THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(ANTI CORRUPTION DIVISION)

CRIMINAL APPEAL NO.008 OF 2011

(Arising from HCT-00-ACD-CSC NO. 020 OF 2010)

1. **ZAAKE M. WALAKIRA**
2. **JULIUS RUGUMAYO**
3. **PATRICK SABIITI** **::::::::::::::::::::**
   APPELLANTS
4. **KYESIMIRA JULIET**

VERSUS

UGANDA **::::::::::::::::::::::::::**

RESPONDENT

BEFORE: HON. LADY JUSTICE CATHERINE K. BAMUGEMEREIRE

J U D G M E N T

This appeal arises out of the Judgment of Her Worship Irene Akankwasa Chief Magistrate of the Anti-Corruption Court. On 8th April, 2011 the learned Chief Magistrate convicted all four appellants, Zaake Walakira (A1), Julius Rugumayo (A2), Patrick Sabiiti (A3) and Juliet Kyesimira (A4) of the offence of Obtaining money by False Pretences contrary to s.305 of the Penal Code

and of Conspiracy to defraud contrary s.390 of the Penal Code Act.

The brief facts that gave rise to this case were that the four accused persons and others still at large, conspired and defrauded the Uganda Revenue Authority of UGX 283, 410,000/= (Two Hundred Eighty Three Million Four Hundred and Ten Thousand Uganda Shillings) and thereby obtained money by false pretences.

At all material times, Zaake Walakira (A1) was a businessman in Kampala while Julius Rugumayo (A2) and Patrick Sabiiti (A3) were employees of the Uganda Revenue Authority (URA). Juliet Kyesimira (A4) on the other hand was a banker with Stanbic Bank.

All the four persons named above were tried, convicted and sentenced to five years imprisonment for Obtaining money by False Pretences c/s 305 of the PCA. In addition each of them was sentenced to six years imprisonment for Conspiracy to defraud c/s 390 of the Penal Code Act.

Further, A2, A3 and A4 were each convicted of the offence of Abuse of Office c/s 87 of the PCA, as it then was. A2 and A3 were each sentenced to four years imprisonment in count two while A4 was sentenced to four years imprisonment in count four.

Similarly A2 and A3 were convicted of the offence of Causing Financial Loss c/s 20 of The Anti Corruption Act and sentenced to

four years imprisonment. A4 was acquitted of Causing financial loss to Stanbic Bank.

On appeal the State was represented by Robert Mackay, learned State Attorney while the Appellants were represented as follows:-

- A1 by Mr. Enoch Barata;
- A2 and A4 by Mr. Oine Ronald,
- A3 by Mr. Tibaijuka Ateenyi.

Following their conviction by the Chief Magistrate, the appellants filed three separate appeals before this court. The three appeals were however consolidated into one due to the fact that the convictions which were being appealed against arose out of the same facts. In total, the appellants filed twelve grounds of appeal which in my view can be disposed of by resolving three major issues.

1. The first issue is whether Stanbic Bank is a public body within the meaning of S.1 of the Anti Corruption Act of 2009 and if so whether a conviction for Abuse of Office could be safely based on this finding?

2. Whether reliance on retracted charge and caution statements made by the appellants rendered the trial a nullity and whether the convictions were unsafe andthe sentences were bad in law

3. Whether conviction of the offences of Obtaining money by false pretences contrary to section, Abuse of office contrary to section 87 of the PCA, Conspiracy to Defraud contrary to section 390 of the PCA, and Causing financial loss contrary to section 286 of the PCA were proper?

It is the duty of this court as a first appellate court to subject the evidence on record to fresh and exhaustive scrutiny weighing conflicting evidence and drawing its own conclusions from it. In doing this Iam cognisant of the fact that I did not have the benefit of observing the demeanor of the witnesses first hand as they testified and I do take that limitation into account. See the case of **Pandya v R 1957 EA 336** and that of **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No.10 of 1997.**

The first broad issue above relates solely to the conviction and sentence of Appellant no.4, Juliet Kyesimira. In arguing issue No.1 Mr. Oine for the 4th Appellant did not dispute the fact that the Juliet Kyesimira was an employee of Stanbic Bank Ltd. Mr. Oine however submitted that it was erroneous for the trial Magistrate to find that the 2nd Appellant Abused Office as an employee of Stanbic. Oine further submitted that the learned trial Magistrate erroneously founded her conviction on the presumption that Stanbic Bank was a public body an assertion she emphasized throughout her judgment. In response to this ground learned State Attorney Mackay submitted that the court

should uphold the findings of the learned trial Magistrate and that indeed Stanbic Bank is a public body.

In count No. 4 the 4th Appellant was charged and convicted of the offence of Abuse of office contrary to s.87 the PCA and sentenced to four years imprisonment. Here in part is an excerpt of her finding which I will take the liberty to quote verbatim;
"However, notwithstanding the defence Counsel's submission, according to the interpretation (of) S. 1(r) ii of the Public Enterprises Reform and Divestiture Act, a public enterprise includes one over which the Government has control either directly or indirectly. It is common knowledge which this Court has to take judicial notice of, but which also is found in the Bank of Uganda Act Cap. 51, that Bank of Uganda controls all banks in Uganda. They are controlledthrough the Bank of Uganda. Therefore the Government controls Stanbic Bank through the Bank of Uganda and therefore Stanbic Bank is a public enterprise and therefore A4 was a public officer at the time of the commission of the crime".

In her view, the fact that Bank of Uganda controls all Banks in the country is ground enough to classify Stanbic Bank as a public Body. With all due respect to the learned trial Chief Magistrate, the above excerpt in her judgment contains misdirection in law. It was erroneous for the learned trial Chief Magistrate to hold that the supervisory authority exercised by the Bank of Uganda over all Banks was ground to classify all Banks as Public Bodies.

I will address this issue in further detail later in my judgment but first I will take a quick look at the ingredients of the offence of Abuse of Officec/s 87 of the PCA. In order to prove the offence of Abuse of Office c/s 87 of the PCA (now repeated by S.11 of the ACA 2009) the following ingredients had to be proved:

1- That Appellant No.4 was an employee of a public body or a **body in which the government had shares**.

2- The Appellant No.4 did an arbitrary Act.

3- That the Act was prejudicial to the main interests of her employer.

With regard to A4, it was essential for the trial Chief Magistrate to satisfy herself that that the prosecution had proved beyond reasonable doubt that Stanbic Bank with which A4 was employed was a public body within the meaning of the repealed Section 87 of the Penal Code Act. Section 87 of the Penal Code Act (now repealed) stated as follows and I quote:

Section 87 Abuse of Office

(1) A person who being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her official, commits an offence…".

Section 87 of the PCA clearly specifies two types of organisations in which arbitrary or prejudicial acts of employees can occasion the offence of Abuse of Office. The first organization is a public body and the second is a company in which the Government has shares. The latter category presupposes that thegovernment has shares in the companyon an ongoing basis. Therefore this section of the law does not cover or include companies that have since been divested.

The learned Trial Magistrate found that Stanbic Bank was a Public Body and that the appellant in question abused her office when she committed an act which was prejudicial to her employer. This finding calls for a close examination of the facts relating to the status of Stanbic Bank at the material time. The brief history of Stanbic Bank is as follows:

Stanbic Bank is a listed company on the Uganda Stock Exchange and it is a subsidiary of Standard Bank Group. In February 2002 Standard Bank Group, a South African conglomerate, bought ninety percent shares in the Uganda Commercial Bank, as it then was. As part of the sale arrangement, the Uganda government retained a ten percent stock holding. Therefore at the material time (2002) Stanbic Bank could have safely been described as a company in which the government held shares within the context of section 87 of the PCA. However in 2009 Government undertook a complete divestiture in accordance with the P.E.R.D Act of 2008. As a consequenceStanbic Bank of Uganda offered

20% of the shares in the Bank to the public. The Bank was henceforth completely privatized with no government interest whatsoever. Currently Stanbic Bank Ltd retains 80% stockholding while 20% belongs to Ugandan Nationals and Institutions through the Uganda stock Exchange (see www.stanbickbank.co.ug as of 9th October 2011).

Further still under the first schedule of the Public Enterprises Reform & Divestiture (PERD) Act 2008, Stanbic Bank is classified as Class III, No.38 of the public enterprises from which the state is required to fully divest. (See the PERD.go.ug website) and for avoidance of doubt, Uganda, Commercial Bank is equally classified in Class III of the first schedule.

By implication, the Stanbic Bank stockholding was fully divested thereby declassifying Stanbic Bank. Having found that by 2009, the Government of Uganda had divested its shares in Stanbic Bank I therefore hold that Stanbic Bank is not a public body for purposes of S. 87 of the PCA or Sec. 11 of the Anti Corruption Act 2009.

Therefore with all due respect to the learned trial Chief Magistrate her findings on the status of Stanbic Bank were erroneous. At the material time, Stanbic Bank was neither a public body nor a company in which the Government held shares within the context of S. 87 of the PCA or Sec. 11 of the Anti-Corruption Act 2009. In any casethe PERD Act 1997 has since

been repealed and replaced by the PERD Act 2008. The law on what amounts to a public body or a company in which the government holds shares is clear and unambiguous and Stanbic Bank does not pass that test. It was therefore erroneous for the learned trial Magistrate to hold that Stanbic Bank is a public body or a company in which the government held shares. I therefore find that the first ingredient of the offence of Abuse of Office c/s 87 of the PCA was not proved and on that ground alone the conviction of A4 on that count could not stand and was unsafe. This ground of appeal therefore succeeds.

I now turn to the second ground of appeal.

Whether reliance on retracted charge and caution statements made by A2, A3, and A4 rendered the trial a nullity and whether the appellant's convictions and sentences were consequently bad in law?

Mr. Oine for A2 and A4 submitted that a close scrutiny of the charge and caution statements made by Rugumayo and Kyesimira respectively reveals that they do not amount to confessions. Mr. Oine argued that the statements were not unequivocal admissions of committing an act which in law would amount to an offence. He further submitted that these were self-exculpatory statements in the sense that the appellants denied the charges and did not substantially admit all the facts that constituted the offences as charged. Mr. Oine further contended that the offences over which the accused persons were charged and cautioned were not the same offences with which they were tried and later found guilty of in the lower court.

Barata for Zaake Walakira and Tibaijuka Ateenyi for Sabiiti Patrick in principle adopted Mr. Oine's submission on the issue of retracted statements.

Learned State Attorney Mackay in reply submitted that the learned trial Magistrate properly addressed her mind to the facts and law regarding the charge and caution statements in this case and urged court to uphold her findings. The State further submitted that the trial Magistrate's findings should be left undisturbed since there was nothing in the law that could prevent her from believing these admissions.

Oine for the two appellants, Rugumayo and Kyesimira had earlier submitted that at the time of taking plea the appellants pleaded not guilty to all the charges and subsequently retracted the alleged confessions. He further submitted that the applicants brought evidence to prove that they were tortured and threatened by the Violent Crime Crack Unit (VCCU). He wondered why the trial Magistrate never took this evidence into consideration at all. In addition, he submitted that the manner in which the trial within a trial was conducted violated the standard procedure. Further Mr. Oine argued that there was no clear distinction between the evidence recoded in the main trial and that gathered during the trial within a trial. This, Counselfor A2 and A4 contended rendered the entire trial a nullity. In addition, Counsel contended that no other evidence was adduced by the prosecution independent of the retracted confessions. He submitted that the learned Chief Magistrate repeatedly referred

to sufficient corroborative evidence without specifying or evaluating which evidence this was.

Tibaijuka Ateenyi for A3 submitted that it was erroneous for the trial Magistrate to have used the charge and caution statements of A1, A2 and A4 against A3. His submission was that criminal liability is personal and that whatever may have been admitted by a particular co-accused cannot be relied on to convict another. Even if a co-accused has pleaded guilty in respect of an offence of which they are jointly charged such a plea cannot be used to the prejudice of the other. He relied on the case of Oriental ETC ASS V Govinder 1959 EA at 121. See also Anyangu and Others v Republic 1968 EA 239 where it was held that the statements of co-accused were not confessions and were only evidence against their makers.

Having given careful consideration to above submissions I note from the onset that there was a problem with the handling of the trial within a trial. A trial within a trial is just what the name suggests; it is a trial within a main trial and must be recorded as a separate, distinct mini trial, set apart from the main trial. In the instant case, it was unclear when the trial within a trial started and at what point it ended. Where learned Counsel wishes to make submissions during a trial with a trial, those submissions must be on record. A ruling by the trial court on the admissibility of the confession must be recorded following representations made in an adversarial manner.

I now turn to the issue of retracted charge and caution statements. The position on retracted statement was laid down in Tuwamoi v Uganda 1967 EA 84 as follows:-

"Where a trial court accepts with caution a confession which has been retracted or repudiated the court must fully be satisfied that given all the circumstances of the case, the confession is true. The evidential value of a retracted confession is very little and it is a rule of practice and also a rule of prudence that it is not safe to act on a retracted confession of an accused person when it is not corroborated in material particulars. There is a stark difference between a retracted statement and a denial that a statement was made. A denial that a statement was made does not amount to a retracted statement. As was held that deliberate and voluntary confession of guilt if clearly proved, are among the most effectual proofs in the law. Their value depends on the sound presumption than a rational being will not make admission prejudicial to his interest and safety unless when urged by the prompting of truth and conscience…" See also Uganda v Yosamu Mutahanzo 1988-1990 HCB 44.

Modern jurisprudence suggests that a confession need not be discounted just because the accused denies having made it and court may convict upon such a confession if there seems to be no reason to believe that the statement is not true.

Under Ugandan law, the two-fold validity test of a confession is whether it was voluntarily made and whether it was made to an officer who is above the rank of an Assistant Inspector of Police (AIP). Having found that such a confession is reliable Court has the discretion to determine how much weight to attach to such a confession.

If the confession is the main evidence against the accused then the court must decide whether such a confession establishes the guilt of the accused with the degree of certainty required in criminal cases.However a trial court should treat with caution a retracted or repudiated statement.

Corroboration is not necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material facts and surrounding circumstances the confession cannot be but true.

I now consider the facts in the instant appeal. The trial court in this case relied squarely on the charge and caution statements made by the appellants. As such the charge and caution statements formed the main basis and backbone of the judgment.

It is apparent from the record that not all the charge and caution statements were subjected to the requisite test in the trial within a trial. Moreover where a trial within a trial was attempted it was never fully held. Failure to follow the procedure of a trial within

a trial renders the whole process a nullity and renders such confessions inadmissible. See Omaria Chandia v Uganda Criminal Appeal No. 23 of 2001(Supreme Court).

Similarly, it is clear that the conduct of the said trial within a trial was not in conformity with established standards and was therefore flawed in material particulars. It also appears that statements of a co-accused person who has since absconded were used against the appellant without due caution and corroboration.I also find that the 3rd appellant was convicted on the basis of the uncorroborated charge and caution statements of the other appellants.

Having carefully perused the record of proceedings I find no evidence on record to prove that a trial within a trial was conducted. There should have been a record to show that a distinct and separate mini trial was held to test that the charge and caution statements were voluntarily recorded from the appellants and to establish whether there was sufficient proof to warrant the admission of the charge and caution statements in evidence. I agree that the trial court can base a conviction entirely on a confession but such confession should have been voluntarily given. If on the other hand a court is inclined to rely on a retracted statement then the court must satisfy itself that the contents of the statement are true by gathering independent corroborating evidence to validate the veracity of the statement.

See Sewankambo Francis and 2 Others v Uganda Criminal Appeal No. 33 of 2001 (Supreme Court).

The prosecution case largely relied on the admissions made in the charge and caution statements. Having found the admissibility of the statements wanting leaves me with no option but to agree that the charge against the appellants cannot stand and I so find.

Before I take leave of this case, I am of the view that this was a case that required a careful analysis of the source of evidence adduced. It would have helped a great deal if the learned trial Chief Magistrate had given due consideration to the three underlying issues of this case; reliability, truthfulness and legality of the charge and caution statements on which the entire case rested. Equally important, the trial Chief Magistrate should have addressed herself to the propriety of the charges. Had she done so, she would have probably arrived at a different conclusion.

After full consideration of the facts, the evidence and the submissions of Counsel on both sides, I find that that it would be unsafe to allow convictions based on the evidence presented to the trial court. Similarly I do not find it useful to delve into other grounds. Accordingly, I therefore allow the appeal and quash the conviction and set aside the sentence.

Catherine K. Bamugemereire

JUDGE

21/10/2011