

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL AT KAMPALA
CRIMINAL APPEAL NO.0080 OF 2013

[Arising from the Judgment of the High Court Criminal Appeal No. 009 of 2013]

5 **BAGARUKAYO CHARLES**..... **APPELLANT**

VS

UGANDA **RESPONDENT**

CORAM: HON. MR.JUSTICE GEOFFREY KIRYABWIRE, JA

HON. MR.JUSTICE EZEKIEL MUHANGUZI, JA.

10 **HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA**

JUDGMENT OF THE COURT

This is a Second Appeal from the Judgment of the High Court on first Appeal delivered by Hon. Mr. Justice D.K. Wangutusi. The Appellant was charged with four counts of corruption contrary to Section 2 (e) and (h) of the Anti-
15 corruption Act. After trial he was acquitted of the charges. The prosecution appealed to the High Court which allowed the Appeal and convicted him of the offence of corruption. The High Court sentenced him to a three year prison term on each of the four counts. The prison term was to run concurrently. The court also sentenced the Appellant to refund a sum of **Shs 38,400,000/=**
20 **(thirty eight million four hundred thousand shillings only).**

INTRODUCTION



Banda Josiah (PW1) was employed in Koboko District as the Senior Accounts Assistant heading the Finance Department. Around the months of November and December 2006 Banda Josiah (PW1) was in Kampala on official duty when he received a telephone call from Mr. Bagarukayo Charles (hereinafter referred to as the Appellant). The Appellant asked Banda Josiah to meet him at Uganda House. Upon meeting him the Appellant introduced himself as an official from the Public service. The Appellant informed him that he wanted to send excess money for the teacher's salary to the Koboko District Account which should thereafter be remitted back to him.

Again in January 2007, the Appellant called Mr. Banda Josiah and asked to meet him when he was in Kampala. They then met in the Appellant's vehicle where he showed him payrolls for teachers and Health workers in Koboko district. What was peculiar about these payrolls was that they had much more money than what teachers and health workers are actually paid. The Appellant told Mr. Banda Josiah to process the salaries and pay the teachers as he usually does and have the excess monies remitted to his Stanbic account. The Appellant also contacted Mr. Onzu Musa (PW2) the Chief Administrative Officer of Koboko district. Zainabu Hemisi(PW4) who was also employed as an accounts assistant also received similar instructions and they made several deposits on the account of the Appellant.

The Appellant was charged on four counts of corruption contrary to section 2(e) and section 2(h) of the Anti -Corruption Act. After trial, the Appellant was acquitted by the trial magistrate. The prosecution being dissatisfied with the decision filed an Appeal to the High court. The High court allowed the Appeal



and convicted him. The Appellant being dissatisfied with the finding of the Appellate court lodged this Appeal.

In his Memorandum of Appeal dated 12th March, 2013, the Appellant raised five grounds namely;

- 5 **1. The Appellate Judge erred in law when he failed to properly evaluate the evidence on record there by coming to a wrong conclusion.**
- 2. The Appellate Judge erred in law when he held that there was sufficient evidence to prove the ingredients of the offence of**
10 **corruption.**
- 3. The Appellate Judge erred in law when he conducted a vigorous cross examination of the Appellant and acted on such evidence to**
 convict the Appellant.
- 4. The Appellate Judge erred in law when he acted and relied on**
15 **accomplice evidence without sufficient corroboration to convict the Appellant.**
- 5. The Appellate Judge erred in law when he proceeded to hear the**
 Appeal without the presence of the Appellant's counsel thereby
20 **denying him his constitutional right to be represented by counsel of his choice.**

Legal Representation

Mr. Michael Akampulira appeared for the Appellant while Mr. Rogers Kinobe Senior State Attorney represented the State.

Duty of the Court



As a second Appellate court we are required to consider errors of law only. (See 45 of the Criminal procedure Code Act). Rule 32(2) of the (Judicature court of Appeal Rules) Directions allows this court in exercise of its jurisdiction as a second Appellate Court to appraise inferences of fact drawn
5 by the trial court. The Rule reads;

“On any second appeal from a decision of the High Court acting in the 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.

10 The Role of 2nd Appellate Court was explained by Supreme Court in the case of **Kifamunte Henry v Uganda Criminal Appeal No. 10 /1997**. At page 12 of the Judgment the court said;

“

15 *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 findings of fact, this being a question of law. R v Hassan bin Said (1942)9 EACA62.”*

20 **Ground one and two**

Case for the Appellant [on evaluation of evidence]

Counsel for the Appellant submitted that the Appellate Judge did not properly re-evaluate the evidence as required under the law.



Counsel for the Appellant submitted that the Appellate court did not carefully weigh the evidence of the prosecution and the defence in arriving at its final Judgment. He argued that the evidence before the court did not show that it was the Appellant who was responsible for the loss. He raised four lines of
5 argument to support this submission.

First, counsel for the Appellant submitted the Appellate Judge did not re-evaluate the evidence of Banda Josiah (PW1).

Banda Josiah was employed as a Senior Accounts Assistant heading the finance department. He submitted that when Banda Josiah (PW1) was being
10 cross examined he testified that he could not tell whether the Appellant had a role in the cash release. He further admitted that he didn't see the Appellant's name on any of the payrolls nor did he see the Appellant's signature.

Counsel further submitted that Banda Josiah (PW1) also admitted that the Chief Administrative Officer (Onzu) authorized payments to himself on the
15 cheques dated 8th June 2007 even though he was not a teacher.

Secondly, counsel for the Appellant submitted that the court did not properly re-evaluate the evidence of the cheques. He referred us to cheques dated 8th February, 2007 wherein the payee was shown as Zainab Kamisi and Banda Josiah was the one who had signed on those cheques. However, the Appellant
20 had not signed anywhere on the cheques.

Thirdly, counsel for the Appellant submitted that the Appellate court did not properly re-evaluate the evidence of bank statements.

He argued that the Appellant had a Stanbic Bank account but from the bank account's statement there were no corresponding figure of Shs 8,000,000/=,



nor was the cheque dated 8th Feb 2007 of Shs 7,000,000/= reflected on the statement. He argued that when the money that was withdrawn by Banda Josiah (PW1) and Onzu Musa (PW2) it was not passed on entirely to the Appellant's account.

- 5 Fourthly, counsel for the Appellant submitted that the Appellate court did not evaluate the evidence of Saviour Mugwanya (PW5).

Counsel for the Appellant referred us to the cross examination of Saviour Mugwanya (PW5). He was employed as the Assistant Commissioner Human Resource to manage payroll Division at the Ministry of Public Service. He was
10 working as the superintendent to the Appellant. When he was shown an extract of a financial transaction (Exh. P14) he testified that he did not know that money was deposited on the Appellant's account. Saviour Mugwanya (PW5) further testified that if there was any excess in the payroll the person best placed to know about such an excess would be the Accounting Officer and
15 not the Appellant. He argued therefore that it was the Accounting Officer who was squarely responsible.

Counsel concluded by submitting that the evidence was not analyzed by the Appellate Judge and created doubt. He prayed that the doubt be resolved in favour of the Appellant.

20 **Case for the Respondent**

Counsel for the Respondent opposed the Appeal and supported the conviction and sentence of the Appellant. He submitted that the Appellate Judge properly evaluated the evidence on record.



In response to ground one and two counsel for the Respondent referred us to the testimony of Banda Josiah (PW1) where he testified that the Appellant called him and introduced himself to Banda Josiah in Kampala. He told Banda Josiah that he wanted to send money to Koboko District Local Government and that he should process and remit the excess to him in cash.

The Appellant had also given him an inflated payroll with excess money [page 38 of the record]. Banda Josiah (PW1) admitted that he had actually sent the money to and the Appellant admitted that he had received it. The Appellant claimed that it was for big people. This was for the month of January 2007. Counsel submitted that the Appellant repeated this scam in the months of March, April, May and June 2007.

Counsel further submitted that the abnormal cash release of January, February and March was exhibited as P1 and the exaggerated payroll was exhibited as Exh 2.

Counsel for the Respondent also used the evidence of Onzu Musa Ismail (PW2) who testified that he had been called by the Appellant and the Appellant had introduced himself as an official of the Ministry of Public Service.

Court's Findings

The gist of the Appellant's complaint in ground one is that the Appellate court did not properly re-evaluate the prosecution's evidence. It was argued that the prosecution evidence did not prove the guilt of the Appellant beyond reasonable doubt. On the other hand the Respondent argues that Appellate court properly evaluated the evidence.



One of the ingredients of the offence of Corruption is the diversion or use by a public official, for purposes unrelated to those for which they were intended, for his /her own benefit or that of a third party of any moveable or immoveable property, monies or securities belonging to the state, to an independent agency, or to an individual which that individual has received by virtue of his or her position for purposes of administration, custody or for other reasons.(See section 2(c) of the Anti-Corruption Act)

This was shown throughout the evidence of the prosecution.

The testimony of Banda Josiah (Pw1) who was employed as Senior Accounts Assistant heading the Finance Department of Koboko district. His testimony was that he first met the Appellant in Kampala. The Appellant told him that he would send excess money for the teacher's salaries and asked him to remit the balance back to him in cash. The Appellant also showed Banda Josiah "teacher's payrolls" that had salaries in excess of one million for each teacher. He later ended up sending the excess money back to the Appellant on his account in Stanbic Bank. He did this from the period of January to June 2007. The Chief Administrative Officer Onzu Musa also states that he had been contacted by the Appellant for the same purpose.

The Appellate Judge took cognizance of this evidence when he found in his Judgment on page 145 of the Record of Appeal,"

"...he introduced himself to him in the presence of another Charles of Ministry of Education. He told him he had processed teacher's salary in excess and that PW1 should go with draw pay the teachers and send back the balance in cash to the respondent...."



Banda Josiah (PW1) also had evidence of cheques. They were tendered in evidence as Exh P4. In these cheques the payee is Zainab Khemis (PW4) who was employed as a Senior Accounts Assistant Koboko District and in another cheque the payee is the Chief Administrative Officer of the district Onzu Musa
5 Ismail (PW2).

Onzu Musa (PW2) who was the Accounting Officer of Koboko district and a signatory to the account of the district. In his testimony he says that he instructed Zainab Khemis(PW4) to deposit the excess money on the account of the Appellant.

10 Onzu Musa (PW2) in his testimony said that there were deposit slips that showed that Zainab had deposited money on the Appellant's account. The said deposit slips were admitted in evidence.

It is clear from the testimonies of the witnesses that this graft would not have occurred without the co-operation of the officers of Koboko District. They
15 were well aware that any excess incomes needed to be sent back to the treasury. However they instead chose not to send it back. Onzu Musa (PW2) and Khemis (PW3) both admitted that they also took some money into their accounts.

We find that Appellate court correctly re-evaluated the evidence before him.

20 **Grounds 3 and 5**

Case for the Appellant [on the Procedure Followed]

Counsel for the Appellant submitted that the Appellate court erred in procedure when it cross- examined the Appellant.



Counsel for the Appellant submitted that the Appellate Judge erred in law when he conducted a vigorous cross examination of the Appellant and acted on such evidence to convict the Appellant. He argued that the court did not allow the Appellant to engage a lawyer to handle his case on Appeal.

- 5 Counsel invited us to look at page 139 of the court record where court asked the Appellant to present his Appeal or to reply to the submissions which had been made by counsel for the Respondent.

Counsel faulted the nature of the questions that were put to the Appellant by the Appellate Judge for example court asked about the cheques which the
10 Appellant explained, then the court asked the Appellant, "*how are you connected to them?*" and the Appellant explained how he was connected to them.

Furthermore counsel for the Appellant submitted that on page 140 the court asked the Appellant whether the public service plays any role in salary to
15 which the Appellate replied.

Counsel also referred us to page 141 where court asks "*so that's the only way someone from public service would influence finance to send a certain amount of money...*" Then court also says "*...let us discuss the documents I have here not the Appellant's documents...*" Counsel for the Appellant submitted that this
20 line of questioning by the court was improper as a matter of procedure. He argued that on Appeal the Appellate Judge should have relied solely on the court record.

Counsel for the Appellant further submitted that it was improper for the Appellate Judge to ask the Appellant questions influenced the prosecution. He



directed the court to page 154 of the record wherein he argues that the Judge actually relied on the evidence that was adduced during that cross examination.

At page 154, the Appellate Judge made the following finding;

5 " from the foregoing the only conclusion is the evidence is abundant that the Respondent was a public official having been an employee of government in government service, there is evidence which is abundant that he received money in form of gratification.... And clearly for him the evidence was abundant without showing how the evidence was connected to the Appellant".

10 He submitted that this finding was improper and caused a miscarriage of justice.

Counsel for the Appellant submitted on the fact that the Appellate Judge ought to have given the Appellate a chance to engage a lawyer to argue the case on his behalf. He referred us to page 127 of the record wherein the
15 Counsel for the Respondent said that the Respondent is present in court but counsel for the Appellant is not attired. The Appellate Judge then says "...you don't have someone to represent you again I have given you three adjournments; in this matter we shall hear you without counsel..."

Counsel then submitted that the Appellate had a constitutional right under
20 Article 28 (3) (c) and (d). He referred to clause (C) that provides that anybody who is accused of a criminal offence shall be given an opportunity and time and facilities for preparation of his or her defence, then be permitted to appear before the court in person or at that own person's expense in court by a lawyer of his or her choice.



Counsel further submitted that the record did not show that there were any previous adjournments as the Appellate Judge had stated. He then referred us to the case of **James Sawoabiri & Anor v Uganda Supreme Court Crim App No.5 of 1990** for the proposition that persons charged with serious offences should be accorded the service of an Advocate.

He further submitted that just as a conviction cannot stand if there has been a refusal to hear the counsel for the accused, so should an Appeal in which the Appellant where there has been a refusal to adjourn and Appeal in which the Appellant was entitled as of right to be heard by counsel assigned to him by government who was unable without any fault of his own to reach court in time.

Case for the Respondent

In response to ground 3, counsel for the respondent referred to Section 164 of the Evidence Act that permits a Judge to ask questions as he pleases at any time and in whatever form and order simply to understand or acquaint himself or herself with in any matter or proceeding before him.

He submitted that the reason why the Appellate Judge asked so many questions was because he had not been represented and the Appellate Judge wanted to know why he was not represented. He also submitted that the court had adjourned the proceedings three times in his presence.

He further submitted that even during the proceedings of the magistrate court (from page 112 to 115 of the record) the Appellant did not appear and the case was adjourned more than seven times as a result of this. Counsel argued that the questions did not constitute cross examination but rather were



merely interrogation or probing for the court to understand and appreciate the facts.

Counsel submitted that Article 28 of the Constitution was not meant to delay trial but to guarantee fair hearing or trial. He also argued that the Appellant
5 was also given a chance or right to file written submissions on 10th of June 2013 which was 8 days before the Judgment of the High Court was delivered. He also submitted that from page 127 of the record of proceedings the Appellant was also given a further right of reply. He argued that this exhibited lenience on behalf of the court towards the Appellant.

10 Counsel further submitted that Section 33 (2) of the Criminal Procedure Code Act permits Appellate courts to hear the Appellant himself or the Respondent or their advocates.

He further submitted that this was a case that did not need mandatory legal representation like murder and distinguished it from the authority quoted by
15 the Judge. He prayed that grounds 3 and 5 be dismissed.

Court's findings

The complaint in this ground is that the Appellate Judge cross examined the Appellant and got evidence from him instead of relying on the record of Appeal. The Respondent on the other hand submitted that the questions asked
20 by the court did not amount to cross-examination of the Appellant.

According to the record of Appeal (page 127) in recording the appearances in court, there was no counsel for the Respondent now Appellant. The court took cognizance of this situation when it stated,



“so you do not have someone to represent you. I have given you three adjournments in this matter; we shall hear you without counsel.”

The Appellant did not given any explanation and the court proceeded with the submissions of the State. It was after the submissions of the State that the
5 court decided to examine the Appellant.

The opportunity to be heard or in other words a fair hearing is the bedrock of the criminal justice system. It is also enshrined in our Constitution in Article 28 as a non derogable right. Furthermore Section 33 of the Criminal Procedure Code Act states as follows;

10 *“..... at the hearing of an appellate court shall hear the appellant and respondent or their advocates.”*

Furthermore under Section 164 of the Evidence Act a judicial officer may, in order to discover or to obtain proper proof of the relevant facts ask questions he or she pleases, in any form, at any time, of any witnesses or of the parties
15 about any fact relevant or irrelevant.

We find that the court was justified in asking the Respondent/Appellant questions since he had on various occasions come to court unrepresented.

Since the record did not show any written submission and the State had made oral submission it was in order for the Appellate Judge to get a reply or
20 clarification from the Appellant by asking him questions.

As for the complaint that the offence was a serious one in which it was mandatory for the Appellant to be represented we find that this was not a



capital offence and therefore it was not mandatory for the Appellant to be represented by counsel.

These grounds also fail.

GROUND 4

5 Case for the Appellant

Counsel for the Appellant submitted that the Appellate Judge erred in law when he acted and relied on accomplice evidence without sufficient corroboration to convict the Appellant. He submitted that Banda Josiah (PW 1), Onzu Musa (PW 2) and Charles Enyuko (PW3) were all officials of Koboko District Administration and they were the ones who withdrew the money from Koboko District salary account.

He further submitted that the Appellate Judge ought to have warned himself of the dangers of acting on uncorroborated evidence of an accomplice.

He also submitted that the Appellate Judge merely relied on evidence of accomplices to corroborate evidence of other accomplices. He concluded that this was wrong as court could not use evidence which itself needs corroboration to corroborate other evidence.

He invited us to consider the evidence at page 155 the Appellate Judge stated the prosecution had proved the offence of corruption contrary to section 2 (e) but the Appellate Judge did not mention Section 2 (h) yet the Appellant had been charged under both. Counsel concluded his submissions by praying that the Appeal be allowed, the Judgment of the High Court be set aside and the Appellant be acquitted of all the charges and be set free.



Counsel for the Respondent

Counsel for the Respondent assured court that the Appellate Judge was aware of the principle concerning evidence of an accomplice and the duty to warn himself. He stated that the questions to be dealt with was how reliable was
5 the evidence of those three witnesses.

He submitted that the three prosecution witnesses who had earlier on been charged with the Respondent received corroboration from Charles Penduko (PW3) and Saviour Mugwanyanya (PW5) who were not accomplices.

Counsel further pointed out the exhibits P8 and P11 which are bank slips
10 indicating deposits and P10 which was the bank statements of the Appellant all showed that these monies were deposited on his account. He submitted that the Appellant also admitted to this money being deposited on his account.

He then relied on Section 132 of the Evidence Act which is to the effect that an accomplice shall be a competent witness against an accused and a conviction
15 is not merely illegal because it proceeds upon the uncorroborated testimony of any witness. He also cited the cases of **Salongo Senoge v Uganda (102 of 2009)** and **Lwarinda John v John (113 of 2012)**.

Court's findings

The complaint in this ground is that the Appellant court relied on evidence of
20 accomplices to incriminate the Appellant. On the other hand the Respondent submitted that the Appellate court warned itself on how to regard evidence of accomplices.



In the case of Baluku Samuel & Anor v Uganda Crim Appeal No.21 of 2014 the Supreme Court gave some guidance on whom an accomplice is;

“

5 *There is statutory definition of who an accomplice is however this court has in various decisions given guidance on whom an accomplice is.*

For instance in, Mushikoma watete Alias Peter Wakhoka & 3 ors Criminal Appeal SCCA 10 of 2000 this court held as follows;

10 *In a criminal trial a witness is said to be an accomplice if she participated as a principal or an accessory in the commission of the offence which is the subject of the trial. The clearest case of an accomplice is where a witness has confessed to the participation in the offence or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after trial.*

15 *Furthermore in Nasolo v Uganda Crim. Appeal No.14 of 2000 (SC) 2003 1 EA 181,189, this court took a more liberal approach in defining who an accomplice is in the following terms In a criminal trial, a witness is said to be an accomplice if inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial.*

20 *However in the absence of such confession or conviction, a court may find, on the strength of the evidence before it at the trial that a witness participated in the offence in one degree or another. Clearly where a witness conspired to commit, or incited the commission of the offence under trial, he would be regarded as an accomplice. See Khetem v R [1956] EA 553 and Watete & others vs Uganda (supra)*



We find that the Appellate Judge properly evaluated the evidence at hand. He considered the fact that all the three witnesses had been charged on 26th August 2010 as people who had committed the offence with the Appellant but the charges against the three had been dropped.

5 The Appellate Judge was also mindful of the fact that the evidence was one of accomplices and cautioned himself on the need for corroboration in respect of evidence of accomplices. He cited the case of **Leo Mabuzi v Uganda 1974 HCB 81** for the proposition that collaboration was looked for in respect of evidence of accomplices and to base a conviction on uncorroborated
10 accomplice evidence such evidence had to be very cogent as to satisfy court beyond reasonable doubt.

The Appellate Judge was also mindful of where this corroborative evidence could be obtained from because he relied on the case of **Abdu Mukasa v Uganda** for the proposition that this evidence could be obtained from the
15 prosecution witnesses, defence witnesses and the accused himself.

The Appellate Judge found that there were three prosecution witnesses evidence which had been corroborated by the evidence of money which had been withdrawn from the Koboko District account and deposited on the Appellant's account. There was also corroboration evidence of bank slips and
20 bank statements which showed deposits on the Appellant's account. Furthermore the accused had also admitted before the Trial court that money was deposited on his account.

On page 145 of the record of Appeal the Appellate Judge corroborated the evidence of Banda Josiah, Zainabu Khemis and Onzu Musa with that of the
25 investigating officer Charles Enuke PW3. The trial Judge found:

“he said to have come across withdrawals by PW2 and PW3, he also stumbled on PW2 and PW4, he also stumbled on deposits of some of the money on Respondent’s account in Stanbic IPS building. PW3 got the bank statement of the said Stanbic account indicating deposits and the person who made the deposits...”

We are in agreement with the Appellate Judge that the evidence of the investigating officer and the deposit slips and the statement of the appellant’s account all corroborate the evidence of Banda Josiah (PW1), and Onzu Musa (PW2). This ground therefore fails.

10 Final Result

Having found that all the grounds of Appeal fail, this Appeal is hereby dismissed. We uphold the conviction and sentence of the first Appellate court.

Dated at Kampala this 3rd day of February 2020

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HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA


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HON. MR. JUSTICE EZEKIEL MUHANGUZI, JA.

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HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA