THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 096 OF 2011

BONGOMIN RICHARD …….

……..APPELLANT

VERSUS

UGANDA ……..

RESPONDENT

CORAM:

HON. MR. JUSTICE A.S NSHIMYE, JA

HON. LADY JUSTICE FAITH E. MWONDHA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

(An appeal from the decision of Hon. Justice Catherine Bamugemereire J arising from Criminal Appeal No.19 of 2010 at the Anti-corruption Division of the High Court of Uganda that arose from Criminal case No. 166 of 2008)

JUDGMENT OF THE COURT

This is a second appeal.

The appellant appeals to this court from the decision of Hon Lady Justice Catherine Bamugemereire sitting at the Anti-corruption Division of the High Court on 29th April 2011 that upheld the decision of Her Worship Ms. Irene Akankwasa, Chief Magistrate delivered on 12th August 2010.

The Chief Magistrate convicted the appellant of the following offences;-

1) **Embezzlement contrary to sections 268 (a), (f), (g) of and 270 of the Penal Code Act, and sentenced him to 3 years imprisonment and also ordered him to refund to or compensate Pader District Local Government a sum of shs.11,178,000/-.**

2) **Abuse of office contrary to section 87(1) of the Penal Code Act and sentenced him to 3 years imprisonment.**

3) **False accounting by a Public officer contrary to section 326 of the Penal Code Act and sentenced him to one year imprisonment.**

4) **Forgery contrary to section 342, 345 and 347 of the Penal Code Act and sentenced him to two years imprisonment.**

5) **Uttering false documents contrary to section 351 of the Penal Code Act him to two years imprisonment.**

All the sentences run concurrently.

By the time this appeal came up for hearing the appellant had already served the sentences. This appeal is against conviction only.

At the hearing of this appeal on 8th April 2014, the appellant was in Court but unrepresented. His counsel Mr**. Anthony Nsimbe** had apparently abandoned him. With the consent of court he was allowed to represent himself. He argued the appeal in person.

Mr. Thomas Okoth senior State Attorney with the Inspectorate of Government appeared jointly with **Mr. Wycliff Mutyabule** also a senior State Attorney with the Inspectorate of Government for the respondent.

The appellant's amended memorandum of appeal dated 23rd March 2012 sets out the grounds of appeal as follows;-

1. ***The Learned Appellate Judge erred in law when she upheld the convictions of the accused/appellant basing on a repealed law without amendment of charges; hence the convictions were an illegality.***

2. ***The Learned Appellate Judge erred in law when she upheld Criminal proceedings against accused/appellant on the basis of charges that were neither consented to by the Director of Public Prosecutions (DPP) or Inspector General of Government (IGG) and the failure, which is a mandatory requirement, occasioned a miscarriage of justice.***

3. ***The Learned Appellate Judge erred in law when she upheld that in the investigation, and prosecution for embezzlement, and false accounting by a public officer by the Inspector General of Government there is no need of an audit report since the Inspector General of Government operates under independent powers; whereas the requirement of an audit report in respect of accounting for public funds is a Legal requirement and failure to adduce an audit report constituted a material irregularity and occasioned a miscarriage of justice.***

4. ***The Learned Appellate Judge erred in law when in the evaluation of evidence, she upheld that a" the ingredients of the charges had been proved beyond reasonable doubt whereas not.***
5. ***The learned Appellate Judge erred in Law when in the evaluation of the evidence with regard to the charges of embezzlement and false accounting by Public Officer ignored the evidence as adduced by the prosecution and upheld the decision of the lower court that relied on estimations not alleged in the charges and not supported by evidence, and this occasioned a miscarriage of justice.***

6. ***The Learned Appellate Judge erred in Law when she upheld the Lower Court decision that ignored the pleas and orders of the High Court at Gulu for the Accused's/ Appellant's right to pre-trail disclosure of a " the Prosecution's statements, Audit Report and Documentary Exhibits intended to be relied on and the failure hampered the accused/appellant in the adequate preparation of his defend; and this violated his rights and occasioned a miscarriage of justice.***

7. The Learned Appellate Judge erred in law when she upheld that the accountability processes for the missing money was completed by the appellant on the basis of evidence on record where as the procedures are set out by statues and regulations there under and such conclusion occasioned a miscarriage of justice.

Before the hearing of this appeal the appellant had already submitted in court his written submissions, a very lengthy 64 page document. He was granted leave by the court to supplement orally what he had already submitted in writing.

The appellant submitted that the case against him started on 18th March 2008 before a Grade I Magistrate for Pader District in which court he was charged with six counts.

That on 6th June 2008, the Grade one Magistrate's court ordered the prosecution to avail to the appellant's counsel copies of witness statements, exhibits and an audit report that it intended to rely upon during the prosecution, in order to enable the appellant prepare his defence as provided for under **Article 28 (3) (c)** of the Constitution. The prosecution appealed the ruling of the court to the High Court, at Gulu. That on 26th February 2010 the High Court presided over by Hon. Justice Kasule J (as he then was) dismissed the appeal and upheld the ruling of the Grade one Magistrate.

Before the trial could proceed before the Grade one Magistrate the appellant submitted that the case file was transferred to the

Chief Magistrate's court attached to the Anti-corruption Division of the High Court.

That on 31st May 2010, the charge sheet was amended and the charges against him were reduced from six to five. That he then pleaded afresh to the new charges before the Chief Magistrate at the Anti-corruption court. He denied all the charges.

He submitted that he pleaded to the amended charges on 31st May 2010, some of which charges were brought under repealed provisions of the Penal Code Act (Cap 120) to wit: - Sections 85-89, 268, 270 and 326. These sections he submitted had been repealed by Section **69** of the Anti-corruption Act which came into force on 25th August 2009. The same sections had been re-enacted under the same Act he added.

He submitted that the new provisions of Anti-corruption Act (Act 6 of 2009) were already in force when he pleaded to the amended charges on 31st May 2010. Yet he was still charged and pleaded to charges brought under the Penal Code Act which law by then had been repealed.

The appellant submitted that the charges against him and the subsequent trial were illegal and violated the provisions of **Articles 28 (1) (2)** of the Constitution.

The appellant submitted that had the charge sheet not been amended and had he not pleaded to fresh charges and had the

trial continued under the old charge sheet dated 12th March 2008, there would have been no violation of the law.

He submitted that the particulars of the offences as set out in the first charge sheet differed from those set out in the subsequent amended charge sheet. That whereas he had first been charged with the embezzling shs. 34,000,000/- in the amended charge sheet the amount was changed to shs 15,504,000/-

The appellant distinguished the case of ***Uganda vs Atugonza Constitutional Reference No. 31 of 2010***. He submitted that in the **Atugonza case** the accused had been charged under the Anti-corruption Act for offences committed before that Act came into force, which offences however were in existence under the Penal Code, at the time they were alleged to have been committed. The same offences had been substituted with new offences and re-enacted in the Anti-corruption Act. In this case he submitted, the offences he was charged with had been repealed by the time he took plea and as such the trial was illegal and nullity. He prayed for the appeal to be allowed on this ground alone.

In reply to this ground counsel for the respondent conceded that the charge sheet had been amended in August 2010 and that it still referred to offences committed in 2006.

He submitted that **Section 13 (2)** of the Interpretation Act validated such charges. He submitted that the amendment was only in respect of figures in the charge sheet.

The rest of the proceedings he submitted were continuing and that there were no new proceedings.

On ground 2 the appellant submitted that, the learned Judge erred when she upheld a conviction based on charges in count one and two which charges were neither consented to by the Director of Public Prosecution (DPP) nor by the Inspector General of Government (IGG) as required under **Section 49** of the Anti-corruption Act.

He submitted that at the time he pleaded to the amended charges, the Inspectorate of Government was not duly constituted and as such no decision could have been legally made to prosecute him and no valid consent could have been made to institute charges against him.

He cited the decision of the Constitutional Court in ***Constitutional Petition No. 46 of 2011 Hon. Sam Kuteesa and others versus Attorney General***. He further submitted that the amended charge sheet was not signed by the then Acting Inspector General of Government, but was signed by a legal office in the Inspectorate of Government, who he submitted had no legal mandate to do so.

In reply to ground 2 counsel for the respondent contended that the amended charges to which the appellant pleaded to were brought under the Penal Code Act and not the Anti-corruption Act.

He submitted that whereas **Section 88** of the Penal Code Act requires consent of the Director of Public Prosecution, the Inspectorate of Government Act **Section 10 and 14(8)** provides for the independence of the Inspectorate of Government in the performance of its functions and that the Inspector General of Government is not subject to the direction or control of any person or authority.

Counsel submitted further that Mr. Sydney Asubo of the legal affairs department of the Inspectorate of Government had been granted powers to sign the charge sheet. That authority he stated from the bar, was contained in a letter that had been submitted to the lower court at the beginning of the trial.

He submitted that there was no duty to be delegated and that signing a charge sheet was simply procedure.

On ground 3, the appellant submitted that the learned appellate Judge erred in law when she held that a charge of false accounting by a Public Officer and that of embezzlement could be proved by the Inspector General of Government without the production in evidence of an audit report in respect of the embezzled public funds. He submitted that the said charges

could not be proved without the prosecution producing the audit report.

In this particular case he submitted that no audit report had been produced in court and as such the charges should never have been sustained.

Counsel for the respondent in reply to ground 3 contended that there was no legal requirement for the prosecution to produce an audit report and the a failure to do so did not constitute a material irregularity neither did it occasion any miscarriage of justice.

On ground 4, 5 and 7 the appellant made very lengthy written submissions of 37 pages in respect of the three grounds of appeal. The submissions relate to issues of fact and the evaluation of evidence. We have not found it necessary to reproduce the submissions in this Judgment.

Suffice it to say that, the gist of the appellants case on these three grounds is that the appellate Judge did not properly evaluate the evidence before her which she was required to do as a first appellate court. That had she done so she would have found that the case against him had not been proved beyond reasonable doubt.

In reply to grounds 4, 5 and 7 Mr. Okoth learned counsel for the respondent submitted that the said grounds offended the provisions of **Rule 66** of the Rules of this Court. He submitted

that grounds 4 and 5 related to issues of fact which could not be argued on a second appeal.

He submitted that the grounds did not relate to questions of law or mixed law and fact as required by law.

On ground 6 the appellant submitted that the learned appellant Judge erred when she did not hold that failure by the prosecution to disclose and hand over documentary evidence that it intended to use against the appellant at the trial violated the appellants right to fair hearing and occasioned miscarriage of justice.

The appellant prayed to the court to allow the appeal and to set aside the Judgment of the High Court.

We have listened very carefully to the submissions of the appellant made orally and we have also read his written submissions and the court record. We have also listened carefully to the submissions made by the respondent's counsel.

Although the appellant was not represented by counsel he did ably represent himself in court.

In respect to ground one, the facts appear to be undisputed. The appellant was first charged and pleaded to six counts on 18th March 2008. The charges were brought under the provisions of the Penal Code Act (Cap 120) Sections 87,268,270,326.

However, before the commencement of the trial the prosecution amended the charges and presented an amended charge sheet dated 25th May 2010, with substantially the same particulars of offences. That amended charge sheet was signed by **Sydney Asubo** for Inspectorate of Government as the officer preferring charges. This is the charge sheet which the appellant pleaded to on 31st May 2010, before the Chief Magistrate at the Anti-corruption Court.

It is also not in dispute that by this date 31st May 2010 the Anti-corruption Act 2009 was already in force having commenced on 25th August 2009 and that some of the sections of the Penal Code Act under which the charges were preferred had been repealed under **Section 69** of the Anti-corruption Act which stipulates as follows;-

"69 Consequential amendment of Act No.17 of 2002

The Penal Code Act is amended by repealing sections 85,86,87,88,89,90,91,92,93,268,269, 322, 325 and 326"

The respondent therefore conceded that the appellant had pleaded to charges that had been brought under some repealed sections of the Penal Code Act.

It was however strongly submitted by the respondent's counsel, in support of the appellate Judge's decisions that, such repealed provisions remained in force under the provisions of Section 10 of the Interpretation Act and on the Authority of the case of ***Uganda vs Atugonza Constitutional Reference No. 31 of 2010.***

Section 10 of the Interpretation Act states as follows;-

"S.10 of Interpretation Act" states:

> ***"Where any Act repeals wholly or partially any enactment and substitutes provisions for the enactment repealed, the repealed enactment shall remain in force until the substituted provisions come into force".***

In resolving this issue the learned appellant Judge at Page 6 of her Judgment states as follows;-

> ***"The ruling in Atugonza was that S.11 of the Anti Corruption Act was a reaffirmation of S.87of the Penal Code Act Cap 120 and that S.87 cannot be treated as though it never existed because of the repeal. This ruling appears to agree with the submission that the law allows for criminal charges to be brought against a person in respect of acts or omissions, which at the time they were committed, constituted an offence but where the law establishing these offences has since been repealed. This reasoning is indeed a 'common law' application of law. Under common-law once an***

offence was recognized as such, a person who committed such an offence could not turn around and claim that such an offence never existed. This situation is obviously made much clearly since there is a written law which re affirms and neutralizes the repealed one. I therefore find that the appellant was properly charged.

Respectfully we do not agree with the conclusion arrived at by the learned appellant Judge.

In the **Atugonza case** (supra) the facts were different. In that case Mr. Atungoza had been charged under the Anti-corruption Act, (Act 6 of 2009) for offences he allegedly committed before that Act had come into force.

Those offences had existed before the enactment of the Anti-corruption Act 2009 under the Penal Code Act. But the Anti-corruption Act had repealed them from the Penal Code Act and had re-enacted them as new provisions in that Anti-corruption Act.

The complaint by Atugonza had been that he was being charged with offences which had not become law at the time he allegedly committed them.

In the **Atugonza case** (Supra) The Constitutional Court held at page 7 of its Ruling as follows;-

"It is a general rule that when a statute is repealed and all or some of its provisions are at the same time re-enacted, the re-enactment is considered a re- affirmation of the old law; and a neutralization of the repeal, so that the provisions of the repealed Act which are thus re-enacted continue in force without interruption and all rights and liabilities there under are preserved and may be enforced."

The Constitutional Court then proceed to pronounce itself further on this issue as follows;-

"We are therefore satisfied that in view of what we have stated above the applicant is properly charged under S.11 of the Anti Corruption Act, which is a reaffirmation of Section 87 of the Penal Code Act. This Section cannot be treated as though it never existed because of the repeal. The Principle that a repeal should treat such provisions as past and closed does not apply for the reasons aforementioned."

In this particular case however the appellant was not charged under the new law, the Anti-corruption Act. He was not charged with the re-enacted offences. But rather he was charged under the amended charge sheet date 25th May 2010 which he pleaded to on 31st May 2010 and under which he was tried and convicted. Counts 1, 2 and 3 in that charge sheet emanate from repealed sections of the Penal Code that is **Sections 87, 268 and 326**. In that regard therefore the facts of the **Atugonza**

case (Supra) differ in a fundamental way from those in this particular case.

It would have been different had the appellant been charged under the Anti-corruption Act for offences committed before that Act came into force. In that case the Interpretation Act and the **Atugonza case** (Supra) would have been applicable.

We agree with the submissions of the appellant that having been charged under repealed law he pleaded to nonexistent charges.

The trial was therefore irregular, unlawful and null and void in respect of count one which was brought under the repealed **Section 268**, count two, which was brought under **Section 87** also repealed and count three bought under the repealed **Section 326** of the Penal Code Act.

This ground of appeal therefore succeeds.

However, we find that the appellant was properly charged and tried in respect of counts 4 and 5 for offences committed under **Sections 342, 345 and 347** of the Penal Code which were not repealed by **Section 69** of the Anti-corruption Act and which continue to exist under the Penal Code Act.

In respect of the offences brought under **Sections 342, 345 and 347**, of the Penal Code the written consent of the DPP or the IGG is not a mandatory prerequisite.

Ground two of appeal therefore fails.

Ground 3 of appeal is now irrelevant in view of our holding in ground one as it relates to evidence in respect of embezzlement, abuse of office and false accounting by a public officer set out in counts 1, 2 and 3. The counts were brought under the repealed law.

In respect of grounds 4, 5 and 7 of appeal we find that, all the above grounds as set out relate to issues of fact or mix law and fact. We have not been able to ascertain any issues of law raised in respect of those three grounds of appeal, the way they are framed notwithstanding.

This being a second appeal the appellant is barred from appealing to this court on matters of fact or of mixed fact and law.

In this regard section 45(1) of the Criminal procedure Code Act (Cap 116) states as follows;-

> ***45 (1) "Either party to an appeal from a Magistrate's Court may appeal against the decisions of the High Court in its appellate jurisdiction to the court of appeal <u>on a matter of law</u> not including severity of sentence, <u>but not on a matter of fact or of mixed fact and law</u>"***

Grounds 4, 5 and 7 therefore fail on that account.

On ground 6 of appeal it was contended by the appellant that his right to a fair trial was violated when the prosecution failed to avail to him or to disclose the documentary evidence it intended to use against him at the trial.

We note that the respondent did not make any substantive reply to this ground in their submissions before us.

Be that as it may, the undisputed fact is that the appellant applied before grade one Magistrate Pader for an order directing the prosecution to avail to him copies of statement of documentary exhibits and any audit reports which the prosecution intended to use against him at the trial.

The court granted the order sought by the appellant on 06-06 2008. The prosecution was not satisfied with decision of the Magistrate and appealed to the High Court in Gulu.

On 26-02-2010 Hon. Justice Remmy Kasule (J) (as he then was) dismissed the appeal and upheld the decision of the Magistrate Grade one. The above notwithstanding the prosecution refused or failed to comply with the said court order and proceed with the trial before the Chief magistrate at the Anti-corruption court as if that order of court affirmed by the High Court had never been made.

The question of pre-trial disclosure was settled by the constitutional court in ***Constitutional reference No. 6 of 2007***

Soon Yeon Kong Kim and Kwanga Mao versus Attorney General (unreported)

In its unanimous decision the Constitutional court held as follows at pages 12-13 of its Ruling;

> ***We have stated here above that Article 28(1) and (3) require an accused person charged with any criminal offence to be presumed innocent and to be afforded all material statements and exhibits to enable him or her prepare him or her prepare his or her defence without any impediment. This is pre-trial disclosure. This disclosure is not limited to reasonable information only. Counsel for both parties have agreed that the right to disclosure is not absolute. We respectfully accept that view. Both the Kenyan case of Juma (Supra) and the South African case of Shabalala (supra) support this view. Such a disclosure is subject to some limitations to be established by evidence by the State on grounds of State secrets, protection of witnesses from intimidation, protection of the identity of informers from disclosure or that due to the simplicity of the case, disclosure is not justified for purposes of a fair trial. This means that an accused person is prima facie entitled to***

disclosure but the 'prosecution may by evidence justify denial on any of the above grounds. It's the trial court that has discretion whether the denial has been established or not."

In this particular appeal before us the trial court made an order directing the prosecution to disclose the information requested for. The prosecution either failed or refused to comply with the said court order.

In the ***Soon Yeon Kong Kim case (Supra)*** the Constitutional Court held further as follows at pages 13-14 of its Ruling;

"In summary, Article 28(1)(3)(a)(c)(d) arid (g) of the Constitution of Uganda in their plain, natural and practical meaning, prima facie entitle an accused person in a Magistrate's Court to disclosure of:-

(a) Copies of statements made to Police by would be witnesses for the prosecution.

(b) Copies of documentary exhibits, which the prosecution is to produce at the trial.

(c) The disclosure is subject to limitations to be established through evidence by the prosecution."

We agree entirely with the above unanimous decision of the Constitutional Court.

Any act that contravenes the Constitution is null and void and is of the no effect to the extent of the contravention. (See Article 2 (2) of the Constitution).

We find that the appellant was denied a fair trial and that the whole trial was conducted in contravention of **Article 28 (1) (3) (a), (c), (d) and (g)** of the Constitution

We therefore find that the whole trial was a nullity and we hold so

This ground of appeal also succeeds.

In the final result.

The appeal is hereby allowed.

The Judgment and orders of the High Court are hereby set aside and substituted with Judgment of this Court allowing the appeal and setting aside the Judgment of the Chief Magistrate, Anti-corruption Division Criminal Case No. 166 of 2008 and quashing the appellant's convictions and setting the sentences aside.

Dated at **Kampala** this **10th** day of **September** 2014.

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HON. MR. JUSTICE A.S NSHIMYE

JUSTICE OF APPEAL

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HON. LADY JUSTICE FAITH E. MWONDHA

JUSTICE OF APPEAL

.....

HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL