

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
**CRIMINAL APPEAL NO. 62 OF 2015**

5 **WAIDA OKUKU STEPHEN ::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**UGANDA ::::::::::::::::::::::::::::::: REEPONDENT**

*(Arising from Criminal Appeal No. 15 of 2011 of the High Court Anti-Corruption Division before Mugamba J. as he was then)*

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**CORAM: HON. LADY. JUSTICE ELIZABETH MUSOKE, JA**

**HON. MR. JUSTICE STEPHEN MUSOTA, JA**

**HON. LADY. JUSTICE PERCY NIGHT TUHAISE, JA**

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**JUDGMENT OF COURT**

This is a second appeal from the Judgment of the High Court on appeal in which the appellant's acquittal by the Magistrate's court was overturned and he was convicted of the offence of corruptly soliciting for gratification c/s 2(a) and 26(1) of the Anti-Corruption Act and sentenced to 10 years imprisonment. The trial Magistrate had found that there was no corroboration of evidence and that it was one person's word against another. On appeal, Mugamba J. overturned that decision and found that there was enough corroboration to sustain a conviction.

The appellant was dissatisfied with the judgment of the High Court and filed this appeal on the following grounds:

1. The Learned appellate Judge erred in law when he convicted the appellant of Corruptly soliciting for a gratification contrary to section 2(a) and 26(1) basing on a Notice of appeal that was not endorsed by the IGG thereby occasioning a miscarriage of justice.
2. The Learned appellate Judge erred in law when he convicted the appellant on appeal without evaluating the evidence for the defence thereby occasioning a miscarriage of justice.
3. The Learned appellate Judge erred in law when he convicted the appellant after heavily relying on the unsworn testimony and retracted confession of a co-accused that had not been properly admitted into evidence thereby occasioning a miscarriage of justice.

### **Background**

The facts of the case as accepted by the trial Magistrates' Court and the High Court are that the appellant, who was a state prosecutor attached to Kampala City Council between 25<sup>th</sup> November 2009 and 1<sup>st</sup> December 2009 while at City Hall solicited for a gratification of six hundred thousand shillings from Kasaga Dan as an inducement or promise to help Kasaga Dan to have a case against him at City Hall Court dropped by the trial Magistrate. Kasaga Dan reported the matter to the IGG and the office of the IGG laid a trap with 300,000/= marked money which was handed over to Kasaga to deliver to the appellant in his office. The trap money was recovered from the appellant's co-accused after his arrest.

### **Representation**

At the hearing of the appeal, the appellant represented himself while Mr. Rogers Kinobe appeared for the respondent.

### **Submissions of the appellant**

The appellant submitted on ground 1 that under section 49 of the Anti-Corruption Act, a prosecution cannot be commenced without the endorsement of the DPP/IGG. That the acting IGG endorsed the charge sheet at the Magistrates Court however on appeal, the IGG

did not endorse the notice of appeal. An appeal emanating from a criminal case is a separate prosecution and cannot be commenced without the consent of the DPP/IGG. That the Notice of Appeal was signed by Sarah Birungi who was not the IGG.

5 In arguing ground 2, he submitted that the appellate Judge did not re-evaluate the evidence on record and ignored the defence case. The defence of alibi raised by the appellant was ignored by the appellate Judge yet it was never disproved by the prosecution. The prosecution witnesses' evidence was untrue. For instance PW1 testified that he  
10 had come to court on the 1/12/2009 and yet it was clear from the court record that there were no court proceedings for PW1 on that day. The prosecution failed to discharge its duty to place the appellant at the scene of the crime. He relied on **Wanyama Vs Uganda [1975] EA 120** where it was held that once an alibi is raised,  
15 the duty lies on the prosecution to disprove it.

The police trap was rendered useless when the police officers did not place themselves in a position to see how the money was being handed over.

20 The appellant's argument on ground 3 was that the appellate Judge relied on the unsworn testimony of a co-accused to corroborate the prosecution evidence that the appellant solicited for gratification and yet section 101 of the Magistrates Courts Act provides that prosecution evidence must be given on oath. That the unsworn testimony of the co-accused had no evidential value for the  
25 prosecution because the appellant could not apply to cross-examine the co-accused.

30 Further, that A2's extra judicial statement (PE4) was improperly admitted into evidence. The defence objected to its admission and the trial Magistrate held a trial within a trial and allowed the admission without giving reasons. The defence objected to it on grounds that it was recorded by PW5 Olwata Moses yet he was part of the investigating team. It was not a confession but rather a statement incriminating the appellant and exonerating the maker (A2).

## Submissions of the respondent

In reply to the submissions on ground 1, the respondent argued that this ground is improper before this court because it was not raised at the High Court. The Notice of Appeal was endorsed by Ms. Sarah Birungi, the head prosecution at IGG, and that this was legal because the consent to prosecute had already been given by the IGG. He referred to section 16(1) of the Inspectorate of Government Act 2009 which provides that the inspectorate shall have such officers and other employees as may be necessary for the efficient and effective performance of its functions under this Act. Likewise under section 32 of the same Act, such documents may be signed by the Inspector General or a Deputy Inspector General or any other person authorized in writing by the IGG.

Counsel submitted that the appellate Judge properly re-evaluated the evidence on record and came to a correct finding that the appellant was guilty of soliciting for gratification. He argued that PW1 was being prosecuted by the appellant at the City Hall and was asked for a sum of 1,000,000/= which PW1 did not have and they zeroed down to 600,000/= which PW1 promised to get on the next adjournment date. Although corroboration is not a legal requirement for the offence under section 2 and 26 of the Anti-Corruption Act, there was sufficient corroboration by PW3, PW4, PW5 and PW6. He relied on **Akarikundira Yustina Vs Uganda COA Criminal Appeal No. 104 of 2009** where it was held that circumstantial evidence can stand on its own as long as the court subjects it to a close scrutiny to determine that the inculpatory facts against the appellant are incompatible with his innocence.

On ground 3, counsel for the respondent submitted that the appellate court properly considered the unsworn testimony of A2 before convicting the appellant. The appellate Judge rightly found that the testimony as well as the charge and caution statement of A2 corroborated other witnesses' evidence. Failure to cross-examine A2 was not illegal because section 128 of the Magistrates Courts Act permits an accused person to choose any of the three available choices; testify on oath, give unsworn testimony or remain silent.

Counsel relied on **Bakubye Muzamiru and another Vs Uganda S.C.C.A No. 56 of 2015** in which it was observed that the underlying requirement of giving evidence on oath is the assumption that such a person would be truthful.

## 5 **Courts consideration of the appeal**

Before we resolve this appeal, we note that it is a second appeal. 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;

10 *“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  
15 drawn by the trial court.

We are also 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;

## 20 ***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  
25 mixed fact and law.”*

The effect of this provision is to bar appeals on matters of fact or matters of mixed fact and law in second appeals.

The Supreme Court has distinguished clearly the duties cast on a first appellate and on a second appellate court in the case of  
30 **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, were properly applied and if it did not, for it to proceed and apply the said principles.

The appellate Judge on page 15 of the record held that;

“nevertheless besides the confession of Ngobi there is some other evidence. There is the testimony of PW1, the complainant. With great anxiety, I have considered the odd relationship between a

5 prosecutor and an accused as related to by with(sic) PW4 and PW6. The evidence of Ngobi in his defence buttresses all that evidence. In aggregate all that evidence lends credence to the complaint by PW1 that the respondent solicited for gratification from him.”

10 With the greatest respect to the learned appellate Judge, we find that he did not exercise his duty as a first appellate court to re-evaluate the evidence and subject it to a fresh scrutiny as is stated in **Kifamunte Henry v. Uganda (supra)**. We shall thus go ahead and re-evaluate the evidence as the first appellate court should have done.

### **Ground 1**

15 Before we re-evaluate the evidence in regard to the ingredients of the offence of soliciting for gratification, we shall first address the argument of the appellant on ground 1 that the Notice of Appeal was not endorsed by the IGG which occasioned a miscarriage of justice.

Section 49 of the Anti-corruption Act provides that;

#### **“49. Prosecution of offences.**

20 ***A prosecution under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions or the Inspector General of Government; but a person charged with such an offence may be arrested, or a warrant for his or her arrest may be issued and executed, and the person may be detained or released on police bond, notwithstanding that the consent of the***  
25 ***Director of Public Prosecutions or the Inspector General of Government, to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been***  
30 ***obtained.”***

In addition, section 32 of the Inspectorate of Government Act 2002 provides that;

#### **“32. Signification of acts of Inspectorate.**

***Subject to this Act, where any instrument or document is required or authorised to be issued by the Inspectorate or any act is required or authorized to be done by the Inspectorate in the performance of its functions under this Act, the instrument or document or act may be signed, executed or done by the Inspector-General or a Deputy Inspector-General or by any person authorised in writing by the Inspector General or by a Deputy Inspector-General.”***

The endorsement of the Notice of Appeal in this case was done by Ms. Sarah Birungi as the head of prosecution. Section 32 gives powers to the Inspector General of Government or Deputy Inspector General to authorize any person to issue any such document that ought to be authorized by the Inspectorate. We agree with counsel for the respondent that the endorsement of the notice of appeal by Ms. Birungi Sarah was legal under authority of the IGG. Ground 1 of the appeal fails.

### **Grounds 2 and 3**

The offence of soliciting for gratification is provided for under sections 2(a) and 26(1) of the Anti-Corruption Act.

Section 2(a) provides that:

#### ***“2. Corruption***

***A person commits the offence of corruption if he or she does any of the following acts—***

***(a) the solicitation or acceptance, directly or indirectly, by a public official, of any goods of monetary value, or benefits, such as a gift, favour, promise, advantage or any other form of gratification for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;”***

The ingredients for the offence of corruptly soliciting for gratification are that:



1. The appellant/accused person is a public official.
2. He directly or indirectly solicited for gratification, and/or
3. He received gratification in exchange for an act or omission in performance of his duties

5 It is an agreed fact that the appellant, at the time the offence was committed, was a public official performing duties as a prosecutor at the Kampala City Council Court. The 1<sup>st</sup> ingredient is thus fulfilled.

The prosecution has to prove that the appellant directly or indirectly solicited for gratification. PW1 was being prosecuted by the appellant and he testified that after he was granted bail and was told to report  
10 to court on 25/10/2009, he met the appellant who told him his case was very serious and he needed 1,000,000/= to avoid remand to Luzira. PW1 bargained and they settled for 600,000/= and was later advised by his friends to report to the IGG which he did. The IGG  
15 team proceeded to City Hall to prove if the appellant had solicited for the said money and on arrival, the appellant met PW1 and took him outside the hall to find out if he had got the money but he said he hadn't. PW1 proceeded to the IGG's office where they mobilized  
20 300,000/= marked notes, gave them to PW1 who proceeded back to City Hall. PW1 handed the money to the appellant and he in turn handed it to A2 to count. The officers of IGG came in and found A2 with the money.

PW3, a prison warden testified that she knew the accused persons while at City Hall. On 1/12/2009, PW3 had taken prisoners to City  
25 Hall Court and saw three men entering the Hall and amongst them was the appellant, A2 and another person she did not recognise. After a while she saw the appellant ran away while A2 remained seated. PW4, PW5 and PW6 testified of the same events.

The appellate Judge relied on the evidence of A2 who testified and  
30 also recorded a charge and caution statement tendered in as exhibit PEX4 that the appellant told him he was expecting somebody to bring him money. The charge and caution statement was recorded by PW5 who was also part of the investigating team. According to the case of **Njuguna & others v R (1954) 21 EACA 316** it was held that it is

inadvisable if not improper for the police officer who is conducting the investigation of the case, to charge and record the cautioned statement of the accused. The essence is that the accused should appear before an impartial person who knew nothing about the background of the case. A charge and caution statement is recorded from every accused person whether they deny or accept the charges against them and is recorded by a police officer. A confession on the other hand comprises of words or conduct or a combination of words and conduct from which whether taken alone or in connection with other words lead to an inference that may reasonably be drawn that the party making the confession has committed an offence. In the case of **Swami V the Emperor (1939) 1 ALL ER 396**, the principle was confirmed that a confession must either admit in terms the offence or all facts which constitute the offence. It is thus important to note that a confession, even though similar in some material particular, is not one and the same as a charge and caution statement as was referred to by the appellate judge.

A2 made an unsworn testimony at the trial. The learned appellate Judge however relied on the unsworn testimony of A2 to corroborate the prosecution evidence. He held on page 13 of the record that;

*“Nevertheless besides the confession of Ngobi there is some other evidence. There is the testimony of PW1, the complainant. With great anxiety I have considered the odd relationship between a prosecutor and an accused as related to by PW4 and PW6. The evidence of Ngobi in his defence buttresses all that evidence. In aggregate all that evidence lends credence to the complaint by Pw1 that the respondent solicited for gratification from him.”*

In our view, the unsworn testimony of a co-accused has no evidential value for the prosecution because under section 101 of the Magistrates Courts Act, prosecution evidence must be given on oath which leaves room for cross-examination. This was thus an error on the part of the appellate Judge. It was equally erroneous for the appellate Judge to consider the evidence of A2 as a confession. What amounts to a confession is provided for under S.23 of the evidence Act. The admission made by a co-accused (A2) who was actually

found to be in possession of the marked money by the IGG was not corroborated by any evidence. It is trite law that the burden of proving a charge lies entirely on the prosecution.

5 The appellant on his part raised an alibi that on the day the offence was committed, he was away attending a requiem mass. He testified on page 123 of the record that;

*“I then told him I was going to Christ the King for requiem mass of my friend who had died of a motor accident. I went to Christ the King Church. I was at the Church upto about 12:30pm.”*

10 The alibi raised by the appellant at the trial was never disproved by the prosecution. It is trite law that by setting up an alibi, an accused person does not assume the burden of proving its truth so as to raise a doubt in the prosecution case. **See Festo Adroa Asenua and Anor. Vs. Uganda SC. Cr. Appeal 1 of 1998.**

15 In the case of **Bogere Moses and Another Vs Uganda SCCA 1 of 1997** the Supreme Court of Uganda had this to say:-

20 *“What then amounts to putting an accused person at the scene of crime? We think that the expression must mean proof to the required standard that the accused was at the scene of crime at the material time.*

*To hold that such proof has been achieved the court must base itself upon the evaluation of the evidence as a whole. Where the prosecution adduces evidence that the accused was at the scene of crime, and the defence not only denies it, but also adduces evidence*  
25 *showing that the accused person was elsewhere at the material time it is incumbent on the Court to evaluate both versions judicially and give reasons why one and not the other version is accepted. It is a misdirection to accept one version and then hold that because of that acceptance per se the other version is unsustainable.”*

30 In this court’s analysis of the appellant’s defence of alibi, we find it surprising that the appellate court did not evaluate the appellant’s assertion that he was at Christ the King for a requiem mass at the time the alleged offence was committed. The trial court did not also

make a judicious finding on the appellant's defence of alibi. There should have been findings by the appellate Judge whether the story of the appellant was inherently improbable or whether there were inconsistencies in his testimony rendering it not credit-worthy or whether his demeanour when he gave evidence gave a poor impression of the appellant as a witness. The appellant gave his evidence on oath. He was cross-examined. He does not appear to have been shaken or discredited. His assertion that at the time of events he was for a requiem mass at Christ The King Church until 12.30pm remained unchallenged. The officials from the IGG that laid a trap did not witness the transfer of the marked money to the appellant. PW1 is the only one that testified to the fact that he handed the money to the appellant who then handed it to A2 to count. We thus find that the alibi raised by the appellant was never disproved by the prosecution.

That PW1 testified that he had a recorder when the appellant was soliciting for the gratification but no such evidence was tendered in court.

Section 23 of the Evidence Act provides that:

- (1) *No confession made by any person while he or she is in the custody of a police officer shall be proved against any such person unless it is made in the immediate presence of-*
- (a) *A police officer of or above the rank of assistant inspector; or*
  - (b) *A magistrate, but no person shall be convicted of an offence solely on the basis of a confession made under paragraph (b), unless the confession is corroborated by other material evidence in support of the confession implicating that person.*

The admission was made by the co-accused (A2) who was actually found to be in possession of the marked money by the IGG officer. As

rightly pointed out by the learned appellate Judge, a statement which does not amount to a confession is only evidence against the maker.

Of all the prosecution witnesses, none gave evidence of solicitation apart from PW1. It is trite law that the burden of proving a charge lies entirely on the prosecution. The offence upon which the appellant was charged tried must be proved by evidence as it appears on the charge sheet. The prosecution has a duty to prove beyond reasonable doubt that an accused person is guilty as charged. From the evidence on record, the prosecution failed to prove the elements of solicitation and receiving gratification. Unfortunately, the trap that was set only trapped A2 because he was found with the money by the IGG officials and the appellant was not even found at the scene.

With all due respect, we are of the view that the appellate Judge erred in convicting the appellant of the offence of soliciting for gratification without ingredients of the offence being proved against the appellant. As already stated above, the incriminating evidence of A2, a co-accused, had to be corroborated by some other material evidence pointing to the appellant soliciting and/or receiving gratification. There was no such corroboration.

We therefore allow this appeal and set aside the conviction and sentence of the High Court on appeal and reinstate the judgment and orders of the Magistrates Court made on 10/05/2011. The appellant is thus set free unless held on other lawful charges.

Dated 15<sup>th</sup> of July 2019



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



**Hon. Mr. Justice Stephen Musota, JA**

Tuhaise

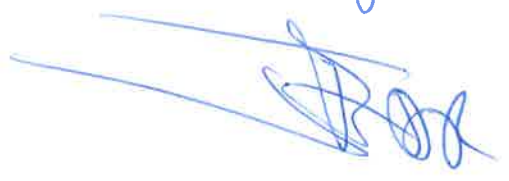
Hon. Lady. Justice Percy Night Tuhaise, JA

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15/7/19.

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of the above.



15.7.19