

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

**CRIMINAL APPEAL NO. 271 OF 2016**

**(Arising from criminal case no. 209 of 2016 Buganda Road Court Chief Magisterial area  
Holden at City Hall Court)**

**ZIKEHIKIRA SAMUEL ::: APPELLANT**

**VERSUS**

**UGANDA ::: RESPONDENT**

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

**1. Introduction**

- 1.1. The Appellant, Zikehikira Samuel, is being represented by Mr. Nzige Hillary and Mr. Twebaze Drake, both from Nzige, Jamero & Co. Advocates, Kampala.
- 1.2. The respondent, Uganda, is being represented by Mr. Wanamama Mics Isaiah, Senior State Attorney, working with the Director of Public Prosecutions, Kampala.

**2. Facts of the Appeal**

- 2.1. The Appellant stood charged with elopement contrary to section 127(1) of the Penal Code Act, Cap, 120 Laws of Uganda. It was the Respondent's case that the Appellant (accused) between the 20<sup>th</sup> day of February, 2016 and 26<sup>th</sup> day of February, 2016 at Kikaya in Kampala District eloped with Ninsiima Hope, a wife to Agaba Bosco.
- 2.2. When plea was taken in the lower Court, the Appellant denied the charge in total.

- 2.3. The prosecution adduced evidence in order to prove its case through eight (8) prosecution witnesses. The Appellant gave evidence and called no other witness for the defence.
- 2.4. In his judgment, His Worship Mushebebe Moses Nabende delivered on 1<sup>st</sup> September, 2016 found the Appellant ( accused ) guilty of the charged offence, convicted him and sentenced him to 75 ( Seventy Five) days imprisonment.
- 2.5. The Appellant was dissatisfied and aggrieved with the whole decision and judgment of the above stated trial Magistrate Grade 1 of Buganda Road Court Holden at City Hall Court, delivered on 1<sup>st</sup> September, 2016. Hence this Appeal.

### **3. Grounds of appeal**

3.1. The appellant appealed against the judgment of the trial Magistrate Grade 1 on the following grounds:-

- (a) The trial Magistrate Grade 1 erred in law and fact when he held that the Appellant eloped with Hope Ninsiima.**
- (b) The trial Magistrate Grade 1 erred in law and fact when he failed to evaluate the evidence before Court and based the conviction on unproven facts and assumptions.**
- (c) The trial Magistrate Grade 1 erred in law and fact when he relied on untruthful single identifying witness without regard to the contradictory material evidence that was before Court.**
- (d) The trial Magistrate Grade 1 erred in law and fact when he relied on circumstantial evidence without any other collaborative evidence on record.**
- (e) The trial Magistrate Grade 1 erred in law by awarding a custodial sentence without a fine in the alternative to the Appellant.**

3.2. The Appellant prays this Court:

- i) To allow the Appeal**
- ii) Conviction quashed, and**

- iii) **Sentence be set aside**
- iv) **In the alternative the sentence be reduced and/or a fine be imposed.**

#### **4. Resolution of this Appeal by Court.**

- 4.1. Both Counsel for the parties filed in Court their respective written submissions. Counsel for the Appellant cited some authorities in support of his arguments while dealing with each ground of Appeal. I hasten to add that **in his written submissions, Counsel for the Respondent conceded to the Appeal.** In his written submissions, Counsel for the respondent too, criticized the judgment of the trial Magistrate Grade 1 and the entire prosecution trial of the Appellant. I will analyze the aforesaid later, hereinbelow, in this judgment.
- 4.2. The first Appellate Court has a duty to re-evaluate and re-consider both the evidence of the prosecution and the defence bearing in mind that it never heard and saw the witnesses testify and come to its own decision in the case. See the case of **Kifamunte Henry versus Uganda, Supreme Court Criminal Appeal No. 10 of 1997.** Again, in the case of **Pandya versus R [1957] EA 336,** the Court held that the first appellate Court cannot excuse itself from the part of weighing conflicting evidence and draw its own inferences and conclusions.
- 4.3. It is, therefore, my duty as the first appellate Judge to appraise, re-evaluate or/and re-consider a fresh the entire evidence on the court record of the trial court and came to my own conclusions in this case.

In their submissions, Counsel for the appellant never considered ground 1 of appeal. However, when dealing with ground 2 of appeal I will at the same time resolve ground 1 of appeal. This is because grounds 1 and 2 of appeal are similar in the circumstances of this appeal.

- 4.4. On ground 2 of appeal: **the learned trial Magistrate Grade 1 erred in law and fact when he failed to evaluate the evidence as a whole and thereby coming to a wrongful conviction.**

Counsel for the appellant criticized the trial Magistrate Grade 1 in their written submissions. In their written submissions, they evaluated the evidence of both the prosecution and the defence. In reply, Counsel for the respondent (prosecution) in his written submissions, he too, evaluated the entire evidence on court record of the lower court **and conceded to this appeal.** I agree with the way they evaluated the entire evidence by the parties. In the case of **Bogere Moses & Anor versus Uganda, SCCA No. 1 of 1997** the Supreme Court of Uganda held that;

**“Court is enjoined to evaluate the evidence of both parties and give reasons why one and not the other has been accepted. It is a misdirection to accept one version and hold that because of the acceptance per say the other version is not sustainable.”**

After evaluating the entire evidence of the prosecution and the defence case, the trial Magistrate Grade 1 at page 8 of his judgment stated:

**“The above was rather the case for the prosecution and the defence. From the record of facts, it is not a fact denied that PW2 and the accused knew each other. The telephone lines indicated on the print outs belong to them and were active. It cannot simply be answered whether they were for business or love relations, one would say there was communication.”**

From the above finding of the trial Magistrate Grade 1, it was not clear to me whether the trial Magistrate Grade 1 considered in his judgment the ingredients of the charged offence and the burden of proof in criminal cases. In this instant case, the appellant was charged with elopement contrary to section 127(1) of the Penal Code Act, Cap 120, which states;

**“127 Elopement;**

- (1) Any person who elopes with a married woman and entices or causes a married woman to elope with him commits an offence and is liable on conviction to imprisonment for a term not exceeding twelve months or to a fine not exceeding two hundred shillings , and in addition the Court shall order any such person on first conviction to pay the aggrieved party compensation of six hundred shillings and on a subsequent conviction compensation not exceeding twelve hundred shillings.”**

Thus the ingredients of offence of elopement are;

- (i) The accused eloped with the victim who is a married woman, or**
- (ii) The accused enticed the victim or**
- (iii) Caused a married (the victim) woman to elope with him.**

The Penal Code Act Cap. 120 Laws of Uganda does not give the definition for “elopement”. I have resorted to the definition given by the dictionaries. According to Black’s law Dictionary, 9<sup>th</sup> Edition, at page 598, the word elope is defined as;

**“ To run away, escape, or to abandon one’s husband and run away with a lover or to ran away secretly for purpose of getting married often without parental consent . Elopement is a noun.”**

Again, according to Oxford Advanced Learners Dictionary, 7<sup>th</sup> Edition at page 475, the word “elope” is defined as;

**“To run away with somebody in order to marry them secretly. Elopement is a noun “**

From the above dictionary definition of the word elope; **communication between the parties is not one of the ingredients of the charged offence.** From the prosecution evidence, there is no single piece of evidence that was adduced to prove that Hope Ninsiima (PW2) abandoned her

husband and run away with the accused (as the lover). There is no evidence that was adduced by the prosecution to prove that the appellant enticed Hope Ninsiima, the married woman to run away from her husband and stayed together with the appellant.

PW2, Hope Ninsiima, the victim, the key witness for the prosecution, in her evidence denied ever eloping with the accused, Zikehikira Emmanuel. At page 39 of the record of lower court, PW2 stated that herself and PW1, her husband, have a family misunderstanding. That on that day of 20-2-2016 at 4:00pm while at their home PW1 fought her. That he opened the kitchen door and threw her outside the house. That she sat at the shed of the house. That PW1 came out and threw her out of the gate. This is the piece of evidence adduced by the prosecution. This piece of evidence does not show or prove that PW2 ran away from her husband (PW1) with the alleged lover, the accused. What this evidence of the prosecution proved is that the cause of the problem was PW1, Bosco Agaba, her husband. There are major contradictions and inconstancies between the evidence of Bosco Agaba (PW1) and the evidence of Hope Ninsiima (PW2) who are husband and wife, respectively. Such contradictions and inconsistencies created doubts in the prosecution case. And such doubts ought to have been resolved in favour of the appellant by the trial magistrate Grade 1.

On why the two (PW1 and PW2) disagreed, fought, leading to PW2 leaving the home, see pages 24-43 of the record of appeal. In my considered opinion, the evidence of PW2 created a big gap in the prosecution case. That big gap indicates that the prosecution never proved its case beyond reasonable doubt. It is a principle in criminal law that the accused is presumed innocent until proved guilty by the prosecution. **See Article 28 (3) (a) of the Constitution of the Republic of Uganda, 1995.**

Accordingly, the accused has no duty to prove himself innocent. In his defence, the accused denied the charged offence in total. He gave an explanation why he was communicating with PW2. **His evidence is corroborated in all material particular by the evidence of PW2, Hope Ninsiima.** That benefit of doubt should have been given in favour of the appellant (accused).

PW2 gave evidence why she left her matrimonial home. PW'2 evidence on oath did not at all support the prosecution case.

Further, the evidence of PW2 contradicts the evidence of the other prosecution witnesses. For the fact that the prosecution adduced evidence from PW2, Hope Ninsiima, the prosecution made a strong case for the defence (appellant). The prosecution believed the evidence of PW2 to be direct evidence and truthful, yet her evidence exonerates the appellant from the commission of the charged offence. The prosecution case ought to have collapsed after PW2 gave strong evidence against the prosecution.

Consequently, PW4, Wahab Tumwesigye; PW5, D/Corporal Mugisha Innocent and PW6 No. 29712 D/C Birungi Willbrand, never found the accused with PW2 at the time PW2 was allegedly arrested from Palm Gardens guest House.

The accused was according to the evidence of PW5 and PW6 arrested from his home. Then where is the evidence from the prosecution to show that the victim (PW2) had run away with the accused? One wonders why the accused person (appellant) was ever arrested by the PW5 and PW6. I do not see any reasons according to the evidence on the Court record of appeal that would have caused the Appellant's arrest and charged with the charged offence.

It is my finding therefore, that the trial Magistrate Grade 1 never properly evaluated the parties' evidence on Court record. In the result, I agree with the submissions by Counsel for the appellant on grounds 1 and 2 of appeal. Thus, I answer grounds 1 and 2 of appeal in the affirmative.

**4.5. On ground 3 of appeal: the trial Magistrate Grade 1 erred in law and in fact when he relied entirely on the evidence of a single identifying witness without regard to contradictory material evidence before the Court**

In the case of **GW Sembajjewe and Anor versus Uganda [1977] HCB 118** in the judgment by Sekandi, J, he held that:-

**“although a fact ought to be proved by the testimony of a single witness, the identification of a single witness should be tested with greatest care and if it is shown that the conditions favouring a correct identification were difficult, there should be other evidence pointing to the guilty from which it would be reasonably concluded that the evidence could be accepted as free from possibility of error.**

From the judgment of the trial Court, I have perused the entire judgment of the trial Court and it is clear that the trial Magistrate Grade 1 avoided evaluating and considering the evidence of PW2, Hope Ninsiima alongside with the evidence of PW1 and DW1 ( the accused). PW2 gave evidence that she was never with the accused as alleged by PW3, Joan Nalwanga, a receptionist at Palm Gardens Hotel. In cross examination, the evidence of PW3 was critically punched in holes. She never produced evidence to prove that she was at the alleged time an employee of Palm Gardens Hotel. She never produced any receipts to show that PW2 had hired a room at the said Hotel. There were no receipts put in evidence for the prosecution to show that PW2 ever paid for the food and drinks at Palm Gardens Hotel. Her (PW3) evidence is sharply watered down by the evidence of PW2 and DW1 (appellant).

In the light that there was direct evidence and truthful evidence of PW2 believed by the prosecution, in my considered finding, there was no need for the trial Magistrate Grade 1 to have relied on the evidence of PW3. In fact PW3 was not a single identifying witness in this case. There is the evidence of PW2 and PW4 which sharply discredits the evidence of PW3. If the evidence of PW2 was not called by the prosecution that is when probably the evidence of PW3 would be considered as the evidence of a single identifying witness, which in the instant case is not.



Further, I perused the telephone print outs that were exhibited on the Court record of the lower Court. The said telephone print outs did not show that PW2 and DW1 (the appellant) were at any one given time or day or night seen to be under the same mast or location. The co-ordinates do indicate that they were in different places, save for one single call in between, that even one on examination wonders if they were deemed to be together, why would one be calling the other by telephone.

In the premises, I find that the trial Magistrate Grade 1 erred in law and fact to rely on the evidence of PW3 to convict the Appellant. In that regard, I agree with the submissions by Counsel for the Appellant. I therefore, answer ground 3 of appeal in the affirmative.

- 4.6. I will resolve grounds 4 and 5 together. On ground 4 of appeal, the trial Magistrate Grade 1 erred in law and fact when he relied on circumstantial evidence without other corroborative evidence on record and On ground 5 of appeal: the trial Magistrate Grade 1 erred in law and fact by awarding a custodial sentence without a fine in the alternative to the Appellant.**

I perused the trial Magistrate Grade 1's judgment and noted that in addition to relying on the single identifying witness' evidence of PW3; he also relied on circumstantial evidence offered by the alleged communication over telephone calls to connect PW2 with the appellant in the commission of the charged offence.

In resolving grounds 4 and 5 of appeal, hereinabove in this judgment, the issue of the telephone print outs connecting PW2 and the accused (appellant) with he charged offence, I held that such evidence as was adduced by the prosecution is un-attainable to say the least. The prosecution never adduced evidence to show and prove what was discussed during such communications between PW2 and the accused (Appellant). PW2 and the appellant in their respective evidence on oath gave circumstances and the discussions on business matters. The evidence of PW2 was believed by the prosecution as truthful that is why PW2 was never declared a hostile witness for the prosecution. At page 8 of his judgment the trial magistrate Grade 1 held that;

**“It cannot be simply answered whether they were for business or love relations, one would say there was a communication.”**

It is clear that the trial magistrate Grade 1 in his judgment doubt the nature and purpose of communication between PW2 and the appellant (DW1).

In the case of **Teper versus R [1952] AC 480** it was held that:-

**“Before drawing inference of an accused’s guilt, it is necessary to be sure that there are no other co-existing circumstances which would weaken or destroy the inferences.”**

Again, in the case of **Mbazira Siragi & Anor versus Uganda SCCA No. 7 of 2004** wherein the case of **Musoke versus Uganda [1958] EA 715** was quoted with approval, it was held, that;

**“In a case depending on circumstantial evidence, the Judge must find before deciding upon conviction that the exculpatory facts were incompatible with the innocence of the accused and incapable of any other explanation than that of guilt.”**

In the instant case, the evidence of PW2, PW6, PW7 and PW8 does not prove, to the standard of proof required in criminal cases, that, of proof beyond reasonable doubt, that the accused committed the charged offence.

In the result, I agree with the submissions by Counsel for the Appellant. I answer grounds 4 and 5 of appeal in the affirmative. Moreover, as I have stated hereinabove in this judgment, Counsel for the respondent conceded to this appeal.

## 5. Conclusion

5.1. In consideration of the entire prosecution and the defence evidence on Court record of appeal, the submissions by Counsel for the appellant while criticizing the judgment of the trial Magistrate Grade 1, and the submissions by Counsel for the respondent whereby he conceded to this appeal. And in further consideration of my examination and analysis of the prosecution evidence as against the defence evidence, I hold that the prosecution never discharged its burden of proof, to prove the charged offence against the accused beyond reasonable doubt. Therefore, the trial Magistrate Grade 1 erred in law and fact when he found the Appellant guilty of the charged offence. He wrongly convicted and sentenced the Appellant of the charged offence.

The prosecution never adduced any credible evidence to pin the appellant with the charged offence.

- 5.2. Accordingly, therefore, I find that this appeal has merit. It is accordingly allowed in the following terms and orders, that;
- (a) This appeal is allowed.
  - (b) The conviction against the Appellant by the lower court is hereby quashed.
  - (c) The sentence of 75 (Seventy- five) days imprisonment against the Appellant is set aside.
  - (d) Consequently, the Appellant is acquitted of the charged offence. He is a free man unless being held on other lawful charges.

Dated at Kampala this 2<sup>nd</sup> day of January, 2017

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**MURANGIRA JOSEPH**

**JUDGE**

2/01/2017

**Order:** The bail money the Appellant deposited in the lower court and in this court be refunded to him henceforth, but not later than 30 days from the date of this judgment.

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**MURANGIRA JOSEPH**

**JUDGE**

2/01/2017

2/01/2017

Mr. Twebaze Drake from Nzige, Jamero & Co. Advocates for the appellant who is in Court.

We are appearing with Mr. Wanamama Mics Isaiah for the state who is not present in court.

However, for the appellant we are ready to receive the judgment.

The complainant, since this appeal came up he has never appeared in this Court. It is our presumption that he could have abandoned the matter.

Ms. Nasuuna Olive the clerk is in Court.-

**Court.** Judgment is delivered in open court.

Right of appeal explained

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**MURANGIRA JOSEPH**

**JUDGE**

**2/01/2017**