of the Magistrates' Courts Act. The evidence of the witnesses that did not take oath should not have been relied on by the trial Magistrate.

In addition, that the prosecution withheld vital documents that could have helped court reach a decision based on the unique operation of the RALNUC. The prosecution failed to produce the supplier register,

supplier list, cash book, cash payment register and the bank statement.

Regarding the issue of non-existing hotels, counsel submitted that there was no evidence on record to confirm the non-existence of these hotels. The prosecution evidence concentrated on the absence of hotel buildings yet there were a number of women groups which were formed to provide catering services and named their groups with existing 'hotel' titles. In addition, the individual owners of the hotels were never brought to court to testify, the vouchers that reflected the transactions were never exhibited and the hotels were not mentioned in the charge sheet.

Submissions of the respondent

Counsel for the respondent opposed the appeal and submitted that the procedure at the trial did not cause a miscarriage of justice and did not in any way prejudice the appellant because the witnesses knew that they were under oath. Further that evidence from one file was also adopted into the 2nd file because they were the same witnesses, same set of facts and same evidence. The appellant was not denied a chance to cross examine on evidence that had been adopted from one file to the other. PW26 names four documents that he received from the offices of the appellant in the course of PW26's investigations and what he received includes vouchers, receipts, requisition for payments and the list of participants for the alleged workshops.

The prosecution evidence was based on accountabilities and the investigation that showed that there were false accountabilities regarding fictitious payees. In regard to the hotels, the evidence led by the prosecution showed that three of them were approached and they did not know about any of the alleged transactions with the appellant or RALNUC. The rest of them were non-existent hotels. In conclusion, counsel prayed that this appeal be dismissed.

Court's consideration of the appeal

As a preliminary matter, we note that these are a second appeals. The role of this court as a second appellate court is laid down under **Rule 32(2)** of the **Judicature (Court of Appeal Rules) Directions** which provides that;

> *"On any second appeal from a decision of the High Court acting in exercise of its appellate jurisdiction, the court shall have power to appraise the inferences of fact drawn by the trial court, but shall not have discretion to hear additional evidence."*

This Court is therefore obliged to appraise the inferences of fact drawn by the trial court.

We are mindful of the provisions of ***Section 45*** of ***the Criminal Procedure Code Act,*** which is the applicable law concerning appeals from the High Court in the exercise of its appellate jurisdiction.

It provides;

> ***Second appeals***
>
> *"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."*

The effect of this provision is to bar second appeals on matters of fact or matters of mixed fact and law. The Supreme Court has distinguished clearly the duties cast on a first appellate court and on a second appellate court in the case of **Kifamunte Henry v. Uganda Criminal Appeal No. 10 of 1997** thus;

> *"We agree that on a first appeal, from a conviction by a Judge the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully*

weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour, the appellate Court must be guided by the impressions made on the Judge who saw the witnesses. However there may be other circumstances quite apart from the manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See ***Pandya v. R [1957] EA 336, Okeno v. Republic [1972] EA 32*** *and* ***Charles Bitwire v. Uganda Supreme Court Criminal Appeal No. 23 of 1985*** *at page 5.*

Furthermore, even where a trial Court has erred, the appellate Court will interfere where the error has occasioned a miscarriage of justice: See S. 33(i) of the Criminal Procedure Act. It does not seem to us that except in the clearest of cases, we are required to re-evaluate the evidence like is a first appellate Court save in Constitutional cases. On second appeal it is sufficient to decide whether the first appellate Court on approaching its task, applied or failed to apply such principles: See ***P.R. Pandya v. R (supra), Kairu v. Uganda 1978 HCB 123****...."*

Therefore, the duty of a second appellate court is to examine whether the principles which a first appellate court should have applied, that is to say, to re-examine and re-evaluate the evidence, and come to its own conclusion, were properly applied and if it did not, for it to proceed and apply the said principles.

Ground 1 (a) and (b) of the memoranda of appeal faults the High Court for holding that witnesses took oath at trial whereas not and adopting testimonies of witnesses and exhibits from another separate criminal file No. 139 of 2010 was proper. At p.80 paragraph 5 of the record of appeal, it is not shown anywhere that an oath was administered unto him. The learned trial Judge states in her judgment at p.330 of the record of appeal no, 20 of 2015 lines 1-15 that "in this case the witnesses were reminded of the oath they had taken. There is no indication that they did not understand or

remember that they were under oath. There is no indication that they told lies by the procedure adopted. The accused could not have been prejudiced at all." She further held that "But just in case I am wrong and the magistrate acted in error, it is true that not every error will result in a miscarriage of justice...Since there is no indication that there was a miscarriage of justice, the error if any cannot be the basis of rejecting the evidence of the affected witnesses." She concludes that the witnesses actually took oath.

At trial, there were two separate files to wit, Criminal Session Case No. 139 of 2010 and Criminal Session Case No. 138 of 2010 even though the offences arose from the same set of facts and the appellant was charged with the same offences but different counts. The trial magistrate adopted the oath that was taken in one file into the other for the same witnesses. The evidence for the following witnesses was adopted from file no. 139 of 2010

PW 24 Patrick Lebu, PW26, PW27, and DW 1.

Article 28(1) of the Constitution provides for the right to a fair hearing. It states that;

"28. Right to a fair hearing.

(1) In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."

Criminal Session Case No. 138 of 2010 was separate and distinct from Criminal Session Case No. 139 of 2010. The fact that the same witnesses testified in both cases did not warrant the trial court to adopt oath taken in one file to another as this did not facilitate a fair hearing as envisaged by Article 28 (1) of the Constitution.

Section 101 (1) of the Magistrates Courts Act provides that;

"101. Evidence to be given on oath.

(1) Every witness in a criminal cause or matter in a magistrate's court shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath."

It is trite law that the trial courts should follow the prescribed procedure in all matters where the law lays down the procedure to be followed during trial. Where a substantial step has been missed, this court ought to rectify such error. It is clear that Criminal Session Case No. 138 of 2010 was separate and distinct from Criminal Session Case No. 139 of 2010. We find that it was an error by the trial Magistrate to adopt an oath taken by a witness in one file into another. The learned appellate Judge ought to have found so.

The procedure taken by the learned Trial Magistrate and upheld by the appellate Judge on adoption of testimonies was clearly erroneous and prejudicial to the fair trial of the accused/appellant because these witnesses testified in another file based on other and distinct counts and particulars. To adopt their testimonies denied the accused the opportunity to question the witnesses on their evidence relating to the specific counts in the 2nd case file. This resulted into unfair trial.

We reiterate the Supreme Court decision in **Makula International vs. His Eminence Cardinal Nsubuga Civil Appeal No. 4 of 1981** in which it was held that;

"A court of law cannot sanction that which is illegal.... Illegality once brought to the attention of court overrides all questions of pleadings, including any admission made thereon....the court is enjoined by section 101 of the Civil Procedure Act, in the exercise of its inherent powers to prevent abuse of its process, it is an abuse of Court process to make an order that is contrary to law".

We thus find that because of the errors we have pointed out above, the trials in the Chief Magistrates Court were a nullity. Ground 1 of the appeal therefore succeeds. We do not find it necessary to deal with the other grounds of appeal because this ground disposes of the appeal. Consequently, the convictions and sentences of the trial

court are quashed. We would have ordered a retrial considering that the original trial was a nullity, however, we note that the appellant had already served 2 years before being granted bail pending appeal and as such, ordering a re-trial will not serve the interest of justice. We therefore order that the appellant be set free forthwith unless held on other lawful charges.

Dated this 7th day of June, 2018

Hon. Lady. Justice Hellen Obura, JA

Hon. Mr. Justice Stephen Musota, JA

Hon. Lady. Justice Percy Night Tuhaise, JA