

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 36 OF 2014

*(Coram: Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha,
Tibatemwa-Ekirikubinza, JJ.S.C)*

Between

Besaleri Saulo Okello Appellant

Versus

Uganda Uganda

*(Judgement delivered by the Court of Appeal at Kampala on the 8th
May, 2014 before, Kasule, Buteera and Kakuru, JJA)*

JUDGMENT OF COURT

The appellant, Besaleri Saulo Okello together with two others, namely, Ocira George and Okot Jalon were indicted before the High Court (Anti-Corruption Division) for the offences of causing financial loss contrary to Section 269 of the Penal Code Act and Abuse of Office Contrary to Section 87 of the Penal Code Act.

The brief facts of the case as accepted by both the High Court and the Court of Appeal were that the appellant and his co-accused were members and officials of the East Acholi Co-operative Union. A. 1 who is now the appellant was Chairman,

A2 Ocira George was Acting Secretary Manager and A3 Okot Jalon was Treasurer. They were signatories to the Union Account in Stanbic Bank, Kitgum Branch.

After the NRA/NRM forces captured power in Uganda there was some resistance by some armed groups in Northern Uganda.

As a result of the insurgency which took several years some properties including the Union ginnery and other assets like motor vehicles were destroyed or rendered obsolete. Others were commandeered. When the insurgency ended the Union sought compensation from the Government of Uganda and in the process hired a firm of consultants, Khas Associates, whose fees was agreed at 15% of any sum recovered as compensation. A firm of Advocates, M/S Omunyokol & Co Advocates were also to receive 15% as legal fees of all the money received as compensation. Furthermore a firm of valuers under the name and style of Independent Consulting Surveyors were to be paid 40% of all the money received as compensation. This in effect meant that the Union would receive only 30% of all the money paid as compensation.

A sum of Shs1,000,000,000= (one billion Uganda shillings) was paid to the Union through their lawyers, Ms Omunyokol & Co. Advocates who recovered their fee amounting to shs150,000,000=. The Consultants were also paid Shs150,000,000= as their fee. Then there was Shs.400,000,000/= purportedly paid out by the Union as fees to the valuers which was subject of the charges against the appellant and his co-accused persons. The purported valuers

were found to be non-existent. The money in issue was withdrawn by the appellant and his co-accused from the Union Account. Hence the charges of causing financial loss and abuse of office preferred against them.

In his defence the appellant denied having committed any of the two offences charged. He testified that the payment to the valuers had been approved by all members because they appreciated the work done to secure the compensation. He stated that the only role he played was to chair the meetings in accordance with the Co-operative Societies Act and to sign the cheques including the one in issue.

On 30th March, 2010 the appellant together with his co-accused they were convicted on both counts and sentenced to four years imprisonment on each count. The sentences were to run concurrently. The Court also made an order for recovery of Shs400,000,000= from them.

They were dissatisfied with the conviction and sentence and appealed to the Court of Appeal. On 25th March, 2004 their appeal was summarily dismissed. Judgment of the Court giving reasons for dismissal of the appeal was delivered on 8th May 2014.

Following the dismissal of the appeal by the Court of Appeal only Besaleri Saulo Okello filed a Notice of Appeal. He gave his address of service as C/o M/S Tumusiime, Kabega and Co Advocates 1st Floor Investment House, Plot 1 Lower Kololo Terrace, P. O. Box 21382, Kampala.

On 15th February 2017 Mr. Emanuel Muwonge appeared before this Court for a pre-hearing conference and introduced himself as Counsel representing the appellants none of whom was in Court. It is incomprehensible that he was representing all the appellants when only one of them had filed a Memorandum of Appeal. Nonetheless the case was fixed for hearing on 10th March 2017. A Memorandum of Appeal was filed on 22nd February in the name of only Besaleri Okello Saulo. The Memorandum of Appeal was drawn by M/s Katende, Sempebwa and Company Advocates, Solicitors and Legal Consultants with no indication as to how the appellant had changed Advocates.

On 10th March, 2017 the case was called for hearing. Mr. Muwonge informed Court that he was representing only Besaleri Saulo Okello who was reportedly bedridden in Kitgum. Okot Jalon who was present was asked whether he had ever filed an appeal and he replied that he had filed a Notice and Memorandum of Appeal. The Registrar of this Court disputed the authenticity of the stamp and signature appearing on the Notice and Memorandum of Appeal. Okot was asked to avail copies of the documents to the Registrar for verification. He never did.

The case was again called for a pre-hearing conference on 7th September, 2017. No appellant was in Court. Mr. Muwonge informed Court that he had failed to trace any of the appellants who had completed their sentence but were appealing against the order for compensation. He stated that he together with the Registrar of this Court had tried to get the appellants together but it was difficult because they did not have their phone

numbers on the file. He suggested that the appellants be served by substituted service at the Court premises at Kitgum. Court ordered both Counsel to file written submissions.

On 20th September, 2017 the case was called for hearing. Mr. Muwonge stated that he was appearing for the appellants on a State brief. He also stated that while previously he was representing only one of the appellants he was now representing all of them. He submitted that they had been served through the New Vision but they could not be traced.

It is clear from what transpired in Court that Mr. Muwonge had instructions to represent only Besaleri Okello Saulo who was the only appellant. Jalon Okot who claimed that he had filed an appeal disappeared when he was asked to verify his papers with the Registrar when their authenticity was questioned.

In respect of Besaleri Okello a Memorandum of Appeal containing two grounds was filed. The two grounds are as follows:-

1. That the learned Justices of the Court of Appeal failed to re-evaluate the Appellant's evidence and as a result came to a wrong conclusion.
2. That the learned Justices of the Court of Appeal erred in law and fact in sentencing the appellant to four years imprisonment and order of compensation of Ugx400,000,000= without being availed the option of paying a fine.

Both Counsel filed written submissions which they adopted at the trial. Mr. Muwonge Counsel for the appellant filed his submissions on 22nd February 2017 while Mr. Wycliffe Mutyabule, Counsel from the Inspectorate of Government filed the respondent's reply on 1st March 2017.

In his submission on ground one Counsel Muwonge submitted that the Court of Appeal had failed to appreciate the evidence of the appellant in relation to his participation in the offence. While acknowledging that the appellant had accepted signing the cheques he was not responsible for establishing who the payee was. Furthermore the payment of the UGX400,000,000= was authorised by the General Meeting of the Union and the appellant was only implementing the decision. According to Counsel there was no evidence to prove criminal intention and the signing of the cheques by the appellant did not on its own establish the ingredients of the offences of Abuse of office.

On ground two Counsel for the appellant submitted that the order of compensation of UGX400,000,000= was harsh and excessive and should be set aside by this Honourable Court.

Alternatively it was submitted that since the appellant had already served the sentence of 4 years imprisonment he had learnt his lesson. He had lost property during his incarceration and he had no livelihood outside prison.

According to Counsel a sentence requiring the appellant to meet the compensation of ShsUGX400,000,000= is harsh and excessive in the circumstances and should be set aside.

On his part Counsel for respondent submitted that the Court of Appeal as a first appellate Court re-appraised the evidence and came to its own finding that the appellant together with his co-accused signed and passed the cheque for payment long before the vouchers were made and that payment to a non-existent payee made the appellant criminally responsible.

On the second ground Counsel submitted that the order for compensation was provided for under S.269 and 270 of the Penal Code Act and it was neither illegal nor manifestly excessive.

The Court of Appeal, after a re-evaluation of the evidence adduced before the High Court came to the following conclusion:-

“We have wholly studied the evidence adduced by both the prosecution and defence at the trial. We find that the learned trial Judge properly evaluated the evidence on record. A summary of the facts of the case is stated above in this judgment. We considered all the facts and evidence. The critical issue in the evidence was the role of each of the three appellants in the payment of Shs400,000,000= to the valuer. The three signed the cheque for the withdrawal of Shs400,000,000/=. The cheque was drawn and all the appellants signed it and the money was withdrawn and paid to the valuer who was non-existent. The company that was paid Shs400,000,000= was a non-existent company. It had never been registered with the Registrar of Companies. The vouchers that are supposed to have originated the writing of the cheque were prepared after the cheque had been drawn and signed by the appellants. There was therefore no basis

for writing and signing the cheque in the first place. The appellants went ahead to sign a cheque for which at that time there were no vouchers. The appellants certainly knew that what they were acting in abuse of their offices. They were paying a non-existing company. The money was withdrawn in cash and paid to a person that could not and cannot be identified.

The members of the Union that employed the appellants and elected them to lead and take care of its interests lost the Shs400,000,000 directly as a result of the conduct of the three appellants.

We find that the learned trial Judge properly analysed the evidence before the Court and reached a correct decision when he convicted the appellants.”

The position of the law is that a second appellate Court faced with the concurrent findings by the two Courts below is not expected to re-evaluate the evidence or question the concurrent findings of the High Court and Court of Appeal unless it is shown that they did not evaluate or re-evaluate the evidence or they are proved manifestly wrong on findings of fact. See **Areet Sam Vs Uganda, Supreme Court Criminal Appeal No 20 of 2005)**

The High Court and the Court of Appeal evaluated the evidence. The finding by the Courts that, through the actions of the appellant and his co-accused the Union lost Shs400,000,00= which was drawn in cash and paid to a non-existent valuer was supported by the evidence at the trial. There is absolutely no reason for this Court to depart from the concurrent finding of the

two Courts that the appellant and his co-accused were responsible for this loss and the offences for which they were convicted were proved beyond reasonable doubt. Ground one is accordingly dismissed.

On sentence, the Court of Appeal cited the case of **Kiwalabye Bernard vs Uganda (Supreme Court Criminal Appeal No 143 of 2001)** where it was stated as follows:-

“The appellate Court is not to interfere with the sentence imposed by a trial Court where the Court has exercised its discretion of sentence, unless the exercise of discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice, or where the trial Court ignores to consider an important matter or circumstance which ought to be considered while passing sentence or where sentence imposed is wrong in principle.”

The submission of Counsel for the appellant on sentence concentrated on the order for compensation of Shs400,000,000= which according to him was harsh and excessive. He submitted also that since the appellant had served the sentence of four years imprisonment during which he lost property requiring him to pay the Shs.400,000,000= is being harsh and excessive.

As rightly pointed out by Counsel for the respondent S.269 and 270 of the Penal Code Act provide for compensation. The Court ordered the appellant and his co-accused to refund exactly what the Union lost. The order was made immediately after the trial and the plea by Counsel that the appellant lost property during

his incarceration or that he had no source of income while in prison cannot be reason for interfering with the sentence. Consequently we find no merit in ground two which is also dismissed.

In the result the entire appeal is dismissed. After serving their term in prison the appellant and his co-accused are still required to pay the compensation of Shs400,000,000= as ordered by the trial Judge and upheld/confirmed by the Court of Appeal.

Before we take leave of this case it is observed that under Article 28 Clause 3 (c) of the Constitution every person who is charged with a criminal offence shall in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the state. The appellant in this case did not fall in that category and should, therefore, not have benefited from a state brief.

We expect that in future the Registrar of this Court will ensure that only those appellants who are entitled to legal representation at the expense of the state benefit from the provision of the said article.

Dated this 14th day of June.....2018




Arach Amoko

JUSTICE OF THE SUPREME COURT


Mwangusya

JUSTICE OF THE SUPREME COURT


Opio-Aweri

JUSTICE OF THE SUPREME COURT


Mwondha

JUSTICE OF THE SUPREME COURT


Tibatemwa-Ekirikubinza

JUSTICE OF THE SUPREME COURT