REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

ANTI CORRUPTION DIVISION

CRIMINAL APPEAL NO. 33 OF 2015

KARAKIRE STEPHEN……..APPELLANT

V

UGANDA……RESPONDENT

BEFORE GIDUDU, J

JUDGMENT

The appellant, a Grade 11 magistrate was tried and convicted of two counts of soliciting and receiving a gratification C/Ss 2(a) and 26 of the ACA, 2009. He was sentenced to 3 years Imprisonment.

In his appeal, he indicates that he appeals against conviction and sentence but there is no ground filed against the sentence.

The brief facts leading to the appeal as accepted by the trial chief magistrate are that the appellant while doing his work at Kyazanga Court was approached by PW3 for help to delay the issuance of a warrant against him for failing to honour summons to appear in court over charges of obtaining credit by false pretence c/s 308 PCA. PW3 had obtained a loan from one Nakawesi and had failed to pay back the same with 30% interest.

The appellant who was known to PW3 offered to delay the case by one month if PW3 gave him 2 million. They bargained till the appellant agreed to take 1 million.

PW3 did not have the money instantly and when he consulted the DPC, he was advised to report the demand to the IGG office which arranged to trap the appellant.

Indeed the appellant was arrested when he received the money from PW3. The appellant claimed that PW3 has a grudge against him and that the 1 million was being conveyed by PW3 from one Frank Baine, a tenant of the appellant. He denied soliciting for the gratification or meeting PW3 until the delivery of the money from Baine.

The trial chief magistrate dismissed his defence and upheld the prosecution evidence finding that it was not challenged in cross examination.

The appellant filed 5 grounds of appeal. Three of them, repeating the same complaint that the trial chief magistrate treated the evidence of the prosecution as Gospel truth just because the appellant did not cross examine witnesses.

I. The learned trial magistrate erred when she held that failure to cross examine a witness ipso facto means that such evidence is truthful.

II. The learned trial magistrate erred when she held that failure to challenge the testimony of a witness means that the testimony is true.

III. The learned trial magistrate erred when she held that it was the appellant and not his advocate who failed to conduct cross examination.

IV. The learned trial magistrate erred in fact and law when she held that the offences of soliciting and receiving a gratification were proved whereas not.

V. The learned trial magistrate erred when she failed to evaluate the evidence properly.

My duty as a first appellate court is to review the evidence and draw my conclusions without ignoring the judgment and mindful that I did not see or hear the witnesses testify. The appellant on first appeal is entitled to a re hearing of his case.

I should point out that when this appeal came for hearing, the appellant's bail application was also due on the same day. Since court had sat to dispose of the appeal, I ruled that the application for bail pending appeal had abated.

The IGG team did not attend court and no reason was given for the prosecution absence.

I directed the appellant's counsel to file written submissions and serve the respondent. The respondent filed a reply.

In the first three grounds the complaint is that when the appellant did not cross examine the prosecution witnesses, the trail magistrate believed their evidence as Gospel Truth without verifying it.

Mr Rwakafuzi, learned counsel for the appellant, correctly in my view, stated that on the available authorities***, an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to it being assailed as inherently incredible or possibly untrue***. See **James Sewaabiri & anor v Uganda Cr. App 5 of 1990 (SC)**

Mr. Rwakafuzi's criticism of the trial court is that having established that the appellant did not cross examine witnesses, the trial chief magistrate should have verified the testimony against the evidence of the appellant to determine its truthfulness.

On the other hand, the respondent's submission is that the appellant excluded himself from the trial and tried to disrupt the progress of the case leaving the court with only the unchallenged evidence of the prosecution.

I have perused the record. When PW1 finished his evidence in chief, the appellant said**" No questions for the witness. Am not participating in the case**" He did not cross examine PW2 also. This was in May 2013. In July 2014 PW3 and PW4 testified before another chief magistrate. The second chief magistrate allowed him time to trace his advocates to conduct cross examination but to no avail. After about 9 months of several excuses from the appellant, the chief magistrate decided to proceed with PW5 and put the appellant on his defence.

When a witness declines to take his or her opportunity to controvert adverse evidence adduced against him or her, the court is entitled to infer that such evidence is true against the accused except if it is inherently incredible or possibly untrue.

Courts verify the truth of witness evidence through observations of their demeanor, body language, consistency especially during cross examination, and comparison with the defence version of the case.

In this case, the appellant failed to either cross examine the witnesses himself or for close to one year failed to trace his elusive counsel to cross examine the state witnesses.

The gist of the prosecution evidence is that PW3 was faced with a court case. He received summons one day after he was supposed to appear in court. He was in a situation where he would be arrested for failing to honour his date in court so he anxiously sought the help of the trial magistrate who he knew very well. The two met in Masaka and bargained reaching an agreement of one million to enable the appellant delay the case to December to give PW3 enough time to bargain with his creditor. PW3 was advised to report the appellant's demand to the IGG. A trap was set and the appellant was arrested with the money.

The appellant admits he knows PW3 so well. He admits he received one million from him. But he claims it was money from one Frank Baine which he sent through PW3. Frank Baine is said by the appellant to be his tenant. In the same defence, the appellant claims that PW3 is a thief who stole his cows and would have prosecuted him if it was not for the troubles the appellant had to sort out with his employer- the Judiciary. He attributes these charges to grudges held by PW3.

Is the prosecution evidence inherently incredible? Is it unbelievable? Is it possibly false? When I weigh the prosecution evidence with the defence version, I find that instead it is incredible that the appellant receives his so called rent from Frank Baine through the hands of the thief he was due to prosecute. Worse still, it is incredible that he receives money through the hands of his

enemy! In absence of Frank Baine's testimony, I find that it is the defence evidence that is inherently incredible and possibly false. The events described by the prosecution witnesses do not suggest any possible lies because the truth is that PW3 conveyed the money to the appellant. He admits it was found on him. He was arrested with it. That money was a trap from the IGG

The trial chief magistrate was therefore entitled to believe the prosecution evidence as true once the appellant opted not to challenge it. Failure to challenge the prosecution evidence rendered the appellant's testimony denying that he solicited for and received a gratification mere afterthought. That is a risk the appellant assumed and has returned to haunt him. The appellant is a magistrate of long standing who knew the implications of his actions in court. He must have known the risk he was taking by not challenging adverse evidence against him. He fell on his own sword.

It is my conclusion that the complaint in grounds one to three in the memorandum of appeal is not justified. The three grounds fail.

The gist of grounds 4 and 5 is that the trial chief magistrate failed to evaluate the evidence properly and reached a wrong conclusion that the charges had been proved whereas not.

Mr. Rwakafuzi faulted the trial court for finding that the appellant solicited for money when telephone print outs were not exhibited to show that there was contact between PW3 and the appellant.

The respondent submitted that the defence denial is an afterthought. The events complained of happened and money was found on the appellant- a fact he admits. The respondent submits that the theory that the appellant believed money was from Baine is false.

The consistency of the prosecution case is that PW3 had a problem to sort out in court presided over by the appellant. He knew the appellant very well. He made contact for a favour. The appellant would only give the favour at one million. PW3 was advised to report to the IGG. The IGG team arranged for the trap. At court, the appellant ushered in PW3 who gave him the money. When the team moved in to arrest him, they found the money in the appellant's pocket. They also found the summons that the appellant had issued. The appellant admits having pocketed the money claiming it was from his tenant Baine. He justified pocketing the money because he believed the arresting team were robbers coming to steal his money.

If there is an incredible story about this case it has been supplied by the defence. It is amusing in some respects how he receives money from a thief and how he imagines robbers have struck from court to rob him. I would not believe these theories in the least especially against the cogent evidence against him.

The evidence of solicitation may be supported by telephone print outs but in their absence, it can be inferred from what follows. Discussions for a bribe like a conspiracy are secret. It is only in actions that follow that can reveal what was discussed in secret.

PW3 was well known to the appellant. It is a fact that the appellant had issued summons following a case against PW3 in court. The unchallenged evidence on record is that a complaint of solicitation of a gratification was received by the IGG and PW1, PW2 and PW4 arranged for a trap if the complaint was true. They marked the money and gave it to PW3 to deliver. The appellant gladly took it and was arrested with it.

If all these were lies as the appellant wants me to believe, why would the appellant gladly receive it without any suspicion since he believes PW3 was a thief who had stolen his cows and was in the process of prosecuting him? That sounds incredible. It was the appellant's defence that he was being framed because of the jealousy PW3 had about his wealth. It is incredible that he gladly takes money from him fully aware they are not on good terms. One version must be a lie and that is the defence version. The trial chief magistrate asked all these relevant questions and decided that the appellant is a liar. I agree

The events of 17th November 2011 prove that there was prior solicitation of money by the appellant. When PW3 reached court, he was ushered in by the appellant and without questioning, the appellant took what I believe had been agreed upon.

Finally, I was asked to consider that the purpose for the solicitation had not been established since the warrant had not been issued. With respect, I find this to be a weak argument. The warrant had been delayed because of the negotiations which matured with the delivery of the money. Each side kept their bargain.

Upon full consideration of the prosecution evidence on record against the defence testimony which dwelt on afterthoughts and irrelevant matters such as the appellant's troubles in the judiciary, I have come to the same conclusion as the trial chief magistrate that the appellant was guilty of solicitation and receipt of a gratification. He was properly convicted.

Grounds 4 and 5 also fail.

The result is that the appeal is dismissed. The conviction and sentence are upheld.

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Gidudu, J

7th December, 2015