THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0099 OF 2018
(Arising from High Court of Uganda at Kampala (Anti-Corruption Division) Criminal Appeal No. 0017 of 2017 also arising from Chief Magistrate's Court of Buganda Road at Anti-Corruption Division Criminal Case No. 0053 of 2015.)

KAKONGE UMAR :::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala (Anti-Corruption Division) before Her Lordship Tibulya, J. delivered on 16th February, 2018 in Criminal Appeal No. 0017 of 2017)

CORAM: HON. MR. JUSTICE ALFONSE OWINY-DOLLO, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF THE COURT

Brief Background

This is a second appeal against the decision of the High Court of Uganda at Kampala (Anti-Corruption Division), which, in exercise of its appellate jurisdiction, upheld the appellant's conviction and sentence by the learned trial Chief Magistrate on the following two counts. Count 1, Corruption contrary to sections 2 (b) and 26 of the Anti-Corruption Act, 2011. Count 2, Abuse of Office contrary to section 11 (1) and (2) of the same Act. The learned trial Chief Magistrate had imposed the following sentences on the appellant; in count 1, to pay a fine of Ug. Shs. 1,000,000/= or in default, to serve a term of imprisonment of one year; in count 2, to pay a fine of Ug. Shs. 1,000,000/= or in default to serve a term of imprisonment of 8 months. The trial Court further passed an order barring the appellant from holding public office for the next ten years from the date of its judgment.

The relevant facts as accepted by both the trial Court and the first appellate Court were that:

In count 1, that on the 6th day of July, 2015, while at the Inspectorate of Government Regional Office in Mukono District, the appellant corruptly offered gratification of Shs. 880,000/= to Oketch Fredrick, an Inspectorate Officer as an inducement to absolve the appellant in a case of allegations of mismanagement of funds received by Buikwe district from Bujagali Energy Limited and Eskom as royalties in the financial year 2014/15 which was being investigated by the Inspectorate of Government.

In count 2, that on the 6th day of July, 2015, while at the Inspectorate of Government Regional Offices in Mukono District, the appellant, had, in abuse of the authority of his office, corruptly offered gratification of Shs. 880,000/= to an Inspectorate of Government Officer to absolve him in a case of allegation of mismanagement of funds received from Eskom and Bujagali Energy Limited in the financial year 2014/15.

Due to the acceptance of the truth of those facts, the first appellate Court upheld the conviction, sentence and orders imposed on the appellant by the trial Court. The appellant was dissatisfied with the decision of the first appellate Court and brought this appeal on grounds which are set forth in the relevant memorandum of appeal as follows:

> "1. **The learned Honourable Judge erred in law when she failed to properly re-evaluate the evidence on record and thus arrived at a wrong decision.**
>
> 2. **The learned Honourable Judge erred in law when she also based on the evidence derived from a recorder which is inadmissible as it was secondary evidence."**

Representation

At the hearing of the appeal, Mr. Sserwadda, learned Counsel, represented the appellant, while, Mr. Luteete Mika, learned Senior Inspectorate Officer from the Inspectorate of Government, represented the respondent. The appellant was in Court. Counsel for either party accepted to file and serve written submissions according to a schedule given to them by Court which

they duly did. Those submissions were accordingly adopted and have been considered in determining this appeal.

Appellant's case
Ground 1

This ground, as presented was barely a ground of appeal, it was not specific as required by the law and for that reason offended the Rules of this Court. Little wonder when it was addressed in the appellant's submissions it touched something totally new which was not raised in the first appellate Court.

The appellant contended that the purpose for which he had allegedly given illegal gratification to PW2 Oketch Fredrick, an Inspectorate Officer in the Inspectorate of Government had not been sufficiently brought out in the particulars of the offence. We have perused the relevant charge and established that the appellant was alleged to have offered gratification to the Inspectorate Officers in issue to have them clear his name in investigations into alleged mismanagement of royalties in Wakisi Sub County where he worked. In other words, the appellant was interested in covering up any wrong doing. This was clearly brought out in the charge despite the contrary contention by the appellant which we hereby reject and summarily dismiss.

Further, counsel complained that the appellant was convicted in the absence of evidence that he offered any gratification to PW2. Counsel submitted that the money alleged to have been offered by the appellant as an illegal gratification was money for a school boy's school fees. He contended that the money which was received from the appellant in PW2's office was meant for school fees for a boy under his care. The money in question was discovered while covered up with receipts which tended to support the appellant's case that it was meant for school fees and not some illegal gratification. Counsel therefore asked this Court to find that the first appellate Court did not appropriately reappraise the evidence.

Ground 2

The appellant faulted the learned first appellate Judge for endorsing the learned trial Magistrate's reliance on secondary evidence in contravention of the law governing such evidence. It was pointed out that the major piece of incriminating evidence against the appellant was a purported audio recording of his conversation with PW2 in which he could allegedly be heard making a corrupt offering of money. The evidence was presented on a Compact Disc having been transferred from an audio recorder. In counsel's view the latter device ought to have been presented in the trial Court but it was not which rendered the evidence in question inadmissible. He asked this Court to strike that unlawfully admitted evidence off the record.

In view of his submissions, counsel asked this Court to allow the appeal and quash the appellant's convictions on both counts.

Respondent's case

Ground 1

The respondent opposed the appeal and supported the findings of the learned first appellate Judge. Counsel for the respondent submitted that the first appellate Court had examined all the circumstances surrounding the presence of the appellant in PW2's office and came to the right conclusion that he was there to offer illegal gratification. Counsel elaborated that the first appellate Court had considered that earlier on, PW2 had complained about the appellant's suspicious conduct whereupon a decision was made to invite the appellant to PW2's office. When the appellant went to PW2's office, the conversation he had while there was recorded and transcribed. The transcribed record was presented in Court and indeed proved that the appellant offered gratification to PW2. The evidence alluded to previously would prove that the first appellate Court had sufficiently fulfilled its duty to reappraise the evidence adduced in the trial Court.

Further, counsel contended that the appellant's claims that the money he had in PW2's office was school fees for a school boy were an afterthought

which was rightly rejected by the first appellate Court. He asked this Court to reject it, too.

Ground 2

Counsel submitted that the first appellate Court had considered the authenticity of the impugned audio evidence and concluded positively about its reliability and admissibility. He agreed that the audio recording in issue was transferred onto a Compact Disc on which it was presented in Court but submitted that the authenticity of that recording was unquestionable. Counsel further submitted that electronic information was admissible even when not in its original form provided its authenticity could be proven. He relied on **section 8** of the **Electronic Transactions Act, 2011** for that proposition.

Counsel concluded by submitting that the first appellate Court properly reviewed all the evidence on record and came up to the right decision to uphold the appellant's convictions by the trial Court. For that reason, he urged this Court to dismiss the present appeal for lack of merit.

Resolution of the Appeal

We have carefully considered the submissions of counsel for either side, the court record as well as the law and authorities cited and those not cited which are relevant in the determination of the present appeal. The law on second appeals such as the present one is as follows. **Section 45 (1)** of the **Criminal Procedure Code Act, Cap. 116** limits the grounds on which a second appeal may be brought to this Court. It states that:

> **"45. Second appeals.**
>
> **(1) 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."**

On a second appeal, this Court is only concerned with matters of law and not matters of fact or mixed law and fact. In **Areet Sam vs. Uganda, Supreme Court Criminal Appeal No. 20 of 2005**, the Court observed that:

> **"...it is trite law that as a second appellate court we are not expected to reevaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or reevaluate the evidence or where they are proved manifestly wrong on findings of fact, this court is obliged to do so and ensure that justice is properly and truly served."**

In **Tito Buhingiro vs. Uganda, Supreme Court Criminal Appeal No. 08 of 2014**, the Court held that a failure by the first appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial Court and make its own mind amounts to an error of law. We shall proceed to determine this appeal bearing in mind the above mentioned principles.

The evidence on record indicates that on the 6th day of July, 2015, the appellant found himself in a very difficult situation. He was seated and handcuffed at the Inspectorate of Government's Mukono Regional Office. There, he was faced with accusations of corruption. He had been the unfortunate victim of a trap laid by officials of the Inspectorate of Government. As would be expected, both the appellant and the respondent assert different versions of that day's events.

The appellant, himself, was at the material time a Local Government Official attached to Buikwe District. Specifically, the appellant was a Senior Assistant Secretary working at Wakisi Sub County in Buikwe District. It was not established in evidence what his precise schedule of duties were in that position. However, it was established by the evidence that he worked closely with the Councillors in the said Sub County.

Wakisi Sub County is the geographical home of Bujagali Falls next to which an electricity generating dam is located. The said dam is managed by Bujagali Energy Limited. Under the law, the communities where such

enterprises are located are entitled to royalties. Such royalties were paid to Wakisi Sub County. Later allegations arose that there had been mismanagement of those funds by the leaders at Wakisi Sub County.

Following those allegations, the Inspectorate of Government carried out investigations to establish if they had any truth in them. PW2 Oketch Fredrick and PW4 Othieno De Souza Paul were involved in those investigations. The duo were Inspectorate Officers whose schedule of duties typically involved the following; receiving complaints, conducting investigations, preparing reports and giving evidence in Courts of Law in relation to the overall duties of the Inspectorate of Government.

Apparently, PW2 and PW4 were offered bribes to reach a certain outcome by the appellant. It was not established what the required outcome really was. As the appellant had offered illegal gratification to PW2 and PW4, a decision was reached to trap him. This was to take place at the Inspectorate of Government's Mukono regional office. The appellant was to be invited to the said office and the said trap operation would be set in motion. The prosecution asserted that trap operation was successfully carried out on 6th July, 2015.

The appellant denied such corrupt intentions. He explained that his presence at the Inspectorate of Government Office on the day in question was for lawful reasons, to wit, to deliver fuel receipts and some Bills of Quantities which had been requested for by the Inspectorate of Government. If the story was to end there, the prosecution would not have made out its case to the required standard.

However, there is some other evidence which is capable of objectively supporting the prosecution case. This is the evidence of an audio recording of the events which took place during the laying of the trap, which took place in PW2's Office. The contents of the discussion which took place between the appellant and PW2 were recorded using some audio recording device. The said audio recording was then transferred to a Compact Disc. The

recordings on the Compact Disk were taken for translation and transcription, where after a written record (Exhibit P. Ex. 12) was made.

It was the prosecution case that the gist of the said recording was that the appellant could be heard promising to give PW2 money, and that the appellant did eventually give PW2 that money. At page 338 of the record, the following is recorded in the relevant transcript of the audio recording:

"**205. So, how much is that,**

206. This is for our futali

207. No, because you told me, (incomprehensible)

208. (Incomprehensible) Now in a (incomprehensible) way this for my Muko

209. I want to agree with this thing that you do (Incomprehensible)

210. Yes plan B.

211. Are you seeing that

212. Yes sir.

213. Because they know we have been having this thing, 2,3,4, people. Don't eat alone.

214. And I am wondering, is it okay if I can like some, I mean do you have anyway, (Incomprehensible) anyway that is okay, then I go out in the next 2 minutes. This one I have 500 with me, I have another one inside but I don't know, I wanted to seek your permission, I come and then for you, you handle my Muko.

215. No problem

216. Okay

217. You have how much

218. 1M with me

219. 1M,

220.	**Naye hopeful, hoping the cause (sic) of the week before the end of the week, I would make another call as we enter the week,**
221.	**This week**
222.	**This week**
223.	**This weekend next weekend**
224.	**As we end, as we end, I will make another call, then possibly even next week mpola, mpola. I will be making a call.**
225.	**So how much do you have in total? You know you have to be (incomprehensible) and then you tell me what you expect of me.**
226.	**You know I need like 4**
227.	**That is (incomprehensible)**
228.	**You know that's why I am saying right now I don't wasn't to, (incomprehensible) I will make another because I want, I want to see you through even in the other struggle of ours.**
229.	**(Incomprehensible) It's fine. It's almost complete, (incomprehensible).**
230.	**Let me see, I am expecting something, anyway, how is 5?**
231.	**(Incomprehensible)**
232.	**By the end of this month, because I am expecting, I am told there are some, there is a ka deal which I am chasing, Insha Allah. If all goes through, by the end of this month."**

Later, as the conversation continued, voices are heard demanding that one of the parties to the conversation is handicapped, because he had given money to the other. This conversation was reiterated during the court testimony of the PW2. During his testimony PW2 testified that when the appellant promised to share futali with him, he had inquired from his superior as to what futali meant. The superior had told him that it was an innuendo for a corrupt offering of gratification.

In this appeal, the appellant objected to the admission of the evidence comprising of the audio recordings of the conversation that took place

between him and PW2. It was submitted that the information which was tendered in Court was on a Compact Disc having been transferred to it from another device, namely, an audio recorder. As such, that information was secondary evidence, which could not be relied on save for exceptional circumstances which had not been proven by the prosecution. For that reason, counsel asked this Court to make a finding that the learned trial Chief Magistrate had erred when she admitted the impugned evidence and to deem it fit to strike it off the Court record.

In reply, counsel for the respondent disagreed submitting that the admission of the evidence in question was permissible under the law. Specifically, he pointed out that under **section 8 (1) (c)** of the **Electronic Transactions Act, No. 8 of 2011**, it is stipulated that rules of evidence shall not be applied so as to deny the admissibility of a data message or an electronic record merely on the ground that it is not in its original form.

He further submitted that the evidential value to be attached to evidence in the form of an electronic record would be assessed against the criteria laid down in **section 8 (4)** of the **Electronic Transactions Act, No. 8 of 2011** which is summarized as follows:

> **"a. The reliability of the manner in which the data message was generated, stored or communicated;**
>
> **b. The reliability of the manner in which the authenticity of the data message was maintained;**
>
> **c. The manner in which the originator of the data message or electronic record was identified."**

The appellant asked this court not to rely on the evidence of the audio recording of the conversation which took place between PW2 and the appellant. He contended that the device on which that conversation was recorded was not tendered in the trial Court.

We note that since the invention of the first practical sound recording and reproduction device by Thomas Edison in 1877, such devices have become

common place and are used worldwide[1]. The process through which those devices come to record sound is reliable. Such devices include the audio recording device on which the conversation between PW2 and the appellant were initially recorded as well as the Compact Disc on which the audio was transferred to.

Perhaps in recognition of the reliable nature of electronic records, **Section 5 (1)** of the **Electronic Transactions Act, 2011** stipulates that:

> **"Information shall not be denied legal effect, validity or enforcement solely on the ground that it is wholly or partly in the form of a data message."**

It is our considered view that the traditional distinction between primary and secondary evidence has been modified in relation to electronic information. The law now recognizes that electronic information may be relied on notwithstanding that the device on which that information was originally recorded has not been exhibited in the trial Court. **Section 7** of the **Electronic Transactions Act, 2011** which is relevant provides:

> **"7. Authenticity of data message.**
>
> **(1) Where a law requires information to be presented or retained in its original form, the requirement is fulfilled by a data message if—**
>
> **(a) the integrity of the information from the time when it was first generated in its final form as a data message or otherwise has passed assessment in terms of subsection (2); and**
>
> **(b) that information is capable of being displayed or produced to the person to whom it is to be presented.**
>
> **(2) For the purposes of subsection 1(a), the authenticity of a data message shall be assessed—**
>
> **(a) by considering whether the information has remained complete and unaltered, except for the addition of an endorsement and any change which arises in the normal course of communication, storage or display;**

[1] Sourced from Library of Congress at: www.loc.gov/collections/edison-company-motion-pictures-and-sound-recordings/articles-and-essays/history-of-edison-sound-recordings/history-of-the-cylinder-phonograph/

(b) in light of the purpose for which the information was generated; and

(c) having regard to all other relevant circumstances."

In regard to the above cited provision, it must be stated that what exists now is a classification of electronic information into – authentic and non-authentic electronic information. Where the information passes the authenticity assessment laid down under section 7 (2), it may be relied on by a court. The said assessment is made against the following criteria; firstly, whether the information has remained complete and unaltered, except for the addition of an endorsement or any other change which may arise in the normal course of communication in light of the purpose for which the information was generated. Secondly, the authenticity of the information is assessed having regard to all other relevant circumstances. In the post-Electronic Transactions Act, 2011 era it is no longer open to anyone to frustrate the admission of electronic information merely because the relevant original recording device has not been tendered in Court.

Having said that, we are of the considered view that in addition to the reliability test referred to above, the electronic evidence sought to be tendered in evidence should be clear, unequivocal and self-explanatory. By clear, we mean that the evidence must be substantially comprehensible. In regard to the audio recording in this case, we find that huge parts of it were found incomprehensible, even by the experts who transcribed the recording.

As regards the requirement that the electronic evidence is unequivocal and self-explanatory. We are of the view that the contents of the said evidence must not be capable of reasonably having two conflicting interpretations. In case they do, the criminal defendant must be given the benefit of the more innocent interpretation. In the present case, it was suggested for the prosecution that the reference to "futali" was an innuendo for corruptly offering money. Futali is an evening meal that Muslims have to break each day's fasting during the month of Ramathan. This creates two reasonably conflicting interpretations.

In view of the above analysis, we find that the relevant electronic evidence was not only incomprehensible, it was also equivocal and not self-explanatory, and created a lot of doubt in the prosecution case. With the greatest of respect to the lower Courts, the appellant should have been given the benefit of the said doubt.

Accordingly, the relevant convictions, sentences and orders in regard to the appellant are hereby set aside. This appeal, therefore, succeeds.

We so order.

Dated at Kampala this ..... 26th ..... day of ..... February ..... 2020.

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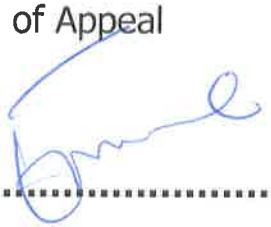
Alfonse Owiny-Dollo, DCJ

Justice of Appeal



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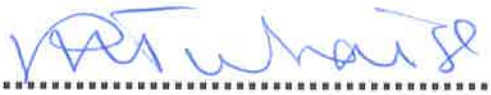
Elizabeth Musoke

Justice of Appeal



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