THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0078 OF 2012

VICENT NTAMBI::

APPELLANT

VERSUS

UGANDA::RESP ONDENT

CORAM: HON. MR. JUSTICE ELDAD MWANGUSYA, JA

HON. MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

(Appeal from a Judgment of the High Court at Kampala before
the Hon. Lady Justice Kiggundu dated the 26th day of March 2012 in Criminal Appeal No. 65 of 2009 arising from Buganda
Road Court Criminal Case No. 1265 of 2008)

JUDGEMENT OF THE COURT

This is a second appeal. It arises from the decision of the High Court of Uganda at Kampala in Criminal Appeal No. 65 of 2009.

The High Court was exercising its appellate jurisdiction in an appeal arising from Buganda Road, Chief Magistrate's Court

Criminal Case No. 1265 of 2008 The brief facts giving raise to this appeal are as follow;-

The appellant was charged at Buganda Road Chief Magistrate's Court with one count of forgery contrary to **Section 347** and **342** of the Penal Code Act, one count of uttering false documents contrary to **Section 351** of the same Act and one count of fraudulent transfer of title contrary to **Section 190** of Registration of Titles Act.

He pleaded not guilty to all the charges on 23rd October 2008.

The prosecution called seven witnesses to prove the case against him.

At the closure of the prosecution case, the defence counsel Mr. Ntende stated as follow;-

> ***"I do not intend to make a submission on whether a prima facie case has been made out or not."***

Accordingly no submissions were made by either party as to whether or not the accused had a case to answer.

On 28th October 2009, the presiding Magistrate, Grade one Mr. Kobusheshe Francis, in a brief two page ruling, held that the accused, now appellant had no case to answer, acquitted him and discharged him under **Section 127** of Magistrate's Court's Act.

Being dissatisfied with decision of the learned Magistrate the Director of Public Prosecutions appealed against the decision to the High Court.

Hon. Lady Justice Jane Kiggundu J on 26th March 2012 allowed the appeal, set aside the decision of the trial Magistrate and ordered a re-trial before another Magistrate.

The appellant then appealed to this court. The appellant first filed a memorandum of appeal on issues on mixed law and fact. When this court brought to the attention of counsel for the appellant the provisions of **section 45(1)** of the Criminal Procedure Code Act , he filed an amended memorandum of appeal on 22 October 2014 which reads as follows;-

1. ***The learned first Appellate Judge erred in law when in the exercise of her duty of evaluating the evidence before her, failed to be guided by the impression made on the trial Magistrate who observed and noted the prosecution witnesses.***

2. ***The learned first Appellate Judge erred in law in failing to rightly evaluate, recognise and find no prima facie case had been made out by the prosecution at the end of its case to warrant the accused to be put on his defence.***

3. ***The learned Appellate Judge erred in law when she misdirected herself on the evidence on record.***

4. ***The learned first Appellate Judge erred in law when she unjustly compelled the accused to stand another trial.***

Learned counsel for the appellant preferred to address only one issue arising from all the above grounds of appeal which he framed as follows;-

> ***"Whether the learned appellate Judge should in law have in the circumstances of this case ordered re-trial"***

After the intervention of this court it was agreed that only one issue be framed in the following terms;-

> ***"Whether the appellate Judge erred in law when she held that there was sufficient evidence adduced at the trial to warrant the appellant to be put on his defence and whether she erred in law when she ordered a re-trial."***

Learned counsel **Mr. Fredrick Samuel Ntende** appeared for the appellant while **Ms. Grace Nabagala,** Senior State Attorney appeared for the respondent.

Mr. Ntende argued that the learned appellate Judge erred when she failed to re-evaluate the evidence before her and when she failed to come to her own conclusion on issues of law and fact. That had she done so she would have reached the conclusion that the appellant had no case to answer at the close of the prosecution case.

He submitted that unlike in the case of **Uganda vs *Kato Kajubi Godfrey (Court of Appeal Criminal Appeal No. 39 of 2010)*** (Unreported) in this particular case there was no irregularity or a contest between justice an impunity.

That the learned trial judge ought to have been guided by the findings of the fact made by the trial Magistrate, the impressions the witnesses had made on him who had seen and had heard them testify.

Learned counsel submitted that the learned appellate Judge erred when she ordered a re-trial as there was no basis of doing so. He cited the case of ***Fatehali Manji vs Republic [1966] E.A 343*** which he contended sets out the principles to be followed by court before a re-trial can be ordered. For a retrial to be ordered, there must be an irregularly, in this case, counsel contended, there was no irregularity. He also cited the case of ***Ahmed Suuma vs R. [1964] E.A 481.***

He asked this court to uphold the appeal, set aside the decision of the High Court and reinstate the order of the trail magistrate acquitting the appellant.

Ms. Nabagala, for the respondent opposed the appeal and supported the decision of the learned appellate Judge.

She submitted that the learned judge had properly come to the conclusion that the appellant had a case to answer.

That a re-trial was justified in the circumstances of this case as the interest of justice so required.

That an order requiring the defence to continue before another Magistrate would cause injustice as that Magistrate would not have had the opportunity of hearing and observing the witnesses' demeanor.

Learned counsel attacked the arguments of learned counsel for the appellant on the issue of re-trial contending that it had not been raised in the memorandum of appeal.

She prayed for the dismissal of this appeal.

Since it is conceded by counsel for the appellant that this appeal is in respect of matters of law only and thus complies with **Section 45(1)** of the Criminal Procedure Code Act, we shall not dwell on the issue of procedure.

At the close of every prosecution case, the court is required to make a decision based on both law and fact as to whether or not the evidence adduced by the prosecution has made up a *prima facie* case against the accused to require him or her to be put on his or her defence.

Courts have defined a *prima facie* case in different words, all meaning the same thing. We shall take the definition given by this court in **Semambo and Other vs. Uganda (Criminal Appeal No. 076 of 1998)**.

It was defined as follows;-

"A prima facie case means a case sufficient to call for an answer from the accused person. At that stage the prosecution evidence may be sufficient to establish a fact or facts in absence of evidence to the contrary, but is not conclusive. All the court has to decide at the close of the prosecution case is whether a case has been made out against the accused just sufficiently to require him or her to make his or her defence.

It may be a strong case or it may be a weak one. At that stage of the proceedings the court is not required to decide whether the evidence, if believed, proves that the accused is guilty of the offence charged."

See also ***Wambiro alias Musa vs R [1960] EA 184, Fred Sabahashi vs Uganda (Criminal Appeal No. 23 of 1993(Sc) and Uganda vs Kato Kajubi Godfrey (Criminal Appeal No. 39 of 2010 (COA).***

The decision of the learned Magistrate was based on his finding of fact that no sufficient evidence had been adduced to prove that one Nulu Bulya's signature had been forged. He arrived at this conclusion because in his view the evidence of the PW6 a handwriting expert was inconclusive. As stated above, the prosecution case maybe strong or weak, but the Court at this

stage is not required to decide whether the evidence if believed proves the accused is guilty of the offence charged.

All that is required is of a court is to decide whether or not at the close of the prosecution case, sufficient evidence has been adduced by the prosecution to require the accused to be put on his or her defence.

The learned appellate judge in a very detailed and well reasoned Judgment set out carefully the evidence of each of the seven prosecution witnesses and showed how, the evidence adduced by the prosecution at the close of its case was sufficient to require the appellant to be put on his defence.

We find no reason to reproduce what was set out in that Judgment. Suffice it to say, we agree with her entirely and uphold her findings.

It is our finding therefore, that the prosecution had adduced sufficient evidence at the closure of its case to require the appellant to be put on his defence.

The remaining question is whether or not the appellate court should have ordered a re-trial. Before making the order for a re-trial, the learned appellate judge noted as follows;-

> ***“ I have noted that the learned trial Magistrate who made the ruling in certain way which in my view was***

not proper *(sic)* ***the demands of justice require that this Court orders a re-trail before another Magistrate. The respondents bail should be re-instated as he prepares for the re-trial."***

With all due respect to the learned appellate judge, we think she ought to have set out detailed reasons why she found it imperative to order a re-trial.

Any number of Magistrates may try a case in succession. The Supreme Court in ***Arvind Patel vs Uganda (Criminal Application No. 36 of 2002)*** held that;-

"Our view is that any number of magistrates as necessary may hear and record evidence in a trial of a case throughout its progress. What matters is to ensure that the accused person is not thereby prejudiced….."

A re-trial involves the re-calling of witnesses some of whom may have died and others may not be easily traceable. The memory of those witnesses may have lapsed and other may have lost interest in the matter. The exhibits may have been tempered with, lost or misplaced. Re-trials also increase case back log in courts. A re-trial therefore ought to be ordered only in compelling circumstances.

Before ordering a re-trial was ordered in the case of **Uganda vs Kato Kajubi Godfrey** (supra) this court gave the following explanation;-

> ***"In light of this finding, we have considered whether we should order the respondent to be put on his defence before the trial judge or before another judge. We have rejected the first option as not being feasible. We do not think it is fair to the parties and to the trial judge to order him to continue with the trial. He seems to have taken certain fundamental positions on various matters in the trial that may be too late to revise now. We do understand the awkward situation he may find himself in being human, like all human beings are.***
>
> ***We do not consider it feasible either, to order that the trial continues before another judge. It is not practicable to expect another judge to continue a case of this magnitude on the evidence of 22 witnesses he/she neither saw nor I heard in the witness box in court.***
>
> ***This case shocked the entire nation. It is in the interest of the respondent and the people of Uganda that a just solution be found. At the risk of an amount of delayed***

justice, we think the only viable resolution of the conflict
between justice and impunity is to order that there be a retrial in the High Court of Uganda before another judge."

Whereas in the above cited case this court found that there existed compelling circumstances that justified an order for a re-trail, with all due respect to the learned appellate judge, we have not found any compelling circumstances in this case that would justify an order for a re-trial.

The learned appellate judge made an order re-instating the appellant's bail. With all due respect to the learned judge, the order was unnecessary and superfluous. The appellant having been acquitted and discharged by the Magistrate's court, he could not have been on bail. The learned Judge should have remanded the appellant in custody. It would then have been open to him to re-apply for bail.

We find no merit whatsoever in this appeal and it is hereby dismissed.

We accordingly, make the following orders.

1. **This appeal fails and is hereby dismissed, the judgment of the High Court setting aside the acquittal and discharge of the appellant is hereby upheld.**

2. **The appellant's trial should proceed with presentation of his defence, without any further delay, before another Magistrate.**
3. **We hereby order that the appellant be remanded in custody and be produced in Court for trial within 14 days of this order.**

It is so ordered.

Dated at **Kampala** this **4th** day of **December** 2014.

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HON. MR. JUSTICE ELDAD MWANGUSYA

JUSTICE OF APPEAL

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HON. MR. JUSTICE RICHARD BUTEERA

JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL