

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.7 OF 2014 (Arising from Buganda Road Court Criminal  
Case No.126 of 2013)**

**1. NUWAGIRA ROGERS**  
**2. TUMUTENDE ENOCK** } :::::::::::::::::::::::::::::::::::::::**APPELLANTS**

**VERSUS**

**UGANDA** :::::::::::::::::::::::::::::::::::::::**RESPONDENT**

**JUDGMENT BY HON. MR. JUSTICE JOSEPH MURANGIRA**

**1. Introduction**

**1.1** The two appellants being filed different memoranda of appeals. The 1<sup>st</sup> appellant, Nuwagira Rogers through his lawyers M/S Bakiza & Co. Advocates filed this appeal against the respondent. Whereas, the 2<sup>nd</sup> appellant through his lawyers Messers A. Murangira, Advocates filed this appeal against the respondent, later the latter firm of Advocates dropped out of the 2<sup>nd</sup> appellant’s appeal. The 2<sup>nd</sup> appellant’s appeal was taken over and argued consultants.

**1.2** The respondent is represented by the Director of Public Prosecutions. The respondent vehemently opposed these two appeals.

**1.3.1** 1<sup>st</sup> appellant’s appeal

The 1<sup>st</sup> appellant in his memorandum of appeal appeals to this Court based on the following grounds; that:-

1. The learned trial Chief Magistrate erred in law and fact when she convicted the accused based on the amended charge he did not plead to and this occasioned a miscarriage of justice.
2. The learned trial Chief Magistrate erred in law and fact when she failed to explain the effect of cross-examination and re-examination of witnesses to the

appellant who was not legally represented yet Court heavily relied on the alleged unchallenged prosecution evidence and this occasioned a miscarriage of justice.

3. The learned Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and frivolously came to the conclusion that the charge had been proved beyond reasonable doubt and this occasioned a miscarriage of justice.
4. The learned trial Chief Magistrate erred in law and fact when she relied on a confession that was illegally obtained by the investigating officer which occasioned a miscarriage of justice.

1.3.2 The 1<sup>st</sup> appellant prayed to this Court for orders; that:-

- (a) The appeal be allowed.
- (b) The conviction be quashed.
- (c) The sentence be set aside.
- (d) By the alternative and without prejudice to the foregoing, if Court is inclined to uphold the judgment and finds the appellant guilty, reduce the sentence.

1.3.3 The 2<sup>nd</sup> appellant's appeal.

1.3.3.1 The 2<sup>nd</sup> appellant in his memorandum of appeal appeals to this

Court based on the following grounds:-

1. The learned Chief Magistrate erred in law when she tried and convicted the 2<sup>nd</sup> appellant for offences which he was not called upon to plead thereby rendering the order of compensation a nullity.
2. The learned trial Chief Magistrate erred in law in failing to afford the 2<sup>nd</sup> appellant all the necessary facilities to aid his defence thereby occasioning a miscarriage of justice.
3. The learned trial Chief Magistrate erred in law and fact in failing to properly evaluate the evidence before her leading to a wrong conclusion in convicting sentencing and ordering the 2<sup>nd</sup> appellant to pay compensation thereby occasioning a miscarriage of justice.

4. The learned trial Chief Magistrate erred in law and fact in illegally sentencing the 2<sup>nd</sup> appellant thereby occasioning a failure of justice.
5. The learned Chief Magistrate erred in law and fact in illegally ordering the 2<sup>nd</sup> appellant to pay compensation thereby occasioning a miscarriage of justice.

1.3.3.2. The 2<sup>nd</sup> appellant prayed to this Court to:-

1. Allow the appeal.
2. Quash the conviction, set aside the sentence and order of compensation.

2. Facts of appeal of both appellants.

2.1 The two appellants were jointly charged with two offences:-

Obtaining money by false pretences Contrary to Section 305 of the Penal Code Act, on Count 1, and Conspiracy to commit a felony Contrary to Section 390 of the Penal Code Act, on Count 2.

They both denied the allegations which were contained in the charge sheet, that Nuwagira Rogers (A1) and Tumutende Enock (A2) between the months of October, 2012 and December, 2012 at Kampala in Kampala District with intent to defraud obtained UGX 8,650,000/= from Aliba Ziria by falsely pretending that they were going to sell her two vehicles whereas not.

It was alleged that in count 2 that the two appellants conspired together to defraud Aliba Ziria of cash amounting UGX 8,650,000/=

The two appellants were tried, convicted, sentenced to 4 years and 3 years respectively and ordered to pay compensation to the complainant (PW1).

The two appellants being dissatisfied with the conviction sentence and order for compensation appealed to this Court against the whole decision by the trial Court.

3. Parties' submissions in this appeal.

3.1 On 29<sup>th</sup> May 2014 when this appeal came up for hearing Counsel for the 1<sup>st</sup> appellant, Mr. Bakiza Chris abandoned ground 4 of appeal and argued grounds

1,2 and 3 together. Whereas, Counsel for the 2<sup>nd</sup> appellant, Mr. Kusiima Peter, abandoned grounds 2 of appeal. He argued grounds 1, 3, 4 and 5 together.

Counsel for the respondent, Ms. Sarah Babirye, State Attorney, argued ground 1 of the 1<sup>st</sup> appellant and ground 1 of the 2<sup>nd</sup> appellant together she also argued ground 3 of the 1<sup>st</sup> appellant and ground 3 of the 2<sup>nd</sup> appellant together. She argued ground 2 of the 1<sup>st</sup> appellant alone. She argued grounds 4 and 5 of the 2<sup>nd</sup> appellant together.

### 3.2 The 1<sup>st</sup> appellant's submissions.

3.2.1. On ground 1, Counsel for the appellant submitted that according to the proceedings of 27<sup>th</sup> May 2013, the prosecution introduced amended charge sheet introducing the 2<sup>nd</sup> appellant to commit a felony. That the appellants never took plea to the amended charge sheet. That the prosecution went on with the hearing of other witnesses Contrary to Section 132 (2) of the Magistrates Courts Act, Cap.16 Laws of Uganda. He evaluated the evidence and the trial Court proceedings to show Court that no plea was taken in respect of the amended charge sheet. He submitted that the trial was a nullity. Ant that ground1 of appeal be allowed by this Court.

On grounds 2 and 3 of appeal, Counsel for the 1<sup>st</sup> appellant submitted that the trial Chief Magistrate never recalled PW1 for cross-examination by the 1<sup>st</sup> appellant. That the 1<sup>st</sup> appellant had a right to cross-examine PW1. That it was the duty of the trial Chief Magistrate to have recalled PW1 for cross-examination in compliance with Section 132 (2) of the Magistrates Courts Act (Supra), that which duty she failed to do. That again, the trial Chief Magistrate failed to advise or warn the 1<sup>st</sup> appellant on the consequences of the failure to cross-examine the prosecution witnesses on material facts on the prosecution evidence. That this failure by the trial Chief Magistrate occasioned miscarriage of justice against the 1<sup>st</sup> appellant.

On ground3, Counsel for the 1<sup>st</sup> appellant submitted that it is that leads to the appropriate conclusion on whether or not the prosecution has proved the case against the accused beyond reasonable doubt. He submitted that in this particular

case, the trial Chief Magistrate failed to evaluate the evidence on Court record. He submitted that in this case the charge sheet is alleging that the appellants obtained UGX 8,650,000/= that yet in the evidence of PW1, when you total up the money being talked about, it comes to UGX 10,743,000/= That in evidence of PW3 at page 21 of the record of appeal, states that what was taken was UGX 7,800,000/=

That therefore, the inconsistencies in the figures alone shows that the ingredient of obtaining UGX 8,650,000/= was never proved. And that in her evaluation she never evaluated fact at page 28 of the record of appeal, 10<sup>th</sup> line from top, that the trial Chief Magistrate said that the total of the money taken was UGX 9,650,000/= Counsel for the 1<sup>st</sup> appellant finally submitted that these inconsistencies are very grave not to constitute a proper evaluation of evidence. He prayed that grounds 2 and 3 be allowed.

### 3.2.2. 2<sup>nd</sup> appellant's submissions for his appeal.

On ground 1 of appeal of the 2<sup>nd</sup> appellant, Mr. Kusiima Peter, in his submissions agreed with the submissions by Counsel for the 1<sup>st</sup> appellant. He submitted that the 2<sup>nd</sup> appellant first appeared in Court on 27<sup>th</sup> May 2013, and that the latter never took plea to the amended charge as required by law. That by that time PW1 had already testified against the 1<sup>st</sup> appellant, but that the trial Chief Magistrate never recalled PW1 for the (A2) accused's cross-examination. That there is also nothing on record to show that the evidence of PW1 was read out to A2 by the trial Court. That since the 2<sup>nd</sup> appellant was not represented by Counsel; he did not know his rights to have PW1 cross-examined.

He further submitted that there is no evidence at all to show that the prosecution proved each ingredient of the charged offences against the 2<sup>nd</sup> appellant. That the only allegation against the 2<sup>nd</sup> appellant is contained in the evidence of PW2. That in this case the trial Chief Magistrate improperly convicted the two appellants for jointly obtaining Shs. 8,650,000/= at the same time.

Furthermore, Counsel for the 2<sup>nd</sup> appellant submitted that the trial Chief Magistrate at the very end of her judgment improperly ordered the appellants to

pay compensation, which compensation amount she did not state in her order. That it is improper for the trial Chief Magistrate to have condemned the 2<sup>nd</sup> appellant to pay back in compensating the complainant UGX 8,650,000/=, that yet there is no evidence that he received that money.

Again, Counsel for the 2<sup>nd</sup> appellant submitted that there is no evidence on Court record to show that the 2<sup>nd</sup> appellant at any time pretended to be selling vehicles to the complainant.

On the offence of conspiracy to commit a felony, Counsel for the 2<sup>nd</sup> appellant submitted that apart from the allegation that A2's telephone number was used to receive part of the money, that there is no other evidence to suggest that A1 and A2 came together and initiated a joint venture to defraud PW1. That the said charge of conspiracy to commit a felony cannot have been proved beyond reasonable doubt.

Counsel for the 2<sup>nd</sup> appellant prayed that the appeal be allowed, conviction quashed, sentence and the order for compensation be set aside.

#### 3.2.3.1. The respondent's submissions in this appeal.

In her submissions, Counsel for the respondent, Ms. Sarah Babirye opposed the two appeals. She supported the judgment, conviction sentence order for compensation of the trial Chief Magistrate.

On ground 1 of the 1<sup>st</sup> appellant and ground 1 of the 2<sup>nd</sup> appellant, Counsel for the respondent submitted that the plea on the amended charge sheet where the two appellants were jointly charged, the plea was not recorded. That, however, there is evidence on Court record that the charges were read to the two appellants and that they responded to the offences charged by denying the charges she prayed that the said ground be disallowed.

Then ground 3 of the 1<sup>st</sup> appellant and ground 3 of the 2<sup>nd</sup> appellant, Counsel for respondent submitted that the trial Court properly evaluated both prosecution and the defence evidence as a whole before reaching her decision in her submissions,

she evaluated that all the ingredients of the offences charged were proved by the prosecution against each appellant beyond reasonable doubt. She prayed that this said ground be disallowed by this Court.

On ground 2 of appeal of the 1<sup>st</sup> appellant, Counsel for the respondent submitted that the trial Chief Magistrate accorded both appellants an opportunity to cross-examine the prosecution witnesses. That no miscarriage of justice was occasioned to the appellants as was argued by Counsel for the appellants. She referred to certain aspects of the proceedings on record to justify her submissions. She prayed that this ground 2 of appeal be disallowed.

Then on ground 4 of appeal of the 2<sup>nd</sup> appellant, Counsel for the respondent submitted that after Court evaluating the evidence on record, and being convicted that the 2<sup>nd</sup> appellant participated in committing the offences as alleged by the prosecution, then the trial Court had powers by law to sentence both applicants to 4 years and 3 years imprisonment respectively. She submitted that the sentence is not illegal.

Finally, on ground 5 of appeal of the 2<sup>nd</sup> appellant, Counsel for the respondent submitted that the order of compensation that was imposed by the trial Chief Magistrate was in accordance with Section 197 of the Magistrates Court Act (Supra). In her submissions she prayed that both appeals be dismissed; conviction sentences and orders for compensation be upheld by this Court.

4. Resolution of the two appeals by Court.

4.1 I have considered the two appeals by the appellants, the submissions by both parties; I then now turn to resolve the appeals of the two appellants. It is important to note that the powers of an appellate Court on appeal from the Magistrates Court is laid down in Section 34 (1) of the criminal Procedure Code Act, which enjoins an appellate Court on record to come to its own decision. Again it is trite law that the duty of the 1<sup>st</sup> appellate Court in a Criminal trial as laid in the case of **Bogere and Another- Vs- Uganda, Supreme Court Criminal**

**appeal No. 1 of 1997; Kifamunte Henry-VS- Uganda Supreme Court criminal Appeal No. 10 of 1997 and also the case of Okwanga Anthony-VS- Uganda Supreme Court Criminal Appeal No.20 of 2000** is that it has a duty to re-hear the case and to reconsider the material evidence before the trial Court. Further the appellants must make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it.

In considering this case, I am being guided by the aforesaid principles in the said cited authorities.

On ground 1 of the 1<sup>st</sup> appellant and ground 1 of the 2<sup>nd</sup> appellant, the plea on the amended charge sheet I would agree with Counsel for the appellants, that there is no plea of not guilty that was recorded by the trial Chief Magistrate. When the amended charge sheet was allowed on the Court record, accordance with Section 132 (2) of the Magistrates Court Act (MCA) (Supra) should have read out the charge to the trial Chief Magistrate would have recorded a plea of not guilty for each accused person in the Court proceedings. The failure by the trial Chief Magistrate not to carefully keep a record of plea of not guilty by the accused persons caused a big irregularity. In this particular case I have considered the proceedings of the lower Court and noted that such irregularity did not cause a miscarriage of justice to the appellants. There is evidence on the Court record of appeal that the amended charge sheet was read and explained to each appellant and that they both responded thereof by denying. On page 16, 1<sup>st</sup> paragraph from the 4<sup>th</sup> line from top of the Court proceedings (page 25 of the record of appeal) the 2<sup>nd</sup> appellant stated in his evidence in defence that:-

**“I did not get any updates about that matter from there up to the date Court ‘rendered’ these charges to me.”**

I bothered to cross-check the original record of the Court (hand written) at page 22 of the court proceedings the word typed as **“rendered”** is actually **“read.”**

Again, I perused the defence of the two appellants (accused); the way each accused responded to the prosecution case gives a clear indication that they knew the case they

were charged with and being tried by the trial Court. It is my considered opinion therefore, that the plea on the amended charge sheet though not recorded, the trial Chief Magistrate must have read and explained the charge sheet to the appellant. The trial Chief Magistrate was only not careful to keep the record of plea of not guilty. In defence the appellants systematically denied the charge charged against them. Failure to record a plea of guilty against each accused (appellant) on the Court record did not cause any miscarriage of justice. This aforesaid technicality is curable under Article 126 (2) (e) of the constitution of the Republic of Uganda. Therefore, to that extent ground 1 of appeal of each appellant fails.

On grounds 3 of appeal of the 1<sup>st</sup> appellant and ground 3 of appeal of the 2<sup>nd</sup> appellant, I have re-validated the evidence on the Court record, and for the offence of obtaining money by false pretences the trial Chief Magistrate considered the evidence of PW1, PW2 and PW3 and the defence of the 1<sup>st</sup> appellant and 2<sup>nd</sup> appellant. On page 2 of the Court proceedings (page 11 of the record of appeal) the complainant, PW1 gave evidence on how she encountered the 1<sup>st</sup> appellant. On page 3 of the record of proceedings (page 12 of the record of appeal) 2<sup>nd</sup> paragraph, 6<sup>th</sup> line, PW1 advanced UGX 7,000,000/= to the 1<sup>st</sup> appellant, later from the 10<sup>th</sup> line from the bottom on the same page, PW1 sent more money to several phones recommended by the appellant for the purpose of securing the two vehicles as assured by the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant never cross-examined PW1 on the strong evidence she gave against him. There is evidence from PW1 that after receiving the said money, the 1<sup>st</sup> appellant (A1) disappeared from her until he was traced by OW2 and arrested. This piece of evidence was never challenged by the 1<sup>st</sup> appellant neither in cross-examination nor in defence. I make a finding, therefore, that that was not a conduct of an innocent person.

At page 8 of the Court proceedings (page 17 of the record of appeal) 1<sup>st</sup> paragraph beginning from 4<sup>th</sup> line PW2 stated:-

**“..... He was with Tumutende Enock. He called Tumutende Enock and asked him for them to meet at Naguru “Go-down.” We arrested Tumutende Enock around the market area where he was working for his colleague.”**

That it is the 1<sup>st</sup> appellant who led to the arrest of the 2<sup>nd</sup> appellant.

PW2's both direct and documentary evidence was not challenged by the appellants in cross-examination not in their respective defences.

In his unsworn testimony in defence, the 1<sup>st</sup> appellant appears to be admitting receiving money from PW1 when he stated at page 15 of the court proceedings (page 24 of the record of appeal) 1<sup>st</sup> paragraph starting from line 7 from the top, that:-

**“She filed this case that she had given me money. Yet we had to give each other money. That is the history of this case.”**

It is my finding that the appellants' defence evidence never negative the prosecution evidence.

As to whether the two appellants conspired to obtain the said conspired to obtain the said money from PW1, PW2 informed Court that during the course of his investigations at page 8 of the Court proceedings (page 17 of the record of appeal) beginning from line 13 from top the evidence is that both appellants received the complainant's money for the purpose of selling PW1 the two motor vehicles which was never done. At pages 28, 29 and 30 of the record of appeal, the trial Chief Magistrate evaluated and considered the evidence of both parties and arrived at the correct decision.

In the premises the said ground 3 of appeal for both appellants must fail.

On ground 2 of appeal of the 1<sup>st</sup> appellant whether the appellants were given an opportunity to cross-examine the prosecution witnesses. On page 5 of the Court proceedings (page 14 of the record of appeal) line 5 from top:

**“Prosecution: The case is for cross-examination.**

**PW1 recalled and cross-examination: yes, we wrote somewhere in acknowledgment of receipt.”**

This clearly shows that PW1 was recalled for cross-examination by 1<sup>st</sup> appellant and that the latter did cross-examine PW1 hence the 1<sup>st</sup> appellant was given an opportunity by the trial Chief Magistrate to cross-examine PW1. Thus, it is not true that the 1<sup>st</sup> appellant was denied that opportunity as alleged by Counsel for the 1<sup>st</sup> appellant.

As for the 2<sup>nd</sup> appellant is concerned, PW1 was never recalled for his cross-examination. However, I perused PW1's evidence on record at pages 11-13 of the record of appeal,

and found out that PW1 in her evidence never mentioned the name of the 2<sup>nd</sup> appellant. The 2<sup>nd</sup> appellant was implicated by PW2 and the 1<sup>st</sup> appellant. Hence, it is my finding that failure to recall PW1 who never implicated the 2<sup>nd</sup> appellant did not cause, in my view, any miscarriage of justice against the 2<sup>nd</sup> appellant.

PW2 who implicated the 2<sup>nd</sup> appellant, was at page 20 of the record of appeal cross-examined; whereby it is stated by the trial Chief Magistrate:-

**“Cross-examination by A2: Nil.**

**Cross-examination by A2: Nil.”**

Therefore, both appellants were given an opportunity to cross-examine and they did cross-examine PW2. It is noted that both appellants never put any questions to PW2 on his testimony in examination –in-chief. Thus PW2’s evidence against the appellants remained unchallenged.

Then at page 21 of the record of appeal PW3 closed his testimony. The appellants were given an opportunity to cross-examine PW3 as indicated by the trial Chief Magistrate thereat:-

**“Cross-examination by A1: Nil.**

**Cross-examination by A2: Nil.”**

It is trite law that a party is at liberty not to cross-examine a particular witness, as and when the adverse party feels that he/she has no question to put to such witnesses. This proposition is supported by Section 137 (1) of the evidence Act, Cap.6 Laws of Uganda, which provides that:

**“Section 137. Order of examinations.**

**(1) Witnesses shall be first examined in Chief, then (if the adverse party so desires) cross- examine, then (if the party calling them so desire) re-examine.”**

Therefore, since the opportunity to cross-examine PW2 and PW3 was availed to the appellants, and they opted not to do so it would not have been proper for the trial chief Magistrate to compel them to put questions to the prosecution witnesses. In the premises, ground 2 of appeal of the 1<sup>st</sup> appellant must fail.

On grounds 4 and 5 of appeal of the 2<sup>nd</sup> appellant, I re-appraised myself on the evidence on record of appeal. The evidence on Court record it is clear that the 2<sup>nd</sup> appellant very well knew the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant is the one who revealed the 2<sup>nd</sup> appellant's participation in the crime; and the evidence of PW2 and PW3 was never challenged by both appellants. Thus the sentences are not illegal as alleged by Counsel for the 2<sup>nd</sup> appellant and supported by Counsel for the 1<sup>st</sup> appellant. My own concern on the sentences is that they are confusing, to say the least. The appellants were charged on two counts. The trial Chief Magistrate at page 32 of the record of appeal last paragraph after considering the mitigating factors by both parties sentenced the accused persons as follows:-

**“I... therefore sentence A1 to 4 (four) years imprisonment. For this offence A2 is sentences to three (3) years imprisonment.”**

Then for A2 (2<sup>nd</sup> appellant) it is stated:

**“A2 is sentences to 3 years imprisonment on count 1 and 2. Compensation is ordered.”**

From the sentencing process, the trial Chief Magistrate gave an omnibus sentence which is improper in accordance with the law. She should have specified a sentence for each count and given an order whether to run concurrently or consecutively against each accused person (appellant). These are sentences, therefore, which should be interested with by this Court. In the premises, the sentences of the appellants are set aside and substituted with a sentence on count 1 of obtaining money by false pretence to fine of Shs. 10,000,000/= (ten millions) or in the alternative failure to pay the said fine to serve the prison sentence of 4 years, on each convict (appellant). Then on count 2 of conspiracy to commit a felony, each convict is sentenced to a fine of shs. 5,000,000/= (five million) or in the alternative, failure to pay the said fine to service the prison sentence of two years.

It is ordered that the sentences on each count for each convict shall run concurrently. The prison sentence begins to run from the time each convict was committed to prison. It is further ordered that the sentence of a fine shall be executed within thirty (30) days from the date of this judgment. It is further ordered that when the fines of total to UGX 20,000,000/= are paid into Court, the same shall be paid to the complainant as

compensation for the loss of her money, costs of following up this case during its prosecution, interest to cover the loss of value in money due to inflation and general damages she might have suffered.

The order for compensation is pursuant to Sections 195 and 197 of the Magistrate s Courts Act (Supra). To that extent, therefore, the order for compensation that was awarded by the trial Chief Magistrate is set aside. The said fine totaling to UGX 20,000,000/= shall be paid to the complainant by the Deputy Registrar of this Court within thirty (30) days from the date of receipt of the said money. In the premises, grounds 4 and 5 of appeal of the 2<sup>nd</sup> appellant partially Succeeds.

**5. Conclusion.**

In the result and for the reasons given hereinabove in this ruling, the appeal of each appellant is dismissed. The conviction of the trial Court is upheld. The sentences and the award of compensation by the trial court are set aside and substituted with sentence and order given above.

Date at Kampala this 10<sup>th</sup> day of June, 2014.

.....

**Joseph Murangira**  
**Judge.**

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.7 OF 2014 (Arising from Buganda Road Court Criminal Case No.126 of 2013)**

**1. NUWAGOIRA ROGERS }  
2. TUMUTENDE ENOCK } .....:APPELLANTS**

**VERSUS**

**UGANDA .....:RESPONDENT**

**REPRESENTATION**

10/6/2014

Mr. Bakiza Chris for the 1<sup>st</sup> appellant.

Mr. Peter Kasiima for the 2<sup>nd</sup> appellant.

Counsel for the respondent is absent.

The appellants are in Court.

We are ready for the judgment.

Ms. Catherine Musoke the clerk is in Court.

Court: Judgment is delivered to the parted. R/A is explained.

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**Joseph Murangira**

**Judge**

**10/6/2014**