

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
[CORAM: TUMWESIGYE; KISAAKYE; JJ.SC, TSEKOOKO; OKELLO,
KITUMBA, AG JJ.SC.]

CRIMINAL APPEAL NO: 01 OF 2013

BETWEEN

CHEPTUKE KAAYE DAVID:..... APPELLANT

AND

UGANDA :.....RESPONDENT

[Appeal from the judgment of the Court of Appeal (S.B.K. Kavuma, Nshimye, Arach Amoko, JJA) in Criminal Appeal No. 293 of 2010]

JUDGMENT OF THE COURT

Cheptuke Kaaye David, the appellant, was convicted by the High Court of corruptly receiving a Gratification, contrary to S. 2 (a) and S. 26 (1) of the Anti - Corruption Act, 2009, and sentenced to one year imprisonment and ordered to refund shs. 100,000= to Angella Uwayezu (PW9). He unsuccessfully appealed against his conviction to the Court of Appeal, hence this appeal.

Background facts

The appellant who was a Grade 1 Magistrate at Kisoro was charged with three counts of corruption related offences. They were: -

- (1) Corruptly soliciting for Gratification contrary to S. 2(a) and 26(1) of the Anti-Corruption Act,

(2) Corruptly receiving a Gratification contrary to S. 2(a) and 26 (1) of the Anti-Corruption Act and

(3) Corruptly receiving a Gratification contrary to S. 2(a) and 26 (1) of the 10 same Act.

He was tried by the Anti-Corruption Division of the High Court and acquitted on count I and count III. He was, however, found guilty on count II, and sentenced to one year imprisonment. He was also ordered to refund to PW9 Shs. 100,000= he received from her as a gratification.

The evidence which was led by the prosecution against the appellant in respect of count II and which the trial judge accepted was that three siblings, a girl and two boys, were on 28th January 2010 brought before the appellant and charged with the offence of malicious damage to property. The girl, on account of her not being well, was released on bail on a non-cash bond of shs. 500,000=.

The relatives of the two other children pressed for their release on bail but in vain. On 12th February 2010 the two accused children applied for bail again on ground that being students they were missing their classes. They presented their aunt, PW9, to stand as surety for them. The appellant granted them a non cash bail bond of shs. 500,000= each and the surety bond of shs. 1,000,000= not cash. However, the appellant did not release them immediately. Instead he asked PW9 to follow him to his chambers and discuss the release of the accused children.

When PW9 went to the appellant's chambers, the appellant told her that shs. 200,000= would have to be paid for the release of the children. She then left and told the mother of the children (PW8) about the demand of the appellant, but PW8 said she only had shs. 100,000=.

The District Speaker of Kisoro, Harerimana William (PW10), was well known to the appellant. So PW9 contacted him and asked him to go with her to request the appellant to accept shs. 100,000= as the mother (PW8) was unable to raise shs. 200,000= that was demanded.

PW10 agreed and accompanied PW9 to the appellant's chambers. There they met the appellant and another person (DW2). The appellant agreed to accept shs. 100,000/= but on condition that the balance of shs. 100,000/= would be paid on 26th February 2010 when the two children would report back to court. PW9 paid the money (shs. 100,000=) to the appellant, and the two children were released on bail.

At the trial, the appellant denied that he received shs. 100,000= from PW9. He stated that he called PW9 to his chambers because he wanted to advise her on how to process bail papers for the accused children. He stated further that PW10 bore him a grudge because of his (the appellant's) refusal to grant an injunction in which PW10 was interested. He further said that PW9 and PW10 were lovers and they had both plotted to frame him. Harera Benon (DW2) also testified that PW9 and PW10 had a love relationship and that though he was in the appellant's chambers when PW9 and PW10 met the appellant there, he did not see PW9 give any money to the appellant.

During the trial there were two assessors and both assessors advised the judge to find the appellant guilty as charged on count II.

The trial judge disbelieved the version presented by the defence and accepted that of the prosecution. He, therefore, convicted the appellant of the offence as charged in count II. Being dissatisfied, the appellant appealed against his conviction to the Court of Appeal on four grounds. However, at the hearing, he abandoned two grounds and only argued two (2 and 4) which read as follows:

"2. The learned trial judge erred in law and fact when he held that the appellant received shs. 100,000= from Uwayezu Angella in order to release her nephews on bail.

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4. The learned trial judge erred in law and fact when he held that any exhibit such as money in issue or a note in acknowledgment of receipt would certainly have been a fillip to the prosecution case in regard of defence of evidence".

The Court of Appeal dismissed the appeal and upheld the decision of the High Court. Dissatisfied with the decision of the Court of Appeal, the appellant appealed to this court against his conviction.

Grounds of Appeal

The appellant appealed to this court on the following grounds:

“1. The learned Justices of Appeal erred in law and fact when they failed to re-evaluate the evidence on record and subject it to exhaustive, fresh and thorough scrutiny thus reaching a wrong conclusion that the appellant received shs. 100,000= from PW9. “2. The learned Justices of Appeal erred in law and fact when they upheld the decision of the High Court without taking into consideration the evidence of DW2, Benon Harera, or giving any reasons for not doing so.”

He prayed that: -

- (i) The conviction be quashed
- (ii) Sentence be set aside
- (iii) The appellant be acquitted of the remaining count.
- (iv) The dismissal of the appellant from the Judiciary as Magistrate Grade 1 based on the conviction be set aside.
- (v) The appellant be reinstated as a Magistrate Grade 1 with all his benefits.

Submissions of Counsel

Mr. Geoffrey Ntambirweki Kandebe represented the appellant while Mr. Rogers Kinobe, Senior State Attorney, represented the respondent.

Learned counsel for the appellant opted to argue both grounds jointly. The second ground in our view was actually superfluous since re- evaluation of the evidence on record as a whole would necessarily include consideration of the evidence of Benon Harera, DW2, as well.

Learned counsel for the appellant argued that while the Court of Appeal reminded itself of its judicial duty to subject the entire evidence on record to fresh and exhaustive scrutiny, and to make its own findings of facts and draw its own conclusions, it did not discharge that duty.

That the learned Justices of Appeal reached their conclusion without reevaluating evidence by merely quoting from the judgment of the learned trial judge the following:

“The appellant denied ever receiving money from PW9, his defence was that there was bad blood between him and PW10, he added PW10 and PW9 had an amorous relationship. DW2 said the same thing”.

Had the learned Justices of Appeal done their own evaluation of the evidence and not depended on the evaluation of the trial judge, they would have found that when the appellant allegedly received shs. 100,000= from PW9 in the presence of PW10, there was also DW2 who witnessed what happened and who stated, among other things, that the appellant guided PW9 when she came to his chambers on how to get bail, and he did not see any money being paid by PW9 to him. He further argued that the sworn evidence of DW2 was not impeached or discredited in accordance with S. 54 of the Evidence Act and, therefore, the two courts below should have believed it or given reasons why they did not accept it.

Learned counsel cited the case of **Bogere Moses and Anor vs. Uganda** (Supreme Court C. A. No.1 of 1997) for the proposition that the court has a duty to evaluate, judicially, the version of the prosecution’s case and that of the defence where the two conflict, and gave reasons why it accepts one version as against the other. He contended that the Court of Appeal did not do so in the instant case, but merely accepted the evidence of the prosecution wholesale without re-evaluating the evidence of the defence and, therefore, failed in its duty to balance the evaluation. Counsel, therefore, called for the re-evaluation of evidence by this court on the basis of the principle laid down by this court in **Mbazira Siragi and Anor vs. Uganda** (Supreme Court C. A. No. 7 of 2004) where it was held that it is incumbent on this court to re-

evaluate the evidence where the Court of Appeal fails in its duty to do so.

Learned counsel for the respondent, on his part, submitted that the learned trial judge was right to convict the appellant on count 2 and the Court of Appeal was right to uphold it. He submitted that the Court of Appeal properly re-evaluated the evidence. He stated that the Court of Appeal found that there was no grudge between the appellant and PW10 and that though DW2 denied the payment of any money to the appellant, this evidence was countered by the evidence of PW8, PW9 and PW10. He submitted that PW10 went to the appellant's chambers to appeal to the appellant to accept the shs. 100,000/= that PW9 had, and the balance of another shs. 100,000/= to be paid later, which the appellant accepted.

On the question of the prosecution not tendering the money which was the subject of count II in court, counsel submitted that the Court of Appeal considered the case of **Uganda vs. Katushabe** [1988-90] HCB 59 and held that although the money was not tendered in evidence, it sufficed that the witnesses had described the incident of the payment explicitly.

Counsel further argued that the Court of Appeal correctly upheld the decision of the High Court because the series of events which constituted the whole transaction leading to payment of shs. 100,000/= to the appellant were described in a straight forward and unambiguous manner both in respect of time and the amount which was ultimately paid. This is contained in the evidence of PW8, PW9 and PW10 which evidence was unchallenged, he argued.

Consideration of the appeal.

Learned counsel's submission was essentially that the learned Justices of Appeal failed to re-evaluate the evidence on record and subject it to a fresh and exhaustive scrutiny as a first appellate court is required to do. According to him, if the learned Justices of Appeal had done their duty, they would have reached a different conclusion from that of the learned trial judge and acquitted the appellant.

The question to resolve in this appeal, therefore, is whether the learned Justices of Appeal properly re-evaluated the evidence in accordance with the principle laid down in a number of well established authorities. These include **Mbazira Siragi and B a gum a Henry vs. Uganda** (supra), **Bogere Moses and Anor vs. Uganda** (supra) and **Baguma Fred vs. Uganda** (SCCA No. 7 of 2004) which were cited by learned counsel for the appellant.

In considering the appeal before them, the learned Justices of Appeal first reminded themselves of their duty to subject the entire evidence to a fresh and exhaustive scrutiny and to make their own findings of fact and draw their own conclusions while giving allowance for the fact that they had no opportunity to see the witnesses. They cited the case of **Okeno vs. Republic** [1972] E.A. 36 as a basis for their approach. They proceeded to consider the evidence on record showing how the three accused siblings were brought before the appellant and applied for bail, but how only one was released by the appellant on bail and the two boys kept on remand until 12/02/2012 when they came back to court to renew their bail application.

The learned Justices of Appeal proceeded to consider the evidence of PW8 and PW9 about the appellant's demand for shs. 200,000/= to secure the release of the children on bail. They then considered the evidence of PW10 who went with PW9 to the appellant's chambers. They then went on to note the evidence of DW2. **"DW2 also said he was in the appellant's chambers and he saw PW9 and PW10 in the said chambers. He said the duo found him there and when he wanted to leave, the appellant asked him to stay. The appellant confirmed this evidence"**, they stated in their judgment.

After going through the evidence on record relating to the difficulties PW8 and PW9 faced in finding the shs. 200,000/= to pay to the appellant, and PW9's enlisting of the help of PW10 to appeal to the appellant to accept shs. 100,000/=, the balance of shs. 100,000/= to be paid later, and the eventual payment of shs. 100,000/= to the appellant, the learned Justices went on to consider the evidence of the appellant and DW2.

0 They stated:

"The appellant denied receiving any money from PW9. His defence was that there was bad blood between him and PW10. He added that PW10 and PW9

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had an amorous relationship. DW2 also said the same thing”.

The learned Justices of Appeal then went on to state the following:

“The learned trial judge after evaluating this evidence reached 20 the conclusion that there was no reason to believe the testimonies of PW9 and PW10 were influenced by any ill will, hence suspect.

‘The two struck me as credible and respectable witnesses and I have no reason to alter that assessment’.

Similarly, we have evaluated the evidence on record. We are not persuaded that the two witnesses had any grudge against the appellant as he would like court to believe. The evidence is actually to the contrary, that they were colleagues...”

After re-evaluating the evidence the learned Justices of Appeal agreed with the assessment of the trial judge. They disbelieved the defence testimony and accepted the evidence of PW9 and PW10 as credible.

The learned Justices of Appeal reached the conclusion that the learned trial judge was right to convict the appellant of the offence of receiving a gratification contrary to S. 2(a) and S. 26(1) of the Anti-Corruption Act. They, therefore, dismissed the appeal and confirmed the orders of the trial court.

The learned Justices of Appeal could perhaps have given a more detailed evaluation of the evidence in their judgment but as we stated in the case of **Margaret Kato and Anor vs. Nuulu Nalwoga** (SCCA No. 03 of 2013), there is no prescribed form laid down which the appellate court should follow. What is important is that the evidence touching on key issues of the case is re-evaluated by the appellate court, and we are satisfied that the Court of Appeal did so in this case.

We wish to observe that there is not much conflict in the evidence of the prosecution and the defence as a whole except on the critical question of whether the

appellant received shs. 100,000/= from PW9. The prosecution evidence was that PW9 was in court to stand surety for the two children on 12/02/2010. The appellant granted the two children bail on a non-cash bond of shs. 500,000= but he did not release them. Instead he asked PW9 to go and see him in his chambers. This in itself is not normal practice. PW9 went to the appellant's chambers where the appellant asked her to pay shs. 200,000= for the release of the two children. After that PW9 then went and told PW8 about the demand of the money by the appellant but PW8 only had shs. 100,000/=, so PW9 asked PW10 who knew the appellant well to go with her and appeal to the appellant to accept shs. 100,000/=. PW10 agreed to the request and they went to the appellant's chambers where they found the appellant and another person (DW2). PW10 talked to the appellant who agreed to accept shs. 100,000/= on condition that the balance of shs. 100,000/ =

would be paid on 26/02/2010. PW9 paid the shs. 100,000/= to the appellant who declined to issue a receipt for it.

The defence version was that around 9:00 a.m. on 12th February 2010 the appellant was in his chambers with DW2 when PW10 whom he knew very well came with PW9 to see him. PW10 talked to the appellant about the release of the two children. The appellant asked PW10 whether PW9 had proper documents to enable her stand as surety for the two children. PW9 produced her identity card which showed she was a nurse. Finding her to be a substantive surety, he approved her to be one and told her to go and see the prosecutor to help her process her documents. PW9 and PW10 then left. DW2's evidence was on all fours with this version.

The appellant denied that PW9 gave him any money. So did DW2. The appellant attributed the evidence PW10 gave about his receipt of shs. 1 00,000/= to malice of PW10 against him. PW10 had ill will towards him, he said, because of his refusal to grant an injunction in a case which was not even before him. PW9 and PW10 were lovers and the two hatched a plot involving receipt of shs. 100,000/= from PW9 merely to frame him, he testified in court.

The learned Justices of Appeal rejected the defence version and accepted that of the prosecution. They accordingly upheld the decision of the trial judge.

We agree with the conclusion reached by both the Court of Appeal and the trial court. We are satisfied that both courts properly evaluated the evidence on record to find that the appellant received shs. 100,000/= as gratification to release the two children on bail. We are also satisfied that the two courts below considered the defence evidence of DW1 and DW2 and rightly rejected it. The story presented by the defence of a sinister plot hatched by PW10, who was not even a complainant in this case, to frame him is not credible. The demeanour of PW10, as well as that of PW9, was described by the learned trial judge who observed them as they gave their testimony in court before him to be of credible and respectable witnesses. And further, it is difficult to believe that PW10 was so ingenuous in his wicked design that he not only recruited PW9 in his plot, but also incorporated PW8 and PW2 to give false testimony in court against the appellant. We are bound by the concurrent findings of the two courts below

that the prosecution evidence of PW2, PW8, PW9 and PW10 was consistent and credible.

Learned counsel for the appellant argued that there were inconsistencies in the prosecution evidence which rendered it unreliable. He mentioned that PW9 testified that PW10 introduced her to the appellant yet she claimed she first went to see the appellant alone. We think that learned counsel attached undue importance on the introduction of PW9 by PW10 to the appellant. Introduction of a person is a mere formality which can be done even where a person has already met another person to whom he or she is being introduced.

Another inconsistency counsel cited was that in the police statement it is PW8 who told PW9 that the appellant had demanded shs. 200,000/= for the children's release yet in court it was PW9 who stated that she told PW8 of the appellant's demand of the money. In her sworn evidence in court, however, PW8 stated that it is PW9 who told her about the demand of Shs. 200,000/= for their release. However, even if we were to agree that PW9's police statement was different from what she stated in court, we would still not agree that this is a fundamental discrepancy that would cast doubt on the veracity of PW9's testimony on the fundamental issue of receipt of money by the appellant.

Learned counsel also argued that there was inconsistency relating to what PW10 and PW9 said about the receipt for the money; that PW9 stated that when she asked for the receipt after paying shs. 100,000/= to the appellant, he told her she would have to pay shs. 500,000/= for each child to get a receipt, yet PW10 stated he believed the appellant would give the receipt later. Counsel further argued that there was inconsistency as to the time PW9 and PW10 went to the appellant's chambers. PW2 said they went to see the appellant in the afternoon, yet PW9 and PW10 and the appellant said they met in the morning. So the evidence of PW2 cannot be said to corroborate the evidence of PW9 and PW10, he argued.

We have considered the above inconsistencies but we think they are minor in nature and do not reflect on the credibility of the witnesses. Criminal trials usually take place several months after the events which give rise to prosecutions, so there is bound to be lapses of memory of witnesses on minor aspects of the events as they happened.

Other issues raised in learned counsel for the appellant's submissions were that count II was introduced late in the charge sheet and that the charge sheet was dated by IGG on the same day that the appellant was arrested which, in his view, shows malice on the part of the IGG against him. This complaint in our view, should have been raised by the defence at the trial stage and not at this late hour. However, we are also of the view that failure by the prosecution to follow the conventional or usual practice of preparing charges or dating charge sheet did not

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occasion mis-carriage of justice to the appellant as he had all the time he needed to prepare his defence.

On the issue raised by learned counsel for the appellant that there had to be tangible evidence of the money the subject matter in count II, we agree with the view expressed by the learned Justices of Appeal that where there is explicit and credible evidence of the object involved in the commission of an offence, failure by the prosecution to tender the object as an exhibit will not be fatal to the prosecution case. They cited **Katushabe vs. Uganda** (supra) to buttress their view. In any case, the money which the appellant received from PW9 was not recovered from him, so it could not have been exhibited in court.

For the above reasons, we find that this appeal lacks merit and we accordingly dismiss it.

Dated at Kampala this.....24th....day of.....October....2014

J. Tumwesigye

JUSTICE OF THE SUPREME COURT

Dr. E. Kisaakye

JUSTICE OF THE SUPREME COURT

J.W.N.TSEKOOKO

AG JUSTICE OF THE SUPREME COURT

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**G.M. Okello AG. JUSTICE OF THE SUPREME
COURT**

**C.N.B. Kitumba
AG. JUSTICE OF THE SUPREME COURT**

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