

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CRIMINAL APPLICATION No. 0036 OF 2016
(Arising from High Court Criminal Appeal No. 014 of 2014 from the decision of the Chief Magistrate’s Court at Adjumani in Criminal Case No. 074 of 2014)

IDRIFUA PATRICK **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under the provisions of section 41 of *The Criminal Procedure Code Act*, and section 39 (2) of *The Judicature Act*, for leave to adduce additional evidence by affidavit, at the hearing of the appeal. It is supported by the affidavit of the applicant in which he deposes that he was denied a fair trial by the Chief Magistrate at Adjumani, since the trial magistrate was biased against him and deliberately excluded from the record of proceedings, his application that the trial magistrate disqualifies himself from the conduct of the trial. The hostility between the trial magistrate and the applicant stemmed from the manner in which the trial magistrate handled the cash bond paid into court for the applicant’s release on bail pending his trial and suspected infidelity of the applicant’s wife committed with the trial magistrate. It is necessary that the facts relating to those circumstances be adduced as additional evidence at the hearing of the appeal.

In his affidavit in reply, Mr. Matata Mohammed the Police Prosecutor who prosecuted the case opposes the application and instead contends that the applicant did not make any application during his trial for the trial magistrate to disqualify himself. The evidence of bias intended to be adduced by the applicant is not credible and the application therefore should be dismissed since the applicant received a fair trial

Submitting in support of the application, counsel for the applicants Mr. Paul Manzi expounded further the grounds contained in the motion and affidavit in support and argued that the applicant needs leave to adduce evidence of bias by the trial magistrate and hostility and unfairness in the trial, which evidence was not reflected in the proceedings but if leave is granted he can adduce such evidence by affidavit and has witnesses who were in court on the date in issue, 19th May 2014. They will confirm by affidavit what transpired when he asked the magistrate to disqualify himself but that the magistrate declined to disqualify himself and he did not reflect it on the trial record of proceedings. According to paragraph 13 of the affidavit in support of the motion, the hostility of the trial magistrate stemmed from the fact that the trial magistrate granted the applicant bail at shs. 2,000,000/= which the applicant paid but was surprised that on the bail form it was indicated as “not cash.” Annexure A3 which is the bail form indicates an attempt to add “NC” after the amount. A receipt was eventually issued and it is annexure A8 but it was issued after the complaint raised by the applicant.

According to counsel, the affidavit in reply is by the prosecutor who prosecuted the case and in paragraph 6 he confirms that the applicant was ordered to pay “not cash.” In the response submitted by the trial magistrate to the Judicial Service Commission following a complaint lodged there by the applicant, annexure A7 at page 3 the third last paragraph, the magistrate stated that the bail money was subsequently given to the victim. This was a cover up. The money was never received by the applicant’s wife. The affidavit in reply is suspect and an affidavit which contains a falsehood cannot be relied upon. That paragraph is in sharp contradiction of A7. The proceeding of the trial court is annexure A10 and the second last paragraph at page 11 is the attempted accountability. The unfair treatment originated from that dispute between the applicant and the court on bail money. His evidence will show that there was a mistrial because of self interest of the trial magistrate and the fact that the complaint in that case is the wife of the applicant. The charge was an assault and he wants to show that the magistrate was biased not only because of the bail money but the applicant’s wife was paying late night visits to the magistrate.

Annexure A2 to the affidavit in support of the motion will show that the applicant made complaints addressed to the IGG as the trial was going on. Annexure A5 shows that he filed a

complaint with the Judicial Service commission and he obtained a copy of the complaint when he filed A4. He had a valid fear that he would not obtain a fair trial. It would have been proper that the record indicates the application for the magistrate to disqualify himself but the record does not do so. He was unrepresented at the time. The magistrate should have stepped down and the evidence will show a mistrial. The affidavit in reply by the prosecutor is tainted with falsehood, but even if not disregarded he was a prosecutor who had an interest in the case and his affidavit is unreliable especially when he says that on 19th the applicant did not ask the trial magistrate to disqualify himself. The clash could have clouded his mind. The magistrate ordered a separation even when there was no matrimonial cause before him. He prayed that the application should be granted.

In her reply, the learned Senior Resident State Attorney, Ms. Harriet Adubango submitted that the application should not be granted. Paragraph 6 of the affidavit in reply is just a typing error as it was intended to show that it was a shs. 2,000,000/= cash bail and not a non-cash bail. This was not a deliberate falsehood. The police prosecutor was the best person to swear the affidavit. In paragraphs 3 and 4 of his affidavit, he narrates the process of the trial and how there was never any application for the magistrate to disqualify himself. The applicant's allegations contained in his complaints to the Judicial Service Commission and The Inspector General of Government were a design to prevent the trial rather than genuine complaints. The fact that he alleged incredible nightly visits of his wife to the trial magistrate is corroboration of the design. There was no mistrial. There was nothing affecting suitability of the magistrate to preside and these were flimsy allegations better handled by other institutions. The magistrate knew the allegations were being handled by other competent organs and he had no reason to disqualify himself. The affidavit is not false and it should be relied on. If considered as an application for reconstruction of the trial record, that should be done by the trial court and not by this court by way of additional evidence. Bias should have been argued as a ground of appeal for the court to make a determination based on the submissions. She prayed that the application should be dismissed.

In rejoinder, counsel for the applicant submitted that the order allowing the applicant's wife to remove her property from the home was upon the order of court as shown by annexure A4 to the affidavit in support of the motion. Bias need not be real but it is sufficient if it is shown to exist

by the perception of a reasonable person. He relied on the case of *Prof. Isaac Newton Ojok v. Uganda*, a decision of the Supreme Court of Uganda. There was bias in this case which can be proved and that it caused a mistrial and it cannot be argued as a ground without the evidence being part of the record. The magistrate did not record the objection and therefore the applicant needs to adduce evidence and make it part of the record. Evidence of bias would be part of a reconstruction as well as leave to adduce additional evidence. The court should invoke its inherent power to ensure that justice is done.

The background to this application is that the applicant, who at the time was the sub-county chief of Pekele sub-county in Adjumani District, was on the 15th day of May 2014 charged with one count of Assault Occasioning Actual Bodily Harm C/s 236 of *The Penal Code Act* whereupon he pleaded not guilty. It was alleged that on the 2nd day of May 2014 at Lajopi Cesia village, Cesia Parish in Adjumani Town Council, Adjumani District, he assaulted Apio Evalyne. The complainant in the case was his wife. The applicant was released on bail on 19th May 2014 and hearing of the case commenced on 30th June 2014. The applicant did not have legal representation during his trial. The prosecution led evidence of three witnesses and the applicant was put to his defence on 2nd July 2014. The applicant initially indicated that he would make an unsworn statement in his defence where after his bail was cancelled and he was remanded on grounds that he posed a threat to the safety of the complainant but two days later on 4th July 2014 when his defence was due to open, he opted not to say anything in his defence and did not call any witnesses. In a judgment delivered four days later on 11th July 2014, he was convicted as charged. He was sentenced to three years' imprisonment and ordered to pay the complainant compensation of shs. 4,000,000/=, to be partly paid by way of the shs. 4,000,000/= he had deposited as bail bond. Being dissatisfied with the outcome of the trial, the applicant lodged an appeal against conviction and sentence. He then filed the current application seeking leave to adduce additional evidence during the hearing of the appeal.

It is trite that litigation must come to an end (see *Brown v. Dean [1910] AC 373, [1909] 2 KB 573*). For that reason, Lord Loreburn LC considered an application for a new trial in that case on the ground of *res noviter*, and said in relation to the exercise of a power to admit further evidence if it was thought "just", then the evidence;

Must at least be such as is presumably to be believed, and if believed would be conclusive.....My Lords, the chief effect of the argument which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine “*Interest reipublicae ut sit finis litium*”, remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist.

The maxim *interest reipublicae ut finis litium* is strictly followed. Courts should not be mired by endless litigation which would occur if litigants were allowed to adduce fresh evidence at any time during and after trial without any restrictions. Courts hence tend to be stringent in allowing a party to adduce additional evidence on appeal, thereby re-opening a case, which has already been completed. On the other hand, courts must administer justice and in exceptional circumstances, new evidence should be allowed. The appellate court should weigh these two interests when determining whether a party may adduce additional evidence not presented at the appeal stage. Interpreting the scope of this balancing act in *Mzee Wanje and others v. Saikwa and others* [1976–1985] 1 EA 364, the court commented;

This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.

In general, it would undermine the whole system of criminal justice and respect for the law if it were open to a party to be able to re-run a trial simply because potentially persuasive or relevant evidence had not been put before the court. An obligation rests on the parties to adduce any material evidence before the court, and if they fail to do so they cannot require a second hearing to put the matter right. Exceptionally, however, justice conflicts with the principle of finality. Evidence sometimes emerges which suggests that the court may have reached the wrong decision in circumstances where it might be unjust not to reopen the judgment. Hence the courts have developed principles for determining when justice requires a case to be re-opened and a

new trial ordered. The jurisprudence is longstanding but the principles were pithily encapsulated over by Denning LJ, as he then was, in *Ladd v. Marshall* [1954] 1 WLR 1489 at 1491.

In that case, at the trial, the wife of the appellant's opponent said she had forgotten certain events. After the trial she began divorce proceedings, and informed the appellant that she now remembered. He sought either to appeal admitting fresh evidence or for a retrial. The Court considered guidelines for the admission of new evidence on an appeal against the background of its availability at the first hearing. Such evidence might be admissible where a witness had made a material mistake and wished to correct it. If a witness had been bribed or coerced into telling a lie and wished to correct it, then a retrial might be appropriate. Per Lord Denning:

First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible. The evidence must be such that as is presumably to be believed or in other words it must be apparently credible though it need not be incontrovertible.

The decision in *Ladd v. Marshall* was approved in *Skone v. Skone* [1971] 1 WLR 817 where the husband appealed, seeking a new trial of a divorce petition following the discovery of fresh evidence consisting of a bundle of love letters from the co-respondent to the wife clearly showing that, contrary to his sworn evidence, he had committed adultery with her. The court admitted the fresh evidence on grounds that a strong prima facie case of wilful deception had been disclosed, and a new trial was ordered. In that case, Lord Denning said:

It is very rare that an application is made for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence for a new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, although it need not be incontrovertible.'

In agreement, Lord Hodson said:

Assuming, as I think your Lordships must for the purposes of this application, that the letters sought to be tendered as evidence are genuine, the basis of the judge's finding of fact at the trial has been falsified to such an extent that to leave matters as they are would, in my opinion, be unjust.....A strong prima facie case of wilful deception of the court is disclosed....” and “The situation of the wife is or was, however, at the material times a peculiar one in that she was in the opposite camp in the sense that she was anxious not to do anything without the approval of the co-respondent, feeling that her interests were bound up with his. The petitioner was advised by counsel, as I have said, and I find it impossible to hold that in these circumstances it is right to hold that the petitioner failed to exercise due diligence in this matter.

Those principles were followed in *Mzee Wanje and others v. Saikwa and others [1976-1985] I E.A 364 (CAK)* and *Attorney General v. P. K Ssemogerere and others [2004] 2 EA 7*. In the case of *Mzee Wanje*, the court of Appeal of Kenya had this to say:

It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court's decision. I consider that the same test should be applied to our rules for otherwise it would open the door to litigants leave until an appeal all sorts of material which should properly have been considered by the court of trial” Emphasis added.

Those principles were re-stated by the Supreme Court in *Makubuya Enock William T/a Polly Post v. Bulaim Muwanga Klbirige T/a kowloon Garment Industry, Civil Application No. 133 of 2014* and in *Hon. Bangirana Kawoya v. National Council for Higher Education Misc. Application. No. 8 of 2013* where it held:

A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

- i. Discovery of new and important matters of evidence which, after the exercise of due diligence, were not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;
- ii. It must be evidence relevant to the issues;
- iii. It must be evidence which is credible in the sense that it is capable of belief;
- iv. The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;

- v. The affidavit in support of an application to admit additional evidence should have attached to it, proof of evidence sought to be given;
- vi. The application to admit additional evidence must be brought without undue delay.

It was further held in *Karmali Tarmohamed and Another v. T.H. Lakhani and Co.* [1958] EA 567; *S.M. Bashir v. The Commissioner of Income Tax* [1961]1EA 508; *G.M. Combined (U) Ltd v. A.K. Detergent Ltd and others* [1999] 1 EA 84 and *Namisango v. Galiwango and another* [1986] HCB.37, that except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available. It is an invariable rule in all the courts that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial

In *Hon. Anthony Kanyike v. Electoral Commission and two others C.A Civil Application No. 13 of 2006, arising from C.A. Election Appeal No. 4 of 2006*, it was decided that fraud was an exceptional circumstance enough in itself to justify leave to adduce additional evidence on appeal to prove that at the trial of the petition, the 3rd respondent, fraudulently told a lie to court about his names and that the court believed his lie hence its judgment in his favour. This would be proved by way of evidence of records of entry of the 3rd respondent into Senior One at St. Mary's College Kisubi as opposed to the one he used in his Nomination papers for the 23rd February 2006 Parliamentary elections for the Constituency. It was also admissible as evidence that elucidated on the evidence that had emerged from or was already on record, to ensure that the ends of justice are attained.

The general rule therefore in civil appeals is that, except on the grounds of fraud or surprise, an appellate court would admit fresh evidence only where it was not available to the party seeking to use it at the trial, or reasonable diligence would not have made it so available (see *Emomeri v. Shell (U) Ltd* [1999] 1 EA 72). A similar position has been taken in criminal appeals such as is evident in *Mudasi v. Uganda* [1999] 1 EA 193; *Elgood v. Regina* [1968] 1 EA 274 and *Kiama v. Republic* [2006] 1 EA 114 where it was held that the principles upon which an appellate court in

a criminal case will exercise its discretion in deciding whether or not to allow additional evidence to be called for the purposes of the appeal are: (i) the evidence that it is sought to call must be evidence which was not available at the trial; (ii) it must be evidence relevant to the issues; (iii) it must be evidence which is credible in the sense that it is well capable of belief; (iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the mind of the trial court as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. It is only in very exceptional cases that the Court of Appeal will permit additional evidence to be called. In that case, the court commented that the affidavit in support of the application to admit additional evidence should have attached to it proof of the evidence sought to be given but in the circumstances, in the interest of justice, the application was allowed.

Hence in exceptional cases, the appellate court will take in evidence at the appellate stage that elucidates on the evidence already on record, as opposed to the introduction of an altogether new matter, that was never raised or does not emerge at all from the evidence already on record (see for example *R. v. Yakobo Busigo s/o Mayogo (194.5) 12 EACA 60* where the Court of Appeal for Eastern Africa made a distinction between new evidence in a trial and evidence adduced to elucidate evidence already on record). It must be evidence which provides greater detail or sheds additional light on the evidence adduced at trial.

Appellate courts will not admit additional evidence which introduces a matter that is new altogether, which was never raised or does not emerge at all from the evidence already on record. For example in *Regina v. Secretary of State for the Home Department ex parte Momin Ali, [1984] 1 WLR 663, [1984] 1 All ER 1009*, the fresh evidence that was sought to be introduced was clearly available and should have been placed before the trial Judge. On application to the appellate court for its admission as additional evidence, it was held that it was not the function of the court, as an appellate court, to retry the matter on different and better evidence. The appellate court is concerned to decide whether the trial judge's decision was right on the materials available to him, unless the new evidence could not have been made available to him by the exercise of reasonable diligence or there is some other exceptional circumstance which justifies its admission and consideration by this court. That was not so in that case.

The integrity of the criminal process and the role of appeal courts could be jeopardised by the routine admission of fresh evidence on appeal. If an appellate court thinks it fit to admit fresh evidence, it will do so only because it is in the interests of justice to admit it. The appellate function can be expanded in exceptional cases, but the appellate process should not be used routinely to augment the trial record otherwise, the finality of the trial process would be lost and cases would be retried on appeal whenever more evidence was secured by a party prior to the hearing of the appeal (see *McMartin v. The Queen*, [1964] S.C.R. 484 at p 148). Furthermore, although a first appellate court is required to re-evaluate the evidence adduced before the trial court, appellate jurisdiction does not provide the appropriate forum in which to determine questions of fact based on fresh evidence, and that should only be done when the fresh evidence presents certain characteristics such as would justify expanding the traditional appellate role.

The considerations for the admission of additional evidence on appeal as developed by the courts are geared towards evidence that goes to the merits of the case. In the instant application, the additional evidence that is sought to be adduced does not go to the merits of the case but rather to the fairness of the trial. A fundamental consideration in any trial will be the independence and impartiality of the court. Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* guarantees to every accused person, trial by an independent and impartial court or tribunal established by law. Much as this provision has implications for the safeguards for judicial officers against improper pressures it also envisages circumstances which may give rise to both actual bias on their part or, more commonly, well-founded apprehension that this might exist. In this context, this court is cognisant of one cardinal principle, expressed in the words of Lord Hewart, L.C.J, in *R. v. Sussex Justices ex p. M'Carthy*, [1924] 1 K.B. 256 at p. 259, that:

It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

Circumstances that necessitate the admission of additional evidence on appeal are not limited to material that goes to the merits of the case. For example in *Sadrudin Shariff v. Tarlochan Singh s/o Jwala Singh* [1961] 1 EA 72, a magistrate held an inquest on the body of a man who had died of a shotgun wound. Within eighteen hours of the death of the deceased, the magistrate returned

a verdict of suicide whilst the balance of the mind of the deceased was disturbed. The widow of the deceased requested the Attorney General to apply to the court for an order to reopen the inquest and, when he refused, applied ex-parte for a writ of certiorari to quash the verdict on the grounds that the inquest was heard with undue haste, that there was insufficient investigation of the circumstances leading to the death and that further evidence was available. The grounds upon which relief was sought were set out as:

The inquest was opened and heard with undue haste, there was no proper investigation into the facts leading up to and surrounding the death, and the coroner conducted the inquest cursorily and superficially, and reached an erroneous verdict on the evidence which was or should have been before him. The grounds are more fully set out in the memorial of the said Anne Nicholson annexed hereto.

It was held that since the deceased's widow obviously considered that justice had not been done in the absence of the additional evidence available, and as justice must manifestly be seen to be done, this was a proper case for directing that the inquest be reopened for taking additional evidence.

In *Malima v. Republic* [1968] 1 EA 455, the appellant was convicted of housebreaking and stealing and on appeal against sentence and conviction to the district court, the district court observed that the evidence taken in the court of first instance was not clear as to whether there had actually been a "breaking" of the premises concerned. The learned magistrate took additional evidence on the point of whether there had been a "breaking" of the premises concerned. The evidence was taken in the presence of the appellant who cross-examined the witness. The appeal was dismissed and the appellant appealed to the High Court. It was held that the procedure followed by the magistrate in taking additional evidence was a proper one and no injustice was done to the appellant and hence the appeal was dismissed.

In *Mrema v. Kivuyo* [1999] 1 EA 190, on a second appeal to the High Court, the Judge had called for additional evidence of the trial primary court Magistrate to clarify on the assessors who had taken part at the trial. This was prompted by the fact that it was indicated on record that at some stage the names of two assessors had been cancelled and substituted with two others thus giving the impression that two sets of assessors were used in the trial. The additional evidence was by

way of an affidavit of the trial primary court Magistrate. The trial Magistrate in her affidavit confirmed that she sat throughout the trial with the same set of assessors. The Learned Judge examined the record of the trial and was satisfied that the signatures of the assessors for the date complained against were similar to those shown in respect of other dates for the trial. On the evidence on record together with the affidavit, the Judge on second appeal dismissed the appeal. The Appellant dissatisfied, lodged a third appeal in the Court of Appeal. There it was held that The Learned Judge of the High Court properly exercised the powers vested in the court in exercise of its appellate jurisdiction in taking the additional evidence of the trial Magistrate to ascertain the assessors who sat with the trial Magistrate; such evidence was neither prejudicial to the Appellant nor was it further evidence in proof of the case. It was additional evidence for the purpose of enabling the Learned Judge to satisfy himself that the procedure followed by the trial Magistrate was correct.

It therefore emerges that whether addressing additional evidence going to the merits of the case or additional evidence going to the propriety of the trial, the overriding consideration must be the interests of justice. Since courts must administer justice, in exceptional circumstances, additional evidence should be allowed. The exceptional circumstances have invariably related to discovery of new and important matters of evidence which, after the exercise of due diligence, were not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence. The instant application raises an entirely different scenario of an applicant who does not claim discovery of new and important matters of evidence, but rather one that claims the trial magistrate declined to place on record, important matters of evidence that were material to the fairness of the trial.

Attached to the affidavit in support of the application are copies of the documentary evidence sought to be adduced as additional evidence on appeal. Annexure A2 is a handwritten complaint by the applicant to the Inspectorate of Government Regional Office at Moyo dated 22nd May 2014 alleging that when he deposited the cash bond of shs. 2,000,000/= for his release on bail, he was instead issued with a bail bond form (annexure A3) with an endorsement, “NC”, after the amount stated in words, indicating that he had not paid cash. He repeated that accusation subsequently in a letter to the Judicial Service Commission dated 1st July 2014 (annexure A.5)

adding that he was eventually issued with a general receipt (annexure A8) only after complaining about the insertion of the initials of “NC” on his bail bond form. In the same complaint, he claimed that on the day he was charged and remanded, the trial magistrate forced him to hand over the keys to his house thereby facilitating the complainant to collect her property from the residence and vacate the home. This is evidenced by annexure A4 dated 15th May 2014, an inventory of items taken by the complainant (the court observes that it has curious content such as; the reference CRB 99/14, the phrase “under Adjumani Magistrate’s Court Order,” and the signatures of Cpl. Chombe L. and W/SPC Lulua Beatrice) which tend to corroborate the applicant’s claim of the court’s involvement in the exercise. He concluded;

I strongly feel that the Grade One Magistrate Adjumani (Mr. Kitiyo Patrick) has taken sides and should not hear my case. Lastly may your honourable office help me recover the two million cash and some of my properties and ensure that my case is heard by another magistrate.

On 29th July 2014, writing in response to the complaint made by the applicant to the Judicial Service Commission (annexure A7 to the affidavit in support of the application), the trial magistrate stated that he did not force the applicant to hand over the keys of the residence but that he did so cordially in which event he asked the court orderly W/SPC Lulua Beatrice to accompany the complainant home and facilitate her evacuation. The applicant was released on a cash bond of shs. 2,000,000/= and he was issued with a general receipt. During the entire trial, the applicant did not complain about the complainant’s evacuation nor did he ask the trial magistrate to disqualify himself. Upon conviction, the amount the applicant had deposited in court was handed to the complainant “to cater for her further treatment and for the upkeep of a young baby, leaving a balance of shs. 2,000,000/= to be paid by the convict on completion of sentence. I therefore look at this complaint as strange, malicious and made in bad faith.”

It was contended by counsel for the applicant that the prosecutor was not competent to swear the affidavit in reply. To the contrary it is my considered opinion that since the additional evidence sought to be adduced relates to the manner in which the trial was conducted, the prosecutor is among the persons best suited to explain. When a similar situation arose in *Attorney General v. P. K Ssemogerere and others* [2004] 2 EA 7, the Supreme Court observed that in an application to adduce additional evidence on appeal in that case, any one or more of the other officers who

handled the petition and the appeal should have explained by affidavit why copies of the speaker's certificate and of the Hansard were not produced as evidence at the hearing of the petition or as additional evidence on appeal to that Court. When the Court questioned the learned Solicitor General on this point his answer was that the responsible State Attorney was on suspension. He was criticised for his failure to explain what efforts had been made to get that officer to give such explanation by affidavit even though he was on suspension or why the others had not done so. The affidavit in reply in the instant case cannot be disregarded.

It is contended by the applicant that it is his insistence on being issued with a receipt for the cash bond he deposited in court that generated acrimony between him and the trial magistrate which created bias in the mind of the trial magistrate manifested by his decision to facilitate the complainant to vacate his home and refusal to record his subsequent application for the magistrate to disqualify himself. Annexures A3, A7 and A8 are designed to establish that causal link. In situations of allegations of bias, Lord Denning, M.R. in *Metropolitan Properties Ltd. v. Lannon*, [1968] 3 All E.R. 304, held that it is enough if seemingly there is cause to think that the decision maker must have been biased. The court looks at the impression that would be given to other people. In his learned treatise *The Discipline of Law* (Butterworth, London, 1979 at 86-87), Lord Denning further addressed the question of judicial bias and referred approvingly to what Devlin J (as he then was) said in *Rep v. Barnsley Licensing ex parte Barnsley and District Licensed Victuallers Association* [1960] 2 QBD 169, where he set out the standard to be applied on the question of bias:

In considering whether there was a real likelihood of bias, the court does not look at the Justice himself or at the mind of the chairman of the tribunal or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which no reasonable man would think it likely or probable that the justice or chairman as the case may be, would or did favour one side unfairly at the expense of the other.

In *Professor Isaac Newton Ojok v. Uganda, S. C. Criminal Appeal No. 33 of 1991*, it was decided that;

The court does not look at the mind of whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression, which would be given to other people. Even if he was as impartial as could be, nevertheless if fair minded persons would think that, in the circumstances, there was a real likelihood of bias, then he should not sit, and if he does sit, his decision cannot stand. Nevertheless, there must appear to be real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the Justice ... would or did favour one side unfairly at the expense of the other.

Similarly in *Tumaini v Republic [1972] 1 EA 441*, it was held that in considering the possibility of bias, it is not the mind of the judge which is considered but the impression given to reasonable persons. (see also; *R. v. Camborne Justices ex p. Pearce, [1955] 1 Q.B. 41*; *Metropolitan Properties v. Lannon, [1969] 1 Q.B. 577 at p. 599*; *R. v. Gough [1993] A.C. 646 at 670*; *Ex parte Barusley and District Licensed Valuers Association (1960) 2 Q B D 169*; *Obiga Mario Kania v. Electoral Commission and another, C. A. Election Petition Appeal No. 4 of 2011*; *G.M. Combined (U) Ltd v. A.K. Detergent Ltd and four Others, S. C. Civil Appeal No. 7 of 1998*; *Shell (U) Ltd and Nine others v. Muwema and Mugerwa Advocates and Solicitors and another, S. C. Civil Appeal No. 02 of 2013* and *Professor Isaac Newton Ojok v. Uganda, S. C. Criminal Appeal No. 33 of 1991*). However, objection cannot be taken to everything which might raise a suspicion in somebody's mind (per Lord Goddard, L.C.J., in *R. v. Nailsworth Licensing Justices ex p. Bird, [1953] 2 All E.R. 652 said at p. 654*).

However, where the challenge to the impartiality of the trial court is not on record, an appellant may be handicapped in raising it as a ground on appeal. For example in *Raphael s/o Raphael Njahiti v. R [1960] 1 EA 1013*, the appellant was convicted of burglary and theft among several other counts and sentenced to imprisonment for fifteen months and three months concurrently. The first complaint on appeal was an allegation against the trial magistrate of bias resulting from past personal relationships. The appellant, who was an educated and intelligent son of a chief, said that he objected to being tried by the magistrate. There was no record of any such objection

and the appellate court did not believe that any was made. The court opined that if it had been made it would have been considered and the trial might have been before another magistrate. It was too late to challenge the neutrality of the magistrate on appeal. The appellate court chose to disregard a letter that was brought to its attention but which did not form part of the record. The appeal was therefore dismissed.

It is considered improper for a party to seek to attempt to influence the decision of an appellate court with evidence which was neither properly adduced and admitted during proceedings in the lower court nor received by order of that appeal court. In *General Parts (U) Limited and another v. Non-Performing Assets Recovery Trust [2006] 2 EA 57*, counsel for the respondent raised a preliminary issue regarding the contents of the record of appeal. They argued that parts of the record consisting of correspondence, legal opinions, records of proceedings, purported releases of mortgages and copies of law reports and judgments, had been included contrary to the rules and that those parts ought to be expunged. The Court held that the purpose of the rule was to ensure that the record contained only what was permissible and necessary for the determination of the appeal. In this instance, the documents had been included in disregard of the principle that an appellate court acted only on material that was properly before the trial court unless for good cause the appellate court gave leave to any party to adduce additional evidence on appeal. The court therefore decided that the documents would be disregarded save for those that the Court of Appeal had relied on in arriving at its decision. It is possibly the reason why in the instant application, the applicant seeks to get that material on record first so that the issue of bias in the mind of the trial magistrate can be addressed as one of the grounds of appeal.

A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real or apprehended. The additional evidence intended to be adduced, considered in isolation; on the face of it would cause a reasonable person to suspect that the trial magistrate acted with bias and that he unfairly favoured the complainant at the expense of the applicant. The conduct of the magistrate can easily lend itself to the argument that his embroilment with the applicant could have affected his mind and coloured his vision thereby preventing him from giving the applicant the proper and fair hearing guaranteed to him by Article 28 of *The Constitution of the Republic of Uganda, 1995*. The final determination as to whether this

suspicion is well founded or whether this indeed actually occurred can only be made after the evidence is admitted and considered alongside the rest of the evidence adduced and material on record assembled during the trial. The court is empowered by the law to exercise its discretion to take additional evidence, if sufficient reasons exist in order to arrive at a fair and just decision. The interests of justice encompass not only an accused's interest in having his or her guilt determined upon all of the available evidence, but also the integrity of the criminal process. The impugned aspects of the trial should be construed in light of the whole of the trial proceedings.

Despite the foregoing, I hasten to add for the avoidance of any doubt that in situations where an objection is taken on proper grounds at the commencement of or during the trial, the case may be transferred from the court of the Magistrate or the Judge, objected to, as a matter of judicial practice. No such question of judicial practice can arise as a practical question after a trial has come to an end and at that stage, the validity or otherwise of the trial already concluded must be determined by reference to the strict principles of law or indications of actual mistrial.

That notwithstanding, this application in a way touches on the possibility of introducing the materials in possession of the applicant as a re-construction of the trial record to the extent that he contends that the part relating to his application for the trial magistrate to disqualify himself was deliberately omitted from the record by the trial magistrate. Where a record of trial is incomplete by reason of parts having been omitted or gone missing, or where the entire record goes missing, in such circumstances appellate courts have the power to either order a retrial or reconstruction of the record by the trial court (see *East African Steel Corporation Ltd v. Statewide Insurance Co. Ltd* [1998-200] HCB 33). It was noted in *Haiderali Lakhoo Zaver v. Rex* (1952) 19 EACA 244, that it is necessary in determining whether to order a retrial to look at the evidence tendered during the initial trial so that if the Court is satisfied that if the same evidence was to be re-tendered, a conviction may result, it can order a retrial. But where it is not possible to determine the appeal on such material as is available or cannot be made available due to part of the record having gone missing, the record could be reconstructed from notes of the evidence taken by counsel and on the information they had, failure of which a re-trial may be ordered. A missing court record or part thereof could therefore be reconstructed by having all copies of documents and notes in possession of each of the parties' advocates compiled. Upon

compiling their respective bundles of documents, and notes, they would then approach the court for purposes of agreeing on the documents and court orders that would then be used and adopted to reconstruct the court file, which when verified by the trial magistrate, are certified and produced by consent to constitute the missing court file or part thereof. Reconstruction of the trial record is thus done by the trial court.

In the instant case, ordering a reconstruction of the record by inclusion of that objection is impracticable since the trial magistrate is being accused of improperly and prejudicially excluding that aspect of the proceeding from the trial record yet the trial magistrate (in annexure A7 to the affidavit in reply) and the prosecutor (in his affidavit in reply) both deny the claim that the applicant ever made such a prayer. The only option open to the applicant is that of adducing those aspects of the trial as additional evidence on appeal and allowing the prosecution to introduce evidence in rebuttal.

Section 41 (1) of *The Criminal Procedure Code Act* empowers an appellate court when dealing with an appeal from a lower court, if it thinks additional evidence is necessary, to record its reasons and to take that evidence itself or to direct it to be taken by the lower court. This provision confers a broad discretion on an appellate court if thinks fit to admit additional evidence if it is in the interests of justice to admit it, provided that it is relevant and credible, and could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The overriding consideration must be the interests of justice.

The first consideration is that the intended additional evidence must be evidence which was not available at the trial, was not within the knowledge of the applicant or could not after the exercise of due diligence, have been produced at the trial. The purpose of the due diligence criterion is to protect the interests of the administration of justice and to preserve the role of appellate courts. The first criterion, due diligence, is not a condition precedent to the admissibility of “additional” evidence in criminal appeals, but is a factor to be considered in deciding whether the interests of justice warrant the admission of the evidence (see *McMartin v. The Queen*, [1964] S.C.R. 484 at pp 148-50 and *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p 205). Due diligence is only one factor and its absence, particularly in criminal cases, should be

assessed in light of other circumstances. In other words, failure to meet the due diligence criterion should not be used to deny admission of additional evidence on appeal if that evidence is compelling and it is in the interests of justice to admit it. If the evidence is compelling and the interests of justice require that it be admitted then the failure to meet the test should yield to permit its admission. In the instant case, the nature of the evidence sought to be adduced being directed at the fairness of the trial rather than the merits of the decision, does not lend itself to the application of this criterion.

Secondly, and this goes without saying, it must be evidence relevant to the issues. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue. A fundamental consideration in any trial is the independence and impartiality of the court as required by Article 28 (1) of *The Constitution of the Republic of Uganda, 1995*. A fair trial is one that is based on the law and its outcome determined by the evidence, free of bias, real or apprehended. To the extent that the additional evidence relates to the impartiality of the court that tried him, I find it to be relevant.

Thirdly, it must be evidence which is credible in the sense that it is capable of belief. It is not for this court to decide at this stage whether it is to be believed or not, but it must be evidence which is capable of belief. What is important is that the facts must be sufficiently stated, at least in general terms, on basis of which an objective preliminary assessment as to their cogency can be made, the proper test being whether the inference proposed to be made is supported by the evidence intended to be adduced. Belief requires the existence of a nexus or relationship between the inference and the underlying facts. If the factual foundation is unstated or unknown, the credibility of evidence cannot be assessed and the inference is weakened. The gravamen is the reasonableness of the proposed inference in relation to the facts availed, the question being; whether any fair person, however prejudiced, could honestly form that opinion on the available facts. The question must be answered by considering where the inference expressed is so consistent with the facts which are recited or so inconsistent with such facts.

The available facts are that exactly seven days after being charged and three days after being granted bail, the applicant had lodged a formal complaint with the Inspectorate of Government

Regional Office at Moyo (annexure A2) regarding the manner in which his cash bond had been handled by the court. The day before the court found he had a case to answer, he repeated that complaint in a letter to the Judicial Service Commission (annexure A.5) In the same complaint, he claimed that on the day he was charged and remanded, the trial magistrate forced him to hand over the keys to his house thereby facilitating the complainant to collect her property from the residence and vacate the home (evidenced by annexure A4), also expressing his strong feelings that the Grade One Magistrate Adjumani (Mr. Kitiyo Patrick) had taken sides and should not hear his case, seeking help to recover the two million cash and some of his properties and ensure that my case is heard by another magistrate. Eighteen days after convicting and sentencing the applicant, the trial magistrate admitted (in annexure A7 to the affidavit in support of the application), facilitating the complainant to vacate the home and release of the applicant's cash bond to the complainant "to cater for her further treatment and for the upkeep of a young baby." It is my considered view that based only on those facts, any fair minded person, however prejudiced, could honestly form the opinion that there was a real likelihood of bias, that the trial magistrate harboured bias against the applicant which would preclude fair treatment of the applicant. However, I find the averment that there were suspicious nightly visits by the complainant to the trial magistrate suggestive of an affair, to be unsubstantiated and outlandish. That aspect of the intended additional evidence is devoid of any supportive facts. The inference proposed to be made is not supported by any evidence attached to the affidavit and that aspect of is therefore rejected and will not be introduced at the hearing of the appeal.

Fourthly, to be admissible, it must be evidence which, when taken with the other evidence adduced at the trial, can be expected to have affected the result. The probative value of additional evidence must thus be considered in order to determine whether it is admissible on appeal. In the law of evidence, admissibility and probative value are two separate concepts. The general principle that applies in respect of admissibility is that relevant evidence is admissible unless it is subject to any exclusionary rules. In the context of the admission of additional evidence on appeal, however, the concepts of admissibility and probative value overlap. To be admissible, it is not sufficient that the additional evidence meets the prerequisite of relevance. It must also be credible and such that it could, when taken with the other evidence adduced at trial, be expected to have affected the result. Accordingly, the probative value of the additional

evidence must, to some degree, be reviewed by the appellate court when it is determining the admissibility of the fresh evidence.

The fourth criterion requires the court to consider whether there might have been a reasonable doubt in the mind of the trial magistrate as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. The assessment of the probative value of the additional evidence is, however, limited, since after determining that the evidence is credible, the appellate court must assume that the trial magistrate would have believed it. If the additional evidence is admitted, the appellate court must again consider its probative value as well as the probative value of all the other evidence in order to determine whether there is merit to the appeal. The question then becomes; if presented and believed, would the additional evidence possess such strength or probative force that it might, taken with the other evidence adduced, have affected the result?

Determining the probative value of additional evidence on appeal may be a difficult task, since the evidence has not been put to the test of cross-examination or rebuttal at trial. Where additional evidence is challenged, or where its probative value is in dispute, it is desirable that it be tested before being admitted. This testing can be done mainly in two ways; by filing affidavits in reply to those submitted by the applicant and by allowing cross-examination of the deponents. The appellate court is not required at this stage to apply the strict rules of evidence as to the sources and types of evidence as are applied during a trial but should only assess the *prima facie* relevance, credibility and probative value of the additional evidence. It must determine whether the additional evidence has such probative force that if presented to the trial magistrate and believed it could be expected to have affected the result. The probative value to be assigned to such evidence is directly related to the amount and quality of admissible material on which it relies. To be admissible, the additional evidence need only be relevant and credible and, when taken with the other evidence adduced at trial, be expected to have affected the result.

In this case, the additional evidence intended to be adduced by affidavit relates to a supposed application made to the trial magistrate to disqualify himself on account of perceived bias. Both the trial magistrate (in annexure A7 to the affidavit in reply) and the prosecutor (in his affidavit

in reply) deny such an application ever having been made by the applicant during the trial. In *Professor Isaac Newton Ojok v. Uganda, Criminal Appeal [1993] VI KALR 11*, a trial judge was criticised by the Supreme Court for not placing on record an application that was made for her to disqualify herself on account of perceived bias and a re-trial was ordered. In that case it was never disputed that such an application had indeed been made. In the instant application, since the Learned Senior Resident State Attorney did not seek to have this part of the applicant's intended additional evidence tested by cross-examination before being admitted, I have had only to assess the relative strengths of the contents of the affidavit in support and the one in reply. Faced with a situation of having to determine whether such an application was ever made, based more or less only on the applicant's word against that of the trial magistrate and the prosecutor, I find that the balance tilts in favour of the applicant by reason of the fact that the applicant in his letter to the Judicial Service Commission dated 1st July 2014 (annexure A.5), a day before the trial court found that he had a case to answer, he appealed to for the intervention of the Judicial Service Commission to ensure that his case is heard by another magistrate. I find that the contemporaneousness of this correspondence with the trial creates a prima facie case of the possibility that he did raise this concern in court as well, despite its omission from the record. The final determination can only be made after both parties are heard on the additional evidence. These pieces of additional evidence, assuming they are true, have the potential to have materially affected the mind of the trial magistrate in his conduct of the trial, assessment of the evidence and determination of a suitable punishment. When additional evidence is taken by an appellate court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent. The question of re-appraisal of this evidence would therefore be reserved for argument at the hearing of the appeal after the evidence in support and rebuttal is placed on record.

Lastly applications for the admission of additional evidence must be brought without undue delay. The appeal in the instant case was filed during the year 2014. This application was then filed on 5th December 2016, more than two years later, without the applicant furnishing any explanation for the inordinate delay. Despite the long unexplained delay in filing this application, I am persuaded by the observation made in *Obiga Mario Kania v. Electoral Commission and another, C. A. Election Petition Appeal No. 4 of 2011* that "courts take allegations of bias very seriously as it might render all proceedings null and void if proved. It affects the entire justice

system if people start to lose confidence in the judicial system, in the officers of the court who decide cases.” This is a case where the interests of justice and the desire to uphold the integrity of criminal justice requires that the allegation of bias, supported by some credible evidence such as the applicant intends to adduce, should override a rule of practice regarding the timeliness of the application. The additional evidence is relevant and vital for the proper determination of the issues at hand in the appeal. I consequently do find merit in the application and find this is a case where leave to adduce additional evidence may properly be granted, and it is hereby granted.

The applicant shall file the additional evidence and serve it on the office of the Resident State Attorney within seven days of this order. The office of the Resident State Attorney, if they wish to file additional evidence of their own in rebuttal, shall file it and serve counsel for the applicant within seven days after service on them of the applicant’s additional evidence. This ruling is to be read out by the Assistant Registrar of this court and the parties shall immediately after it is delivered to them, fix a date for hearing of the appeal convenient to them during the week of 15th to 31st July 2017 at 9.00 am and the applicant’s bail shall be extended to the date so fixed.

Delivered this 22nd day of June 2017.

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Stephen Mubiru
Judge
22nd June 2017.