THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: ODOKI, CJ; KATUREEBE; OKELLO; TUMWESIGYE AND KISAAKYE; JJSC.)

CIVIL APPEAL NO. 08 OF 2009

BETWEEN

RWAKASHAIJA AZARIOUS
DR. KAGGWA JAMES::: APPELLANTS
MUHANGI KATTO

AND

UGANDA REVENUE AUTHORITY:::::::::::::::::::::::::: RESPONDENT

[An Appeal from the decision of the Court of Appeal at Kampala (Engwau, Kitumba and Byamugisha, JJ.A) dated 30th March 2009 in Civil Appeal No. 5 of 2007]

JUDGMENT OF TUMWESIGYE, JSC

This is an appeal by Rwakashaija Azarious, Dr Kaggwa James and Muhangi Katto (the appellants) from the decision of the Court of Appeal given on 30th March 2009 in favour of Uganda Revenue Authority (URA) (the respondent).

The appellants had filed a suit against the respondent in the High Court claiming to be paid shs 213,935,574/= being 10% of the tax the respondent recovered from a construction firm. The High Court allowed their claim and the respondent appealed to the Court of Appeal which reversed the decision of the High Court, hence this appeal.

The brief facts of this case are that in September 2001 a joint tax fraud audit was conducted on Grupo Dragados SA (herein referred to as "Dragados") by the respondent and Special Revenue Protection Service (SRPS). SRPS was a revenue agency under the office of the President which was connected to the respondent. Dragados had been contracted by the Government of Uganda to rehabilitate some Government hospitals in the country. The head of SRPS, Col. Kale Kayihura (as his military rank then was), had requested for this joint audit. The audit led to a recovery of Shs 2,247,114,516/= from the firm. The appellants claimed that they gave information which led to the recovery of this money to the head of SRPS, Kale Kayihura, and that they were, therefore, entitled to be paid 10% of that sum of money.

The Parliament had by way of encouraging the public to assist Government in curbing tax evasion passed a statutory provision under section 7 of the Finance Act, 1999, that a person who gives information leading to recovery of tax is entitled to be rewarded

10% of the tax recovered. The appellants based their claim of 10% of the tax recovered on this statutory provision.

When the appellants asked the respondent to pay their claim, the respondent declined. The respondent's Commissioner General explained to the appellants' lawyers that the tax which was recovered was already known to the respondent and therefore no information could be said to have been given to them, and further that it was not a case of VAT tax evasion by Dragados, as the appellants claimed, but rather a case of delayed payment of VAT by the firm.

Failing to get the money claimed, the appellants filed a suit in the High Court against the respondent. The learned trial judge, Okumu Wengi, J, decided the matter in favour of the appellants. He held that the appellants had provided information that led to the recovery of the tax and that they were, therefore, entitled to be paid 10% of that revenue under the Finance Act. He awarded the appellants Shs 214,000,000/=, interest at 11% from the date of filing the suit till payment in full, and the costs of the suit.

The respondent being dissatisfied with the judgment of the trial judge appealed to the Court of Appeal. In a unanimous decision the Court of Appeal reversed the decision of the trial judge and awarded costs in both courts to the respondent.

Being dissatisfied with the decision of the Justices of the Court of Appeal the appellants appealed to this court on the following two grounds:

1. **The learned Justices of the Court of Appeal erred in law and in fact when they departed from the findings of the learned trial judge that the appellants gave information leading to recovery of tax when the finding of the High Court is supported by both oral and documentary evidence on record.**

2. **The learned Justices of the Court of Appeal erred in law and in fact when they departed from the finding of the learned trial judge that a case of under-estimation of VAT had been established by the appellants when this finding is supported by both oral and documentary evidence on record.**

The appellants prayed the court to reverse the decision of the Court of Appeal and to affirm the decision of the High Court. They also prayed for the costs in this court and the two courts below.

Both the appellants and the respondent filed written submissions in this court. Mr. Fredrick Sentomero of Messrs Katende, Ssempebwa & Company Advocates represented the

appellants, while Mr. Moses Kazibwe Kaumi of Uganda Revenue Authority represented the respondent.

Learned counsel for the appellants argued the two grounds of appeal in the order he filed them. I will follow the same order.

On ground one counsel argued that the learned Justices of the Court of Appeal erred in principle in departing from the findings of fact of the trial judge that the appellants supplied information to SRPS when there was ample evidence on record to support this fact.

He submitted that the learned Justices of the Court of Appeal unnecessarily put undue weight on Rwakashaija Azarious, PW1's **"slip of the tongue"** when he testified in the trial court that he had supplied information to SRPS in April 2000 when his other testimony points to the correct time as July 2001. PW1's evidence, he submitted, is corroborated by other evidence on record.

He argued that the Court of Appeal's departure from the finding of the learned trial judge was based on the fact that there was no mention of the names of the appellants in the document Exhibit P1, which the appellants relied on as being the informers. Counsel submitted that the appellants identity was withheld for their own security and that of their sources and in

any case PW1 and other witnesses from SRPS gave information about their identity in the trial court.

Counsel further argued that SRPS's head Kale Kayihura's letter corroborates PW1's testimony since it says that SRPS was responding to information received about possible fraud. He further argued that the letter from the Permanent Secretary Ministry of Finance to the Commissioner General of URA dated 2nd August 2000 had requested for a thorough audit and that this audit was conducted and it yielded only 12 million shillings because of a cover up by the respondent's staff.

He further argued that the question of identity of the informers was not in issue when the Commissioner General of URA refused to reward them, the only ground for her refusal being that it was a case of delayed payment of VAT and not a case of VAT evasion.

Learned counsel for the respondent supported the decision of the Court of Appeal. He agreed with the learned Justices of the Court of Appeal that the trial judge had failed to properly evaluate the evidence before coming to the conclusion that the appellants supplied information to SRPS. He argued that the documents tendered in court as exhibits in support of the appellants' case do not show the kind of information the appellants allegedly provided to SRPS; that the document

strongly relied upon which was from SRPS's head Kale Kayihura never mentioned the appellants as the informers, and that Kale Kayihura was never called as a witness to support the appellants' claim.

Counsel submitted that the evidence relating to the appellants as the informers was the oral testimony of PW1. This testimony, counsel argued, contained a lot of inconsistencies and contradictions especially relating to the time when PW1 allegedly supplied information to SRPS and the nature of the information he allegedly supplied. All these inconsistencies were ignored by the trial judge, he contended.

He dismissed the letter purportedly written by the Head of Finance/Internal Audit (F/IA) of SRPS, Capt. Leni Mugalu as of no evidential value as it was not addressed to the respondent and did not specify the information supplied by the appellants, but was just a "to whom it may concern letter".

He argued further that the audit which resulted in the collection of shs. 12 million was not a cover up of tax evasion as the said audit carried a recommendation that URA should carry out further investigation and that indeed this was followed by preparations for further investigation which preparations preceded the letter from SRPS's head Kale Kayihura.

Learned counsel further argued that there was sufficient documentary evidence to show that the taxes in question were known to the respondent before the request from Kale Kayihura for a joint investigation. According to counsel the appellants failed to prove that they provided information to SRPS.

I will first deal with the point of law raised by counsel for the appellants that the learned Justices of the Court of Appeal erred by departing from findings of fact of the trial judge when there was sufficient evidence to support the trial judge's findings. Learned counsel cited the cases of ***Ephraim Ongom and another vs Francis Binega Donge*** S.C.C.A, ***Sanyu Lwanga Musoke vs Sam Galiwango*** S.C.C.A No. 48 of 1995, ***Selle and another vs Associated Motor Boat Company Limited and others*** [1968] EA 123 and ***Peters v. Sunday Post*** [1947] 1 All E.R. 582 for the principle that a first appellate court only departs from findings of fact of the lower court if these findings of fact seem to be inconsistent with the evidence in the case generally.

The principle which guides the Court of Appeal when it is considering findings of fact of a trial judge is contained in Rule 30(1)(a) of the Court of Appeal Rules and in several cases decided by this court.

Rule 30 (1)(a) of the Court of Appeal Rules provides that on any appeal from the decision of the High Court acting in exercise of its original jurisdiction, the court may re-appraise the evidence and draw inferences of fact.

In ***Masembe vs Sugar Corporation and another***, SCCA1/2000 it was held that an appeal from the High Court was by way of a retrial and in exercise of its powers of re-evaluation of evidence, a first appellate court was not bound to follow the trial judge's findings of fact if it appeared that he had clearly failed on some point to take account of particular circumstances of the case generally. See also ***Bogere Moses vs Uganda*** Cr. Appeal No. 1 of 1997, ***Kifamunte Henry vs Uganda***, Cr. Appeal No. 10 of 1997 and ***Baguma Fred vs Uganda*** Cr. Appeal No. 7/2004.

All the cases cited above follow the principle laid down in ***Selle vs associated Motor Boat (supra)*****,** where it was stated:

> **"An appeal to this court from a trial of the High Court is by way of a retrial and the principles upon which this court acts are well settled. Briefly put they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."**

See also ***Dinkerrai Ramkrishan Pandya v. R*** (1957) E.A 336 which has been cited in several decisions of this court on this point. In ***D.R. Pandya v. R*** (supra) the E.A. Court of Appeal quoted the following passage from ***Coghlan v. Cumberland*** (3) [1898], Ch. 704 as a guiding principle:

> "**Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must re-consider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its mind, not disregarding the judgment appealed, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong….when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be guided by the impression made on the judge who saw the witnesses. But there may obviously be circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even**

on a question of fact turning on the credibility of witnesses whom the court has not seen."

Learned counsel for the appellants cited ***Selle and another vs Associated Motor Boat Co. Ltd and others (supra)*** as laying down the principle "that an appellate court should not depart from the findings of a trial judge who had opportunity to see and hear witnesses **except in very exceptional circumstances**". He also cited ***Watt v Thomas*** [1947] 1 All E.R. 582 to support this view. With respect, I do not think that this is the guiding principle of this court.

The principle, as I understand it, can be stated as follows: 1. The Court of Appeal acting as a 1st appellate court has power and also a duty to carefully and exhaustively re-evaluate the evidence as a whole and make its own decision on the facts. 2. In making its decision it should bear in mind that it has not had the opportunity of seeing or hearing the witnesses as the trial judge had especially when the demeanour of witnesses is key to the findings made. 3. However, even where the demeanour of witnesses is relevant, the court may reverse the decision of a trial judge if it is of the view that considering all circumstances his or her decision cannot stand. 4. Where the question is not of demeanour of witnesses but is rather of drawing of inferences from facts adduced the Court of Appeal is entirely free to reverse the findings of a trial judge if after its own re-

evaluation of evidence, it is of the view that the findings of the trial judge were wrong.

As it will be shown later, the demeanour of witnesses was not an important factor in the Court of Appeal's decision to depart from the findings of the trial judge. What the Court of Appeal did, and rightly so in my view, was to reappraise evidence on record and draw its own conclusions taking into account the veracity of statements made in testimonies and in exhibits admitted.

From the outset Engwau, JA, who wrote the lead judgment cited the cases of ***D.R. Pandya v. R*** (supra), ***Ephraim Ongom and another vs Francis Binega Donge*** (supra) and Rule 30 (1)(a) of the Rules of the Court of Appeal cited above as his guiding authorities. This, in my view, shows that the learned Justice of the Court of Appeal was very much alive to the importance of applying the above-mentioned principle correctly to the matter before him.

He then proceeded to re-evaluate the evidence of PW1 who was the appellants' key witness. He found that the evidence of PW1 who stated that he passed information to SRPS in April 2000 showing that Dragados had paid only shs 12 million as VAT to be unbelievable as the demand for shs 12 million was made on Dragados by URA on 24th October 2000. The learned

Justice of the Court of Appeal wondered how information about Dragados having paid shs 12 million could be obtained by PW1 several months before the money was paid. Counsel for the appellants argues in his submissions that mention of April 2000 by PW1 was "a slip of the tongue" and that there is other evidence on record which points to the fact that PW1 refers to July 2001. I do not accept this argument. I find no justification for a claimant to be inconsistent on essential facts of his case. The learned Justices of the Court of Appeal were, in my view, right to find that PW1's testimony in this respect was not credible.

The learned Justices of the Court of Appeal equally found the evidence of PW1 that he passed four or five certificates of completion of works to SRPS for April 1999, May 1999, June 1999, July and August for the same year unbelievable because certificates of completion are not issued at monthly intervals. Counsel for the appellants argued in his written rejoinder that mention of certificates by PW1 was a "slip", that the witness, for lack of words, meant monthly returns, that PW1 was "a mere lay man, a debt collector" and that that was why he was mistaking documents.

I find the arguments of counsel unconvincing. PW1 was not an illiterate, ignorant person from the village but a man who described himself as a debt collector who did business studies

that included accounts and law. When asked in court what a return is, he correctly described it as "**the amount calculated from output and input of goods, the difference results in the tax component supposed to be paid"**. It is difficult to imagine such a person confusing a return with a certificate of completion. PW1 is the 1st appellant. This was his case. He knew that what he had to say in court was important to his case. If it had been a mere slip of the tongue, as counsel for the appellants argues, he would have corrected it immediately. The learned Justices of the Court of Appeal were, in my view, right to treat PW1's evidence in this respect as untrue.

The Court of Appeal was of the view that the appellants were not known to the respondent and the collection of taxes due from Dragados was not based on the appellants' information. The Court of Appeal reached this conclusion basing itself on the fact that both the letter of Kale Kayihura and that of the Secretary to the Treasury requesting for investigation did not mention the names of the appellants as informers. The only mention of the names of the appellants as informers is made in Head F/IA SRPS, Captain Leni Mugalu's letter. According to the Court of Appeal, the letter does not state the nature of the information that the appellants passed to the SRPS and worse still it was written 18 months after the taxes were paid.

I cannot fault the Court of Appeal for treating the letter from Head F/IA as of little help to the appellants' case. The letter was written long after the taxes were paid. It does not indicate what information the appellants provided. It is a "to whom it may concern" letter addressed to no-one in particular. It was mis-dated. It seems to have been written in a hurry. I think it was a contrivance, to say the least.

Counsel for the appellants argues that the letter from Secretary to the Treasury led to an investigation which yielded only shs 12 million as tax; that Kale Kayihura's letter did not mention the names of the appellants because he wanted to keep their identity confidential; that the same letter stated that SRPS was responding to information about possible fraud and therefore it corroborates PW1's evidence that he gave information to SRPS; that PW3 Natumanya Emmanuel told court that "he remembers the informers. He saw two. One was a doctor"; that other witnesses mention that information which led to the second audit was received from informers, and that all this evidence corroborates PW1's evidence.

I respectfully agree with the learned Justices of the Court of Appeal that Kale Kayihura's letter to URA does not corroborate the evidence of PW1 that the appellants gave information to SRPS and by extension to URA. The letter does not mention the names of the appellants as informers. There is nothing in that

letter that suggests that it is the appellants who gave information to SRPS. If the appellants had an eye on getting a reward from URA as informers, it would have been in their interest to provide the information in writing stating the nature of information they gave. It would also have helped them to call Kale Kayihura to come and testify in court that he received information from them and the nature of the information he received. They did not.

In the circumstances the identity of the persons who supplied information mentioned in Kale Kayihura's letter can only remain a matter of conjecture. The Court of Appeal was in my view justified to find that there was no linkage between Kale Kayihura's letter and the appellants as informers.

The learned Justices of the Court of Appeal considered the evidence of Natumanya (PW3) and found it unhelpful to the appellants' case. I respectfully agree with them. PW3 could not remember the names of the appellants although he was their witness. He could not even remember how many they were.

Counsel for the appellants submitted that the names of informers were withheld from Kale Kayihura's letter for their own security and that of their sources. The appellants are claiming payment to them of shs 213,935,574/= as informers to URA under Section 7 of the Finance Act, 1999. It would not

be proper, in my view, for URA to pay informers whose identities are not known to it. URA did the right thing to introduce a system of registering informers, giving them code numbers and showing the nature of information received, and when it was received, as DW1 and DW2 testified in court. A system which allowed URA to pay anonymous informers would be wrong, in my view, as it would undoubtedly lead to gross abuse. This court cannot put its stamp of approval to such an undesirable practice.

Learned counsel for the respondent argued that the VAT in issue was known to the respondent before URA received Kale Kayihura's letter of 17th August 2001 requesting for a joint audit. Counsel for the appellants, on the other hand, argued that the Secretary to the Treasury's letter of 2nd August 2000 requesting for a thorough investigation did not lead to the recovery of two billion shillings from Dragados but instead led to the recovery of only shs. 12 million. He, however, omits to mention that that investigation report recommended that URA should "carry out further research". He also fails to mention that the case Control Record admitted as Exhibit D5 which was prepared on 19th July 2001 mentions letters from Secretary to the Treasury and Permanent Secretary Ministry of Health as a basis for URA's investigation and this preceded Kale Kayihura's letter which was written almost a month after on 17th August 2001 to the Commissioner General of URA.

I will quote brief facts recorded on the said Case Control Record (Exhibit D5):

> **"On 19th July, 2001 DC-TI has instructed SPRO (VDTI) to initiate a thorough investigation into the VAT computation in relation to the ADB/funded Health Sector Rehabilitation Project as per letters dated 2nd August, 2000 and 14th June 2001. MOF require URA to work closely with the PS –MOH to provide all relevant documents and information relating to the project (to facilitate recovery of VAT where necessary). The contract sum is US $ 35,748,960 including VAT (local) of US $ 5, 194,258.7 as per PS-MOF letter of 14th June 2001."**

The contents of this document were not disputed by the appellants. It is surprising that the trial judge ignored this vital piece of evidence which clearly shows that instructions to conduct a thorough investigation on Dragados VAT payment were issued to relevant officers of URA almost a month before Kale Kayihura's letter was written. The Case Control Record also shows that URA knew that the VAT payable by Dragados was about US $ 5,194,258.7.

I agree that URA took an unreasonably long time to act following letters from authorities of Ministries of Finance and

Health requesting, and an audit report recommending, investigations to be conducted in respect of Dragados VAT payment status. This no doubt reflects on URA's efficiency and effectiveness during this period. Still it would not be right, in my view, to say that the tax authority did not have information on which to act until it received Kale Kayihura's letter. Clearly this was a case of URA delaying to act on information already in its possession rather than a case of URA having no information on which to act.

Counsel for the appellants argued that the Commissioner General's letter (Exhibit P7) to the appellants' lawyers of 19th December 2002 mentioned only one reason for her refusal to reward the appellants which was that it was a case of tax arrears on the part of Dragados rather than that of tax evasion as the appellants claimed. It is not clear to me whether by this argument counsel for the appellants is saying that the respondent should not be allowed to raise any other grounds except one that was mentioned in the Commissioner General's afore-mentioned letter. If it is the appellants' argument that they were misled by the Commissioner General's letter to believe that the respondent had only one ground for rejecting their claim, and that if they had known that the respondent had other grounds they would not have sued, then they should have refrained from suing from the time they learnt that the respondent had other grounds.

This, in my view, is not a case where the doctrine of estoppel by representation can apply. Moreover, the Commissioner General's letter states: "I trust the above clarifies that there are no grounds for approving a reward in this case." If she addressed only one ground in her letter, it does not mean that she admitted other grounds. I do not even know the contents of the letter the Commissioner General was replying to as it is not on record. I find no merit in this argument.

It is my view that if the trial judge had evaluated the evidence properly, he would not have come to the conclusion that the appellants provided information to the respondent. I find that the Court of Appeal evaluated the evidence properly to reach its conclusion and that it was justified to depart from the trial judge's findings in this respect. This ground of appeal must, therefore, fail.

This conclusion would, in my view, dispose of the case. Furthermore, it will be seen that my observations in my consideration of ground one also apply to ground two. I will, therefore, deal with ground two briefly.

Counsel for the appellants submitted that PW1, PW3, and PW4 testified that Dragados had evaded tax and that the learned trial judge correctly relied on their testimonies to make his

conclusion that the firm had evaded tax. Therefore, counsel argued, the Court of Appeal erred to depart from the findings of the learned trial judge.

According to counsel’s submission PW3 found that there was a discrepancy about what was in the certificates and what was in the returns and that this was an indication of under declaration. If the firm had declared all that it was supposed to declare, he submitted, there would have been no need for another audit.

Counsel further quoted the testimony of PW4 who testified that Dragados declared less than what the audit team established and that there was underpayment of VAT on the firm’s part. Counsel argued that DW1 also testified that Dragados had underdeclared their tax liability.

Counsel for the respondent, on his part, submitted that the learned justices of the Court of Appeal correctly relied on the testimonies of PW3 and PW4 to arrive at the conclusion that it was a case of delayed payment of tax by Dragados and not a case of under declaration of tax.

Considering the evidence as a whole I find that the Court of Appeal was correct to reach the conclusion it did and to depart from the findings of the learned trial judge in this respect.

PW3 and PW4 were part of the team together with DW2 who conducted the joint investigation on Dragados. They prepared a VAT investigation report which PW3, PW4 and DW1 all signed. The report clearly states that the outstanding tax was delayed payment (tax arrears) and not tax underdeclaration. In my view PW3 and PW4 are bound by the findings of the investigation report they signed. Furthermore, PW4 stated in court: "We used the term late payment rather than evaded tax … in this case we meant late payment… The tax was known by both parties. It was estimated and actuals would go up and down." This statement cannot be reconciled with a finding of tax evasion as counsel for the appellants contends. DW1 testified: "We agreed the issue was of late payment, not evasion of tax." DW1's statement is consistent with the conclusion written in the joint investigation report signed by all the members of the investigation team that what the investigation team identified was VAT arrears and not VAT evasion.

Minutes of the meeting between SRPS and Dragados held on 26th September 2001 and chaired by SPRS's head Kale Kayihura which are on record show that that meeting did not dispute the fact that it was VAT arrears. One Dalal Murtaza who was auditor of Dragados is said in the minutes to have "assured the meeting that the tax liability of Ug. Shs. 2,247,114,516 VAT arrears is not in dispute. But he informed the meeting that the

arrears were due to non-payment by the Ministry of Health to URA".

This is corroborated by the Commissioner General of URA who in her letter to the appellants lawyers mentioned earlier stated: "There is a fundamental problem in the treatment of VAT on donor funded projects in that in accordance with the VAT Statute 1996 the supplier is responsible for the output tax, the donors only pay the suppliers the principal sum, and the line Ministries are responsible for paying the VAT but do not do so in time." The Commissioner General's letter goes on to explain the difficulties which Dragados was experiencing as a result of change in VAT payment policy and the efforts the firm made to have these difficulties resolved. PW1 stated in court that contrary to the respondent's assertions about the delay of the Ministry of Health to pay VAT to Dragados, the Ministry actually paid VAT to Dragados promptly. However, there is no other evidence on record to support this testimony. The appellants should have called some knowledgeable, independent witness to testify to this effect.

In my view the trial judge did not evaluate the evidence properly before coming to the conclusion that the appellants proved that Dragados had evaded tax and that, therefore, they were entitled to be rewarded 10% of the amount recovered. The Court of Appeal was justified to depart from his findings as,

in my view, a case of VAT evasion was not successfully made out by the appellants. Therefore, ground two of appeal must fail as well.

Accordingly, I would affirm the decision of the Court of Appeal and award costs here and in the two courts below to the respondent.

Dated at Kampala this **17th** day of **August** 2010.

JOTHAM TUMWESIGYE
JUSTICE OF THE SUPREME COURT