THE REPLIC OF UGANDA

INTHE SUPREME COURT OF UGANDA AT KAMPALA

CORAM: (ARACH-AMOKO; MWONDHA;TIBATEMW A-EKIRIKUBINZA; JSC)

CRIMINAL REFERENCE NO.Ol OF 2016
(Arising out of Criminal Application No.06 of 2015)
(Arising out of Criminal Appeal No.7 5 of 2015)

BUSUL W **A BI.ASIO .....** APPLICAN'T

VS

UGANDA .....RESPONDENT

(Reference from the ruling of Opio-Aweri, JSC (single Justice) dated 19th February, 2016 in Criminal Application No.06 of 2015)

RULING OF ARACH-AMOKO, *JSC*

This is an application by way of a reference from the decision of a single Justice of this Court (Opio-Aweri JSC) delivered on the 9'lt February, 2016 dismissing Criminal Application No.06 of 2015 for bail pending appeal.

The reference seeks for orders from a panel of three Justices varying or reversing the said decision.

It was brought by notice of motion under section 8(2) of the Judicature Act, Rules 41 (2) and 52(b) of the (Supreme Court Rules) Directions.

Background

The applicant was tried by a Magistrate Grade 1 at Buganda Road Chief Magistrates Court, for the offences of intermeddling with the estate of a deceased person contrary to section 11 (1) of the Administrator General's Act and fraud contrary to section 190(1) of the Registration of Titles Act, respectively. He was acquitted on the 10th June, 2010.

The DPP was dissatisfied with that decision and appealed to the High Court. The High Court overturned the decision of the Grade 1 Magistrate and convicted the applicant and sentenced him to 30 months imprisonment on 30/01/12.

Aggrieved by the decision of the High Court, the applicant appealed to the Court of Appeal against the conviction and sentence. The Court of Appeal upheld the decision of the High Court.

The applicant was dissatisfied with the decision of the Court of Appeal and has filed Criminal Appeal No. 75 of 2015 in the Supreme Court against it. At the same time, he filed Criminal Application No. 06 of 2015 in the Supreme Court, for bail pending appeal. Opio Aweri JSC who heard the application dismissed it for failure to satisfy the requirement for the grant of the order of bail pending appeal on the 19/02/106. Hence this reference.

The *Grounds of the reference:*

The reference is supported by the affidavit of the applicant setting out the details of his complaint; however, the grounds of the reference are briefly that:

1. The learned justice of the Supreme Court erred In law and fact when he held that Criminal Appeal No. 75 of 2015 was a third appeal which would on such account be Incompetent In this honourable Court.

2. *The learned Justice of the Supreme Court erred in law and fact when he held that on account of Criminal Appeal No.* 75 *of 2015 being incompetent, the applicant cannot be granted bail pending appeal.*

3. The learned Justice of the Supreme Court erred in law and fact when he held that Criminal Appeal No. 75 *of 2015 was incompetent without allowing counsel for the applicant to address him on that issue thereby denying the applicant a fair hearing leading to a miscarriage of justice.*

4. The learned Justice of the Supreme Court erred in law and fact when he held that an appeal without a certificate of importance from the Court of Appeal or without leave of the Supreme Court would be incompetent on that account.

5. The learned Justice of the Supreme Court erred in law and fact when he held that Criminal Appeal No. 75 *of 2015 was incompetent yet such a decision can only be taken by a full panel of the Supreme Court consisting of five justices and such a decision can only be taken when the appeal comes up for hearing:*

6. It is in the interest of justice that the decision of the single Justice be reversed and the applicant be granted but pending the hearing of his appeal.

Submissions

Mr. Andrew Sebugwawo, learned Counsel for the applicant argued all the grounds together as follows:

He submitted that the main complaint in the reference is the holding by the learned Justice that *Criminal Appeal No.* 75 *of 2015* is a third appeal. He contended that the said appeal is not a third appeal. This is because Section 204(1) of the Magistrates Courts Act provides that subject to any written law, and except as provided in that section, an appeal shall

lie to the High Court by a person convicted by a court presided over by a Chief Magistrate or a Magistrate Grade 1. The applicant was acquitted by a Magistrate Grade 1. Therefore, he could not appeal against his acquittal. The appeal against the applicant's acquittal was lodged in the High Court by the DPP, not the applicant.

The applicant was thereafter convicted by the High Court. Section 132 of the Trial On Indictments Act provides that an accused person may appeal to the Court of Appeal from a conviction and sentence of the High Court. The first time the applicant carried a conviction and sentence was in the High Court. According to counsel, that is where the applicant's right of appeal against the conviction and sentence commenced. Therefore, his appeal to the Court of Appeal was a first appeal and his appeal to this Court is a second appeal. The appeal is therefore not incompetent as the learned Justice held.

Secondly, counsel submitted that the learned Justice arrived at the finding that the applicant's appeal was a third appeal and therefore incompetent without according the applicant a hearing. That is why it constituted a miscarriage of justice. Counsel distinguished the case of **Charles** Twagira that the learned Justice relied on in his ruling on the ground that the facts constituting that case were different from the instant case in that, in the Twagira case, he was the appellant right from the Chief Magistrates Court to the High Court, the Court of Appeal and the Supreme Court. Counsel contended that in counting the number of appeals, the Court should consider the party who has appealed as opposed to the number of times the case has been handled by a court of law.

Thirdly, Counsel submitted that even if the applicant's appeal were a third appeal as ruled by the learned Justice, an appeal cannot be rendered incompetent on account of being lodged in the Supreme Court without a certificate of importance since Rule 57(3) of the Supreme Court Rules

clearly states that it is not a requirement before lodging a notice of appeal. See: Gashumba Maniraguha vs. Sam Nkundiye, Civil Application No.24 of 2015.

Lastly, counsel contended that the issue whether or not an appeal is competent cannot be decided by a single Justice of the Supreme Court. It must be decided by the entire court. The learned Justice therefore had no jurisdiction to take that decision.

He prayed that Court allows the reference and grants the applicant bail pending the determination of his appeal.

Senior Principal State Attorney Anna Kabajungu who represented the Respondent adopted the same order in her submissions but opposed the reference very strongly.

She agreed with the applicant's counsel that, the main issue is whether the appeal filed by the applicant in this Court is a third appeal or not. She supported the holding by the single Justice that this is a third appeal according to the provisions of section 5(5) of the Judicature Act. Her contention on the other hand, is that it is the number of times the matter has been handled by the Courts that counts, regardless of whichever party has appealed, up to the final Court. Therefore, the applicant needed a certificate of importance before instituting his appeal in this Court. The learned Justice did not therefore err in holding that this was a third appeal and it was thus incompetent in view of the fact that there was no certificate of importance from the Court of Appeal or leave from the Supreme Court before the appeal was lodged.

In reply to the argument in respect of jurisdiction, the learned State Attorney contended that Section 8 of the Judicature Act gives powers to a single Justice to handle any interlocutory matter or cause before the Court. The authority of Gashumba Maniraguha vs. Sam Nkundiye relied

on by counsel for the applicant does not say that a single Justice can decided the competence of an appeal that had been lodged before the Court nor does it say that an appeal should be decided by a full Court. Section 8(1) of the Judicature Act reads: (1) *A single justice of the Supreme Court may exercise any power vested in the Supreme Court in any interlocutory cause or matter before the Supreme Court.* JJ

Regarding fair hearing, the learned counsel for the respondent conceded that the learned Justice did not give the applicant any opportunity to respond to the issue of the competence of the appeal before taking the impugned decision, but contended that the applicant was represented in court by counsel; the matter concerned an application for bail pending appeal which was dependent on a high chance of success of the appeal. That in deciding that issue, the judge had to look at the appeal that was lodged, not the merit of the appeal. It was therefore not necessary to give the applicant a hearing. On that basis, she denied that the decision of the learned Justice resulted into a miscarriage of justice as alleged by counsel for the applicant.

Counsel prayed that the reference should be disallowed and the decision of the single Justice be upheld.

Consideration of the reference by the Court

I have carefully considered the grounds of the reference, the submissions of counsel as well as the authorities cited and the law.

I have taken cognizance of the fact that the reference arose from a decision of a single Justice of this Court in the course of determining an application for bail pending appeal. It is gainsaid that there are settled principles for the grant of such applications and that it is within the discretionary powers of the judge. Further, the principles for interference with the exercise of discretion by a judge are settled as well. Whenever a

decision is based on the exercise of discretion of a judge, such decision will not be reversed merely because the appeal judges would have exercised the discretion differently if they had been presiding in the court below. If on the other hand , the appellate court finds that the trial judge has failed to exercise any discretion at all or has exercised it in a way that no reasonable judge would have exercised; or erred in principle or in law; or took into account irrelevant factors; or has omitted factors which are material to the decision. See: Mbogo v Shah [1968] 1 EA 93.

Section 8(2) of the Judicature Act which governs references provides that:

"(2)Any person dissatisfied with the decision of a single justice in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of three justices of the Supreme Court which may confirm, vary or reverse the decision."

A reference is thus in essence an appeal from the decision of a single Justice to a panel of three Justices, so the above principles are applicable to the instant case.

From the grounds set out above and the submissions of both counsel, the main complaint in the reference is the finding of the learned single Justice that the applicant's appeal was a third appeal, therefore it was incompetent because it had been instituted in the Supreme Court without a certificate of importance as required by section 5(5) of the Judicature Act.

The record shows that after setting out the background of the application and the submissions by both Counsel, the law and the principles, the learned Justice considered the guideline set out by Oder JSC (RIP) in the case of Arvind Patel vs. Uganda, SCCA No.1 of 2003 for the grant of bail pending appeal in this Court and he stated thus:

"In my View the most important consideration for bail pending appeal in the Supreme Court should be the possibility or probability of success of the appeal and that should be supplemented by the other conditions stated in the guideline in Arvind Patel (supra)."

The learned Justice then proceeded to consider the probability of success of the applicant's appeal and his findings are contained in the relevant part of the ruling complained of as follows:

((*... An appeal which has gone through two appellate systems like the instant case cannot be said to have a high probability of success.*

I also note that the applicant's appeal to the Supreme Court appears to be a third appeal and would be Incompetent In View of section 5(5) of the judicature Act ...

A third appeal like the instant one would be Instituted by leave of court through a certificate of importance.

I have not seen a certificate of the Court of Appeal that the matter raises a question of great public or general Importance. Without such certificate, the Appeal No. 75 of 2015 would be incompetent: See: Twagira. v Uganda, Supreme Court Criminal Appeal No. 27 of 2003. An Incompetent appeal has no probability of success for the purposes of a bail application.

For the foregoing reasons, I find that the applicant has not satisfied the conditions for this court to exercise discretion to release the applicant on bail pending appeal. The application is accordingly' dismissed. JJ

It is clear from the foregoing that the learned Justice gave two main reasons why the applicant's appeal did not, in his view, have a high probability of success, and therefore, did not satisfy the conditions for the grant of the order sought by the applicant.

The first reason was that the case had gone through two appellate systems, namely the High Court and the Court of Appeal, with the same result. This finding is not a subject of complaint in this reference.

The second finding which has given rise to the complaint in this reference is that the appeal is a third appeal; it was instituted without a certificate of importance from the Court of Appeal and on that account it would be incompetent in view of S.5(5) of the Judicature Act.

The main issue for determination is therefore, first of all, whether *Criminal Appeal No.* 75 *of 2015* is a 3rd appeal or not. The definition of a “third appeal" is not given by the Judicature Act or the Rules of this Court. The answer lies in the interpretation of section 5 of the Judicature Act which governs appeals to the Supreme Court in criminal matters. Section 5(5) reads as follows:

"(5) Where an appeal emanates from a judgment of the Chief Magistrate or a Magistrate Grade 1 in the exercise of his or her original jurisdiction, and either the accused person or the Director of Public Prosecutions has appealed to the High Court and the Court of Appeal, the accused or the Director of Public Prosecutions may lodge a third appeal to the Supreme Court, with the Certificate of the Court of Appeal that the matter raises a question of great public or general importance , or if the Supreme Court, in its overall duty to see that justice is done, considers that the appeal should be heard, except that in such a third appeal by the Director of Public Prosecutions, the Supreme Court shall only give a declaratory judgment" (Underlining is for ernphasis.)

The key words in my view are "Where an appeal emanates from a judgment of the Chief Magistrate or a Magistrate Grade 1 in the exercise of his or her original jurisdiction, and either the accused person or the Director of Public Prosecutions has appealed to the High Court and the

Court of Appeal, the accused or the Director of Public Prosecutions may lodge a third appeal to the Supreme Court .. "

It is clear from the above provision that a third appeal is an appeal which emanates or originates from the decision of a Chief Magistrate or a Magistrate Grade 1 in the exercise of his or her original jurisdiction, to the High Court, the Court of Appeal and eventually to the Supreme Court. The appeal to the High Court and Court of Appeal may be lodged by either the accused or the D PP.

It should be noted that section 5(5) of the Judicature Act is similar to section 73 of the Civil Procedure Act which requires the High Court to issue certificates in cases of appeals emanating from judgments of Grade 11 Magistrates to the Court of Appeal.

Black's Law Dictionary defines an "appeal" as:

"A *proceeding* *undertaken to have a decision reconsidered by a higher authority; esp. the submission of a lower court's or agency's decision to a higher court for review and possible reversal.* JJ

It is thus the number of times the proceedings are placed before a higher court for review that count. At every stage, the case has to be reviewed by court, regardless of the appellant. The first appellate court actually has the duty to subject the evidence to fresh scrutiny and reach its own conclusions [see: Kifamunte Henry V Uganda, SCCA No.10 of 1997]. In the instant case, the proceedings which originated from the Magistrate Grade 1 Court were first placed before the High Court and then secondly, before the Court of Appeal. That makes *Supreme Court Criminal Appeal No. 75 of 2015* a third appeal. As such, the applicant required a certificate of importance from the Court of Appeal that the matter raises a question of law of great public importance or leave from the Supreme Court, otherwise it would be incompetent, and as the learned Justice pointed out

rightly, in my view, such an appeal stood no chance of success in this Court.

Examples of third appeals include the case of Namuddu and Professor Ssenyonga, Criminal Appeal No.6 of 1999 (SC) reported in [2004] 2 EA 207, where the applicants were jointly charged and convicted of the offence of causing financial loss and abuse of office and were sentenced to terms of imprisonment by the Buganda Road Chief Magistrates Court. Their appeal against the convictions and sentences to the High Court was successful and they were acquitted and discharged. The Director of Public Prosecutions successfully appealed to the Court of Appeal against the decision of the High Court and the Court of Appeal reversed the decision of the High Court and affirmed the convictions and sentences of the Chief Magistrate's Court. The appellants were dissatisfied with the decision of the Court of Appeal and lodged their appeal Criminal Appeal No.6 of 1999 (SC) in the Supreme Court without obtaining the requisite certificate from the Court of Appeal.

When the appeal was called for hearing before the Supreme Court, learned Counsel for the appellant informed Court that he had not applied to the Court of Appeal for the said certificate through inadvertence, but that upon realizing his mistake, he had filed the application in the Court of Appeal. Consequently, counsel applied for adjournment to pursue the said application before the Court of Appeal. Counsel for the respondent opposed the application and instead prayed that the appeal ought to be struck out as incompetent or dismiss it for want of prosecution. This is what the Supreme Court said:

" *We are persuaded that an appeal does exist because in criminal appeals, an appeal is commenced by a Notice of Appeal -see S.* 326(1) *of the Criminal Procedure Code and rule* 56 *of the Rules of this Court It is clear, however, that the Appellants failed to tai(e in time an essential step*

of applying for a certificate from the Court of Appeal that the appeal raises a question or questions of law of great public Importance. In the absence of that certificate a third appeal cannot be entertained by this Court. Indeed in the absence of that certificate) the Registrar is precluded from compiling the record of appeal". (Underlining was added for emphasis)

The Court went on to rule as follows:

"However, two provisions of the rules are significant; first rule 39(1) *of the Rules of this Court permits the appellant to file a Notice of Appeal before obtaining the certificate. It follows therefore that an appeal can be competently instituted prior to the certificate being obtained. Secondly, rule* 4 *of the Rules of the Court of Appeal gives discretion to that court to extend time fixed by the rules. In the circumstances it is still possible for the appellants to rectify the omission."*

The Supreme Court granted the appellants' application for adjournment to enable them to regularize their appeal. The appellants pursued their application before the Court Appeal but the Court of Appeal declined to grant them the certificate on the ground that the issues raised were not points of law of great public importance or novel. (see: Criminal Application No.12 of 1999(CA) (unreported).

Thereafter, the appellants successfully applied for leave to appeal before the Supreme Court under the provisions of section 5(5) which does not impose the said restrictions on the Supreme Court in determining to hear a third appeal.

I have also come across another example of a third appeal. This is Lt Col. Badru Kiyingi v Uganda, Criminal Appeal No 19 of 1999 (unreported).

The appellant was tried and convicted by the Chief Magistrate Buganda Road Court of simple robbery contrary to sections 272 and 273(l) (a) of

the Penal Code Act and was sentenced to seven years imprisonment. His appeal to the High Court was dismissed. He then appealed to the Court of Appeal which allowed the appeal but substituted the conviction of robbery with that of stolen property contrary to section 298 of the Penal Code Act and sentenced him to five years imprisonment. He appealed to the Supreme Court against the decision of the Court of Appeal.

When the appeal was called for hearing, the Court inquired from counsel for the appellant whether the appellant had sought and obtained a certificate to appeal as required by section 6(5),which is now section 5(5), of the Judicature Act, whereupon counsel for the respondent raised an objection to the competence of the appeal for non-compliance with the said provision as well as Rule 59(2) and (3) (b) (now 60 (2) and(3),of the Supreme Court Rules and applied for it to be struck out.

Counsel for the appellant contended that an appeal can be lodged in the Supreme Court without the intending appellant first seeking a certificate from the Court of Appeal because the Supreme Court has an overall responsibility to see that justice is done by virtue of section 6(5), which is now section 5(5) of the Judicature Statute. The Court said the following:

"The appeal before us emanates from a decision of a Chief Magistrate. The appeal first went to the High Court. From there a second appeal went to the Court of Appeal. There from came this appeal which is a third appeal. Third appeals are now regulated by subsection (5) *of section* 6' *of the judicature Statute. Sub-section* (5) *reads: ...”*

After reproducing the provisions of subsection (5), the Supreme Court then went on to clarify the legal position as follows:

(Prom the foregoing provisions) two scenarios emerge. The first scenario is that a third appeal to this court is possible if the Court of Appeal grants

a certificate to the intended appellant that the subject matter of the intended appeal raises a question or questions of law:-

(1) Of great public importance, or

(ii) Of general importance.

The second scenario is that a third appeal to this Court is possible if this court in its overall duty to see that justice is done considers that the appeal should be heard.))

In addition to the above, the Supreme Court stated that Rules 39 and 59 (now 60) (f) of the Supreme Court Rules clearly provide that an intending appellant in a third appeal must first seek a certificate from the Court of Appeal. That this point is clearly set out in Rule 37(1) (b)-(now 38(1) (b). It is appropriate to reproduce the provisions which state as follows:

"37(1)In criminal matters:-

(a) Where an appeal lies if the Court of Appeal certifies that a question or questions of great public importance or arises, applications to the Court of Appeal shall be made informally at the time when the decision of the Court of Appeal is given against which the intended appeal is to be taken; failing which a formal application by notice of motion may be lodged in the Court of Appeal within 14 days after the decision , costs of which shall lie in the discretion of the Court of Appeal;

(b) If the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of this sub rule, an application may be lodged by notice of motion in the Court within 14 days after the refusal to grant the certificate by the Court of Appeal, for leave to appeal on the ground that the intended appeal raises one or more matters of public or general importance which would be proper for the Court

to review in order to see that justice is done."(the underlining is supplied.)

The Supreme Court then explained that it is clear, from the foregoing, that before a third appeal can be filed in this Court without the certificate of the Court of Appeal referred above, the following steps have to be taken:

"(s) The *intending appellant must first seek a certificate from the Court of .Appeal;*

(c) The Court of Appeal should have refused to grant that certificate;

(d)The intending appellant must file an application for leave by way of notice of motion within fourteen days after the Court of Appeal has refused to grant the certificate) and

(e) That notice of motion must indicate in its body that the applicant seeks leave to appeal on the ground that the Intended appeal raises one or more matters of public or general importance which would be proper for the court to review In order to see that Justice is done.

In that case, the Court found that none of the above steps had been taken and rejected the contentions by counsel for the appellant.

The Supreme Court also considered the provisions of Rules 55(3) and came to the conclusion that the rule must have been intended to protect an intending appellant in that he/she should file the notice of appeal within the prescribed period without waiting for the certificate of the Court of Appeal or the leave of the Supreme Court. The rule reads as follows:

"55(3)(now 60(3), where an appeal lies only with leave or on a certificate that a point of law of great public or general importance is involved, it shall not be necessary to obtain the certificate or leave before lodging the Notice of Appeal."

The opinion of the Court on this was buttressed by paragraphs (f) of sub rule (2) of Rule 59 (now 60) and sub rules (3) and (4) thereof which read as follows:

"59(2) For the purpose of an appeal from the Court of Appeal, the record of appeal shall contain documents relating to proceedings in the trial court and shall also contain copies of the following documents relating to the first Court-

(a) to (e) are not applicable.

(f) In the case of a third appeal, it shall contain also the corresponding documents in relation to the second appeal the certificate of the Court of Appeal that a point of law of great public or general importance is involved.

(3) Notwithstanding sub rule (1) of this rule, the registrar of the Court of Appeal shall not prepare the record of appeal-

(b) Where the appeal cannot be heard without leave to appeal or a certificate that a point of law of great public or general importance is involved, until he or she has been notified that the leave or certificate has been given or unless the Chief Justice otherwise directs."

The Supreme Court distinguished this case from the one of Professor Ssenyonga (supra) and held that:

"The two matters are distinguishable. Unlike in the present case) in the Ssenyonga appeal, the appellant had actually lodged a notice of motion in the Court of Appeal seeking for the requisite certificate. In the present

case the appellant through his counsel contends that the certificate need not be sought. This raises a fundamental distinction between the two cases.

As we have already shown} no third appeal to this court is possible without the certificate of the Court of Appeal or leave of this Court. For the foregoing reasons we are satisfied that this appeal is not properly before us and the same is struck out." (Underlining is supplied for emphasis.)

The reasoning and conclusions by the Supreme Court in the two cases above support the findings by the learned Justice that the applicant's appeal appears incompetent in that he had not only lodged it without the requisite certificate. **It** is also apparent that the time within which to lodge the application before the Court of Appeal had long expired by the time the learned Justice made the impugned Ruling. However, since the appeal has not yet been set down for hearing, perhaps counsel still has an opportunity to regularize it by following the laid down procedure and pursuing the matter before the Court of Appeal first.

The foregoing conclusion disposes of grounds (a), (b), (d) and (e) of the reference.

This brings me to the complaint in ground (c)of the reference that the learned Justice erred in law and in fact when he held that Criminal **Appeal No. 75 of 2015** was incompetent without allowing counsel to address him on that issue thereby denying the applicant a fair hearing, thus leading to a miscarriage of justice.

With due respect to counsel for the applicant, this ground is not borne out by the record. The learned Justice never held that the appeal was incompetent. The relevant part of the ruling reads as follows:

"A third appeal like the instant one would be instituted by leave of court through a certificate of importance.

I have not seen a certificate of the Court of Appeal that the matter raises a question of great public or general importance. Without such certificate, the Appeal No. 75 of 2015 would be incompetent..... an incompetent appeal has no probability of success for the purpose of bail application. "

It is not in dispute that the learned Justice was considering the conditions for the grant of a bail application when he made that finding. To him and I share the same view, the most important consideration was the success of the appeal. In so doing, the learned Justice had to rely on the record of proceedings before him, since the appeal was yet to be argued before the full panel of the Supreme Court.

In discussing the probability of success of the said appeal within the context of the bail application before him, he perused the record and found that the appeal had been lodged without the requisite certificate from the Court of Appeal, yet it was a third appeal. That is the reason why he formed that opinion that the appeal would appear incompetent. At that point during the drafting of his ruling, I do not think that the learned Justice had to go back to court to give the parties a hearing. He had all the relevant materials before him to make a decision on the application before him, and that is precisely what the learned Justice did.

I also believe that the learned Justice possessed the requisite legal knowledge and experience to assess the probability of success of the appeal for purposes of bail application without running back to the applicant for his views. No judge would complete a case, if that were to be the practice. In my considered opinion, the determination of the issue whether the appeal was a third appeal or not was a legal issue. All the learned Justice had to do was to peruse the Record of Proceedings and apply the law. That is precisely what he did, and he cannot be faulted for it.

The discussion and conclusions on ground (d) largely answer the concern raised in this ground. As earlier stated, the learned Justice did not determine the appeal. He had no jurisdiction to do so. He merely opined that it appeared incompetent due to the absence of the requisite certificate from the Court of Appeal. What he determined was the application for bail pending appeal which he dismissed for failure to satisfy the conditions for the grant of such applications laid down by the courts. Criminal **Appeal No. 75 of 2015** is still pending before this Court to date. As learned counsel for the respondent submitted rightly in my view, the learned Justice had the powers to make that decision under section 8(1) of the Judicature Act.

In the premises and for the reasons above, I find no reason to interfere with the exercise of discretion by the learned Justice. The reference is dismissed and his orders are affirmed.

Dated at Kampala this .....19th .. day *Of April* *2017*

M.S. ARACH AMOKO

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

CRIMINAL REFERENCE NO.1 OF 2016

(CORAM: STELLA ARACH-AMOKO, FAITH MWONDHA, LILLIAN TIBATEMWA-EKIRIKUBINZA, JJ.SC.)

BETWEEN

BUSULWA BULASIO ..... **APPLICANT**

AND

UGANDA ..... **RESPONDENT**

JUDGMENT OF PROF. DR. LILLIAN TIBATEMW A-EKIRIKUBINZA.

I had the benefit of reading in advance the draft ruling prepared by my learned sister, Arach-Amoko, JSC. I agree with her that the reference should be dismissed.

I specifically agree with her analysis and conclusion that Criminal Appeal No. 75 was a third appeal but wish to emphasize some points in regard to this matter. The background to the matter before court is that the present applicant was tried for an offence by a Magistrate Grade 1 Court but was acquitted of the charge. The DPP being dissatisfied with the decision appealed to the High Court. The High Court overturned the decision of the magistrate's court and convicted the appellant. The appellant in turn appealed to the Court of Appeal which confirmed the conviction and sentence of the High Court. Dissatisfied with this decision the appellant appealed to this Court.

35 When a case comes from the Magistrate's Court to the High Court, irrespective of the party appealing, the High Court as a first appellate

court is obliged to **re-evaluate** the evidence adduced by each of the parties in order to come to its own conclusion. The court will evaluate the case evidence in its entirety. This duty was well articulated in the locus classicus case of **Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No.10 of 1997.** In effect the High Court will be considering a matter hitherto resolved by an earlier court, it would not be a court of first instance. Therefore when the appeal was made to the Court of Appeal, the court had the matter as a second appellate court. A further appeal to the Supreme Court against the Court of Appeal decision would be a third appeal. What would make the Supreme Court a third appellate court is the fact that the evidence in support of each of the parties would have already been considered by the Magistrate's Court as a court of first instance, then the High Court as first appellate court and the Court of Appeal as a second appellate court. At each stage/each court, the merits between the parties are considered and a decision is arrived at by process of law.

To argue that the appeal to the Supreme Court does not constitute a 3rd appeal because the first time the applicant appealed against a decision was in the Court of Appeal is to contend or imply that a court hearing an appeal limits its consideration of the matter to the arguments of the person who has appealed against the earlier decision.

I also wish to express myself on a few other matters touching this reference.

I will deal first with the fourth ground of appeal to the effect that the learned Justice Aweri-Opio erred when he held that an appeal without a certificate of importance from the Court of Appeal or without leave of the Supreme Court would be incompetent.

In resolving the matter before Court, I am guided by **Section 5 (5) of the Judicature Act which** provides *inter alia* that a party may lodge a third appeal to the Supreme Court in a criminal matter: " ... **with the certificate of the Court of Appeal that the matter raises a question of law of great public or general importance."**

I am further guided by Rule 38 of the Supreme Court Rules which states as follows:

> Application for certificate of importance or leave to appeal in criminal matters.
>
> (1) In criminal matters-
>
> (a) where an appeal lies if the Court of Appeal certifies that a question or questions of great public or general importance arise, applications to the Court of Appeal shall be made informally at the time when the decision of the Court of Appeal is given against which the intended appeal is to be taken; failing which a formal application by notice of motion may be lodged in the Court of Appeal within fourteen days after the decision, the costs of which will lie in the discretion of the Court of Appeal; and
>
> (b) if the Court of Appeal refuses to grant a certificate as referred to in paragraph (a) of this sub rule, an application may be lodged by notice of motion in the court within fourteen days after the refusal to grant the certificate by the Court of Appeal, for leave to appeal on the ground that the intended appeal raises one or more matters of great public or general importance which would be proper for the court to review in order to see that justice is done.

I am also guided by Rule 40 of the Supreme Court Rules which provides as follows:

> Application before or after notice of appeal
>
> (1) Where application for a certificate or for leave is necessary, it may be made before or after the notice of appeal is lodged. (My emphasis)

Furthermore Rule 56 (3) provides that:

Where an appeal lies **only with leave or on a certificate that a point of law of great public or general importance is involved, it shall not be necessary to obtain the certificate or leave before lodging the notice of appeal.**(My emphasis)

It is clear from the above provisions that an application for a certificate of importance may be made before or after the lodging of the Notice of Appeal.

I therefore find that the filing of the Notice of Appeal in the Supreme Court without a Certificate of Importance did not render the appeal incompetent.

The applicant therefore succeeds on this ground.

A related argument by the applicant's counsel was that the learned Justice did not give him an opportunity to be heard on the issue of the competence of the appeal.

I opine that the question of whether or not the appeal was competent is a question of law. It is not a question of fact and therefore cannot be said to be exclusively in the knowledge of the party. Arising from this, a judicial officer need not hear the submissions of counsel regarding a legal as opposed to a factual issue before determining the law pertaining to a particular matter. Consequently, the arguments of counsel regarding this matter are misconceived.

In regard to whether a single judge has power to determine the competence of a pending appeal while hearing an application for grant of bail pending appeal, I am guided by **Section 8** of the **Judicature Act** which provides as follows:

(l)A single justice of the Supreme Court may exercise any power vested in the Supreme Court in any interlocutory cause or matter before the Supreme Court. (My emphasis)

(2)Any person dissatisfied with the decision of a single

justice in the exercise of a power under subsection

(1) is entitled to have the matter determined by a bench of three justices of the Supreme Court which may confirm, vary or reverse the decision.

Under **Rule 50 (1)** of the **Supreme Court Rules,** it is provided that:

Every application, other than an application included in sub rule (2) of this rule, shall be heard by a single judge of the court; except that the application may be adjourned by the judge for determination by the court.

Sub rule (2)

This rule shall not apply to the following-

(a) an application for leave to appeal, or for a certificate that a question or questions of great public or general importance arise;

(b) an application for a stay of execution, injunction or stay of proceedings;

(c) an application to strike out a notice of appeal or an appeal; or

(d) an application made as ancillary to an application under paragraph (a) or (b) of this sub rule or made informally in the course of the hearing, including an application for leave or to extend time if the proceedings are found to be deficient in those matters in the course of the hearing.

The import of Section 8 of the Judicature Act and of Rule 50 (1) is that as a general rule, a single Justice is authorized to determine matters which a panel of three justices have the power to handle.

However Rule 50 (2) creates exceptions to the general rule and outlines matters (applications) which a single Justice cannot handle- an application for bail pending appeal is not one of such applications. It must be noted that the question whether or not Criminal Appeal

35 No. 75 was competently before the Court was discussed by the single Justice only as a question ancillary to the application for bail pending

appeal. Since a single Justice is empowered to handle applications for bail pending appeal and to use her/his **discretion** in determining the matter, I find that we cannot limit the factors which such a single justice would consider in arriving at a judicial decision. It follows therefore that in considering the probability of success of the appeal, a judge may consider whether the appeal is *on the face of it,* competently before the Court.

I therefore find the arguments of the applicant's counsel regarding this issue misconceived.

In considering whether the applicant should be granted bail pending appeal, the judge considered the likelihood of success of the pending appeal as one of the factors which should guide the court's decision.

As observed in **Singh Lamba vs. R (1958) E.A 337,** a distinction between an application for bail pending trial and an application for bail post-conviction ought to be made.

An applicant for bail pending appeal bears the burden of proving that there are exceptional reasons to warrant his or her release on bail. This is because the presumption of innocence no longer holds. This can be said to be true in cases of a first appeal, second appeal and even much more strongly when dealing with an application of a party who has been declared guilty by 2 appellate courts, as is in this matter before court.

Furthermore, I note that there is no law which obliges a judicial officer to base her discretion to decline granting of bail on more than one ground. It is my considered view that one ground can be strong enough to support the judicial decision of not granting bail. It follows that a judge's discretion cannot be challenged for its being solely based on one ground.

Whereas I differ from the learned Justice Opio-Aweri's finding that the appeal in question is incompetent for want of a certificate of importance, I nevertheless agree with him that a 3rd appeal cannot be said to have a **high probability** of success. On this ground alone, I would decline to grant the applicant bail pending appeal.

For the reasons given, this reference is hereby dismissed.

Dated at Kampala this ..... 19th. day of .*April* 201

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HON. JUSTICE PROF. DR. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram: Arach-Amoko; Mwondha; Tibatemwa JJ.S.c.

CRIMINAL REFERENCE NO.1 OF 2016

(Arising out of Criminal Application No 6 of 2015 & Criminal Appeal No. 75 of 2015)

Between

BUSULWA BULASIO .••.....••.•..•.•..•••••••.•.....•....•.. APPELLANT

And

UGANDA .....RESPONDENT

(Reference from the Ruling of Opio-Aweri JSC (Single Justice) dated 19th February, 2016 Criminal Application No.6 of2015}

JUDGMENT OF MWONDHA JSC

I had the opportunity to read in draft the Ruling of my sister Justice Arach-Amoko. I agree that the main issue for determination in the reference is whether or not the learned Justice Opio-Aweri JSC rightly came to the conclusion that the appeal was a third appeal and therefore incompetent for lack of Certificate of importance from the Court of Appeal.

I agree with the principle of case law that an appellate Court will not interfere in the exercise of Judges discretion unless if it is apparent that it was wrongly exercised leading to injustice.

I also agree with the five aspects of the main issue for consideration as stated I however differ from the resolution as resolved by the learned sister Justice:-

Issue 1:- whether the applicants appeal is a third appeal.

Learned Justice Opio Aweri found that this appeal was a third appeal and there was no certificate of importance from the Court of Appeal and therefore was incompetent. He said:- **"an appeal which has gone through two appellate systems like the instant case cannot be said to have a high probability of success. I also note that the applicants appeal to the Supreme Court appears to be a third appeal and would be incompetent in view of Section 5(5) of the Judicature Act among others"**

He relied on the case of **Twagira v. Uganda Supreme Court Criminal Appeal No 27 of 2003.** He added:- **"an incompetent appeal has no probability of success for purpose of bail application."**

I had the liberty to read the **Twagira case** relied on by the learned Justice Opio Aweri. As Counsel for the applicant argued and I accept his submission, the **Twagira case** was far distinguishable from the facts of the instant case. I will heavily reproduce the same for appreciating the difference. The appellant in the **Twagira case,** was charged with two offences and appeared before the Chief Magistrate Court for trial. The Chief Magistrate heard the evidence of the prosecution and at the close of the prosecution case, he found that there was a case to answer to require the accused to give his defence. Instead of the appellant giving his defence he filed an application for a revisional order in the High Court. The application was dismissed by the High Court and ordered that the file be remitted back to Chief Magistrate for further hearing. The appellant having not been satisfied by the High Court he appealed to the Court of Appeal and purported to apply for leave to appeal in the Court of Appeal. The application for leave was not granted by the Court of Appeal but instead the

Court of Appeal held that the 1st right of Appeal of the appellant accrued when the appellant applied to High Court and the High Court dismissed the application. It held further that the subsequent appeal to the Court of Appeal would be his 2nd right of appeal he was exercising so he did not have to seek for leave to hear the appeal in the Court of Appeal. The Court of Appeal dismissed the appeal. The appellant appealed to the Supreme Court which dismissed the appeal as incompetent for the following reasons:-

(1) Under S. 5(5) of the Judicature Act there is no right of appeal from interlocutory ruling of Chief Magistrate or Magistrate Grade I permitted to come to the Supreme Court. There was no other law Court was aware which grants a right of appeal against such rulings. Even if such an appeal could be made it could only come to the Supreme Court with leave.

(2) S.5 (5) of the Judicature Act doesn't confer a right of appeal to High Court in respect of interlocutory orders.

The Supreme Court reproduced S.5(5) of the Judicature Act as here below:- **"Where the appeal emanates from a judgment of a Chief Magistrate or Magistrate Grade I in exercise of their original jurisdiction and either the accused person or has appealed to the High Court and the Court of Appeal, the accused person or may may lodge a third appeal to the Supreme Court with the certificate of the Court of Appeal that the matter raises a question or questions of law of great public importance, or if the Supreme Court in its overall duty to see that justice is done considers that the appeal should be heard.**

The Supreme Court faulted the Court of Appeal in holding that the appeal before them was 2nd appeal. The learned Justices held that the appellant had no right of appeal to High Court, Court of Appeal or the Supreme Court. The reason as earlier given was that **S. 5(5) of the Judicature Act doesn't confer any right of appeal from interlocutory matters from Chief Magistrate or Magistrate Grade I Court.**

That is why the appeal was dismissed as incompetent and the trial was ordered to resume.

From the reasoning of the Supreme Court, it is clear in my mind that even if the appeal was to be before it with leave, the appeal would be incompetent, because the matter in Chief Magistrates had not been completed to its finality.

The Court cited various cases like **Jethwa and Another v. Republic [1969] EA 459, Republic Wandira [1975] EA 262, Republic v. Kidasa [1973] EA 368 among others.** The Court said, that all those cases the trial Magistrates had concluded the trial at the close of the prosecution case by delivering final judgments. In those decisions each appellant had a right of appeal because his case had been concluded by the respective trial Magistrate and the same position is reflected in Section 127 of the MCA.

The right of appeal belongs to any party not the Court before which the parties are appearing and that is why S.5(5) provides for either the accused person or the DPP which signifies that whichever party is dissatisfied can appeal starting at High Court going to Court of Appeal and the 3rd appeal with leave of Court of Appeal. The right of appeal cannot accrue concurrently to both parties. I do not therefore agree with my sisters draft judgment, that it is the number of times the case has appeared in Court not the party. In this case the right of appeal accrued to the DPP not the accused since the accused had been acquitted. It is also apparent to me that a right of appeal according to S. 5 (5) of the Judicature Act does not accrue to the parties at the same time in the same Court.

The Chief Magistrates Court or Magistrate Grade I has to be in exercise of the original jurisdiction and this is where either the accused or DPP if dissatisfied by the final judgment of that Court can have the 1 st right of appeal to High Court accruing. In other words my view is that one has to be an appellant from Magistrates Court to High Court, Court of Appeal, and then to Supreme Court when a certificate of importance is required for the 3rd Appeal. In the instant case, the appellant was not, the appellant from

Magistrates Court to High Court. It was the DPP and the lower Court decision/judgment was set aside and was substituted with conviction and sentence of 30 months imprisonment. Then the 1st right of appeal accrued to the appellant to the Court of Appeal from the final decision of the High Court. That being the case the appeal to Supreme Court was the 2nd appeal so there was no requirement of Certificate of importance.

The first issue is resolved in the negative that the appeal to the Supreme Court was not a 3rd appeal as the learned Justice Opio-Aweri determined so.

Issue two:-

I have answered this issue when addressing issue one. For avoidance of doubt I will emphasise that lack of a certificate of importance does not render the appeal incompetent. This is so because the **provision's** of S.5 (5) of the Judicature Act are wide, they state at the end **"or if the Supreme Court in its overall duty to see that Justice is done considers that the appeal should be heard."**

My understanding of the above is that when the full Coram sits, it has the discretion to hear and determine the same even without a certificate of importance in the interest of Justice for the party pursuing the appeal to exhaust his or her rights. Also **Article 126 (2) (e) of the Constitution)** is clear.

Issue three:-

I am aware that the rules of this Court clothes a Court presided over by a single Justice with powers of the full Court. However these powers in my view are as far as interlocutory applications are concerned and the boundaries have to be borne in mind by that Court. The issues of competence of the appeal, with all due respect have to be reserved for the full Coram to determine. For reason that the appeal can not be before that Court at the time. So obviously in my view the learned Justice didn't have the power to determine the competence of the appeal for whatever reason.

Issue four:-

If the learned single Justice decided to deal with matters of Competence of the appeal which he did not have to it goes without saying that he was obliged to accord the applicant the opportunity to be heard before reaching that conclusion.

Article 44(c) of the Constitution is clear - no derogation from the right to fair hearing in any circumstances. This is one of the four human rights and freedoms which the constitution prohibits to be derogated from enjoyment notwithstanding anything in the Constitution.

The appellant was condemned unheard and this also contributed to the unjustified refusal for grant of bail pending appeal application.

Issue five:-

It was clear to me that the decision was based on wrong principle. I would reverse the decision of the learned single Justice.

As for granting the bail pending appeal I am of the view that considering the length of the sentence and the delays in concluding this matter, and having nothing on record to show whether the appellant/ applicant is still serving sentence, I would decline to order that he is released on bail pending appeal. In the result I would allow the reference.

Dated at Kampala this .....1.9th . .day Of April 2017

Hon. Lady Faith Mwondha
JUSTICE SUPREME COURT