

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA
CRIMINAL APPLICATION NO. 17 OF 2020

OUMA ADEA.....APPLICANT

VERSUS

UGANDA.....RESPONDENT

(CORAM: OPIO AWERI, MWONDHA, MUHANGUZI, TUHAISE, CHIBITA JJSC)

RULING OF COURT

This Application was brought by way of Notice of Motion under Section 5(5) of the Judicature Act, Cap 13 and Rules 2(2) and 38(1) (b) of the Judicature (Supreme Court Rules) Directions SI 13-11. It seeks an order that;

1. Leave be granted to the Applicant to file a third appeal in this Honorable Court.

The Applicant deposed an affidavit setting out the grounds in support of the Application. Briefly, the grounds are that:

1. The intended appeal raises important matters of law for the court to review in order to see that justice is done.
2. The Court needs to determine whether a conviction on the offence of bribery could be upheld on the basis of evidence of prosecution witnesses whose testimony in regard to solicitation had been rejected.
3. The Applicant was charged and convicted of the offence of corruptly receiving a gratification in the Chief Magistrate's Court at Kololo
4. The Applicant had also been charged with the offence of solicitation in the same court but was acquitted of the said charge on account of the rejection of the evidence of two prosecution witnesses on the said charge.
5. The Court of Appeal upheld the decisions of the lower courts in Criminal Appeal No. 109 of 2014

6. That the Applicant's Miscellaneous Application No. 82 of 2016 to the Court of Appeal for the certificate of importance was dismissed on the 22nd October 2020
7. The decision appealed against has serious consequences in regard to evaluation of evidence in bribery trials and the law on the defense of entrapment.
8. That it is in the interest of justice that the order sought herein is granted to the Applicant.

The respondent opposed the Application and an Affidavit in Reply deposed by Brenda Kimbugwe, the Manager Prosecution at the Inspectorate of Government was filed to that effect.

Background

The Applicant who was the District Chairperson of Busia District, was charged on four counts of corruption related offences as follows;

1. Corruptly soliciting for gratification, contrary to section 2(a) and 26 of the Anti- Corruption Act, 2009
2. Corruptly receiving gratification, contrary to section 2(a) and 26 of the Anti-Corruption Act, 2009
3. Abuse of Office, contrary to Section 11(1) of the Anti-Corruption Act, 2009
4. Abuse of office contrary to Section 11 (1) of the Anti-Corruption Act, 2009.

The Applicant was tried by the Chief Magistrate's Court and acquitted on counts I, III and IV. He was however found guilty on count II, and sentenced to pay a fine of UGX. 2,000,000 or to imprisonment of one year, in default of paying the fine.

The Applicant appealed against the trial Court's decision to the High Court. The High Court upheld the trial Court's decision and dismissed the appeal. Having been dissatisfied with the High Court's decision, the Applicant instituted a second appeal in the Court of Appeal. The Court of Appeal dismissed the appeal and dis-allowed the Applicant's Application for a

certificate of importance to lodge a third appeal before this Court. Hence, this Application.

Representation

The Applicant was represented by Counsel Jude Byamukama and the respondent was represented by Mr. Rodgers Kinobe, a Senior Inspectorate Officer in the Inspectorate of Government.

Applicant's submissions

Counsel for the Applicant submitted that this Court has discretion to grant leave to file a third appeal so as to ensure that justice is done. He relied on Section 5(5) of the Judicature Act, Cap 3 and **Namuddu Christine Vs Uganda SCCr. Appl No. 3 of 1999**

He referred to Rule 38 (1) (b) of this Court's Rules and submitted that if the Court of Appeal refuses to grant a certificate, an Application may be lodged by Notice of Motion in this 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 public or general importance which would be proper for the court to review in order to see that justice is done.

He submitted that the issues for determination on third appeal are:

- (a) Whether a conviction of the applicant on the offence of corruptly receiving gratification could be upheld on the basis of evidence of prosecution witnesses whose testimony in regard to solicitation had been rejected?
- (b) Whether the failure of the trial court and appellate courts to consider the defence of entrapment in favour of the Applicant was fatal?

He argued that while it is stated as a fact in the Court of Appeal judgment that PW6 and PW1 decided to set up a trap against the applicant, this was ignored by the trial court and the two appellate courts which was an injustice to the applicant as it went to the core of the prosecution's evidence against the applicant. Counsel submitted that the lower courts were required to consider the defence of entrapment in favour of the Applicant even though the same was not raised by him.

He prayed that the Application is allowed as it raises important matters of law in respect of evaluation of evidence and the defence of entrapment in criminal matters which ought to be considered by the Highest Court of the land on appeal.

Respondent's submissions

Counsel submitted that the applicant is required to prove that the matter for which he is seeking a certificate raises a question of public or general importance, which proof has not been provided or attached to the Application.

He argued that according to the authority of this Court in **Kasoma Fred Vs Sembatya James SCCA No. 18 of 2016**, such proof can only be furnished by record of proceedings in the trial and subsequent appellate courts that indeed, the question was raised in the trial court and that it was not properly handled. He submitted that the defence of entrapment is an equally new matter which was not raised for exhaustion by the lower courts.

He submitted that the points raised by the applicant are not grounded in law or evidence and therefore, the Application lacks substantial grounds to render the grievance of either general or public importance.

He argued that the grievance as to whether a conviction of the applicant on the offence of corruptly receiving gratification could be upheld on the basis of evidence of prosecution witnesses whose testimony in regard to solicitation had been rejected, are clear matters of evaluation of evidence which were resolved by this Court in earlier decisions to wit **Cheptuke Kaye Vs Uganda SCCA No. 01 of 2013** while following **Margaret Kato & anor Vs Nuulu Nalwoga SCCA No. 03 of 2013**.

He submitted that the applicant has not demonstrated any point of law requiring the involvement of this Court. Counsel argued that specifically, the applicant should indicate that the outcome of his pursuit is likely to benefit the general public and not the applicant alone. He relied on a decision of the Supreme Court of Kenya in **Hermanus Philipus Steyn Vs Giovanni Gnecci-Ruscone, Sup Ct. Civil Application No. 04 of 2012**.

He further submitted that it is not true that the testimonies of the witnesses were wholly rejected by the lower courts in one charge and again relied upon in another charge. Counsel was emphatic that the court distinguished the two

counts and the ingredients thereof, before addressing the so-called contradictions alluded to.

On the issue whether the failure of the trial court and appellate courts to consider the alleged defence of entrapment in favour of the Applicant was fatal, counsel submitted that this is a new matter emerging for the first time in this case before this Honorable Court. He argued that when a party seeks certification and leave to appeal to the Supreme Court, the questions he/she seeks to bring to this Court must have been subject of consideration /litigation in the High Court and then the Court of Appeal. He relied on the Supreme Court of Kenya case of **Pati Limited Vs Funzi Island Development Ltd SC. Civil Application No. 04 of 2015** and **Cheptuke Kaye Vs Uganda (supra)**

Counsel submitted that the Applicant is merely dissatisfied with the findings of the lower courts but has no substantial question of general or public importance arising from the findings of the lower courts to warrant a certification under Section 5(5) of the Judicature Act. Counsel prayed that the Application is dismissed.

Consideration of the Application

The Applicant brought this Application seeking leave to lodge a third appeal before this Honorable Court. He relied on Section 5(5) of the Judicature Act, Cap 13 and Rule 38 (1)(b) of the Judicature (Supreme Court Rules) Directions SI 13-11.

Rule 38(1)(b) provides for the procedure of bringing this Application and it 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 shall lie in the discretion of the Court of Appeal;

(b) If the Court of Appeal refuses to grant a certificate under 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 public and general importance which would be proper for the court to review in order to see that justice is done.

In **Kasoma Fred Vs Sembatya James Civil Application No. 18 of 2016**, this Court observed as follows:

It is not enough for the applicant to state that a question of great public or general importance arises without showing the court how it arose. The court will not depend on mere claims of the applicant. The court must be satisfied through the reading of the court record and those of subsequent appellate courts that indeed the question was raised in the trial court and that it was not properly handled. Mere allegations by the applicant that there is a question of great public or general importance will not suffice.

In the instant case, the applicant failed to attach the trial court and appellate court's record. The Court is therefore not satisfied that indeed the questions raised by counsel in this Court were raised in the lower courts and that they were not properly handled.

Be that as it may, the applicant's counsel placed heavy reliance upon section 5(5) of the Judicature Act, Cap 13 which provides as follows:

Where the appeal emanates from a judgment of the chief magistrate or a magistrate grade I 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 law 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. (emphasis added)

In **Namuddu Christine Vs Uganda Criminal Application No. 03 of 1999**, this Court held as follows:

...this court will grant leave if the court, in its overall duty to see that justice is done, considers that the appeal should be heard. In other words, this court is not bound by restrictions placed on the Court of Appeal, when that court is considering an application for a certificate. The Court of Appeal grants a certificate where it is satisfied: (a) that the matter raises a question or questions of law of great public importance; or (b) that the matter raises a question or questions of law of general importance. On the other hand, this Court will grant leave if it considers that in order to

do justice the appeal should be heard. Anything relevant to doing justice will be considered including questions of law of general or public importance.


We are cognizant of the above position of this court, however, the justice of the case can only be discerned from the record. It cannot be based on mere allegations of counsel or dissatisfaction of an aggrieved party. We have already indicated that the Applicant failed to attach the record which affected negatively the credibility of his own case. Furthermore, the question or matter of public and general importance was not specified in the application.

In the circumstances, this Application fails and it is hereby dismissed.


Dated at Kampala this 30th day of Sept 2021.


Justice Opio-Aweri
JUSTICE OF THE SUPREME COURT


Justice Mwendha
JUSTICE OF THE SUPREME COURT


Justice Muhanguzi
JUSTICE OF THE SUPREME COURT


Justice Tuhaise
JUSTICE OF THE SUPREME COURT


Justice Chibita
JUSTICE OF THE SUPREME COURT

Delivered by the Registrar 30/9/21
