THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

CORAM: (Kisaakye, Mwangusya, Tibatemwa and Mugamba, JJSC; Tumwesigye, Ag. JJSC.)

CIVIL APPEAL NO 02 OF 2018

BETWEEN

DAVID CHANDI JAMWA:::::::::::::::::::::::: APPELLANT

AND

UGANDA :: RESPONDENT

DISSENTING JUDGMENT OF JUSTICE DR. ESTHER KISAAKYE, JSC, AND JUSTICE JOTHAM TUMWESIGYE, AG. JSC

Chandi Jamwa, the appellant, was indicted in the High Court for two offences viz, Abuse of Office contrary to section 11 of the Anti corruption Act and Causing Financial Loss contrary to section 20 of the same Act. The High Court acquitted him of the offence of abuse of Office but convicted him of the offence of Causing Financial Loss. For the conviction of causing Financial Loss the

High Court sentenced him to 12 years imprisonment and barred him from holding any public office for 10 years after serving sentence.

He appealed to the Court of Appeal against both conviction and sentence. The Inspectorate of Government (IGG) which prosecuted him in the High Court also cross-appealed against the acquittal in respect of the offence of Abuse of Office. The Court of Appeal upheld the appellant's conviction and sentence. In addition, it reversed the High Court's decision in respect of the offence of Abuse of Office, convicted him of the offence and sentenced him to 4 year's imprisonment, the sentence to run concurrently with the term of imprisonment of 12 years. The appellant now appeals to this court against both convictions and sentences.

Background to the Appeal

The appellant was the Managing Director of the National Social Security Fund (NSSF) when he was charged with the above-mentioned offences. NSSF is a public body established by an Act of Parliament to manage workers' savings so that when they retire from employment they can get back that money with interest to help them in their retirement. NSSF usually invests it in different business ventures to make it earn profit.

The prosecution's case was that the appellant as Managing Director of NSSF without good reason and necessary authority sold NSSF treasury bonds before their maturity at a price below their face value and that if he had not sold the bonds before maturity, NSSF would have gained and not lost shs. 3,163,256,502=. The appellant denied the allegations by stating, among other things,

that he acted on the authority of the NSSF Board of Directors and that of the Ministry of Finance to sell the bonds, and that no loss was incurred by NSSF as alleged.

Following the upholding of the appellant's conviction and sentence for causing Financial Loss by the Court of Appeal which, in addition, convicted him and sentenced him for Abuse of Office, the appellant filed the following grounds against the decision of the Court of Appeal.

1. **The learned Justices of Appeal erred in law when they failed to correctly re-evaluate the evidence relating to the ingredients of the offence necessary to satisfy the charge of Causing Financial Loss contrary to section 20 of the Anti-Corruption Act, 2009, and therefore occasioning a miscarriage of justice.**
2. **The learned Justices of Appeal erred in law when they failed to correctly re-evaluate the evidence relating to the ingredients necessary to satisfy the charge of abuse of office contrary to section 11 of the Anti-Corruption Act, 2009 and therefore occasioning a miscarriage of justice.**
3. **The learned Justices of Appeal erred in law when they failed to properly consider the appellant's submissions in regard to the legality and severity of the sentence of the court of first instance.**
4. **The learned Justices of Appeal erred in law when, they upheld the trial court's conviction of the accused against a non-existent offence under the Anti-Corruption Act, 2009.**

5. **The learned Justices of Appeal erred in law in making/rendering a decision without the requisite coram.**

At the hearing Mr. Peter Kabatsi, Mr. David Mpanga and Ms. Mercy Odu appeared for the appellant while Mr. Rogers Kinobe, Senior Inspectorate Officer, and Mr. Phillip Munaba, Senior Inspectorate Officer, both from the Inspectorate of Government appeared for the respondent.

Ground 5

We will begin consideration of this appeal with Ground 5 because the ground raises an important question as to whether this court has jurisdiction to entertain this appeal. We respectfully do not agree with the resolution of Ground 5 of appeal by the majority members of the panel. The issue in this ground is whether the impugned judgment that was delivered by Justice Kakuru on the 15th of January, 2018 in Criminal Appeal No. 77 of 2011 is a valid judgment of the Court of Appeal.

Our view is that the impugned judgment which was delivered when the majority members of the panel had vacated the court by the time of its delivery is not valid.

Article 135(1) of the Constitution provides that "**The Court of Appeal shall be duly constituted at any sitting if it consists of an uneven number not being less than three members of the court**".

It is not in dispute that the impugned judgment was delivered on 15th January, 2018, by Hon. Justice Kakuru, JA, alone after two

Justices of Appeal, namely Kavuma, DCJ, and Opio-Aweri, JA (as he then was) were no longer members of the court. Justice Opio-Aweri had been elevated to the Supreme Court in September, 2015, while Justice Kavuma had retired in September 2017.

When the two members of the panel left the jurisdiction of the court only one member remained. It therefore follows that by the time of the delivery of the impugned judgment on 15th January 2018, Justice Kakuru alone could not constitute the coram to reflect the mind of the court as had been constituted in accordance with Article 135(1) of the Constitution. Justice Opio-Aweri was a Justice of the Supreme Court and had held this position for about two and half years. By that time he had long lost the jurisdiction of the court. He could not be called back to the Court of Appeal to deliver his "judgment". If loss of jurisdiction could not allow him to come back to deliver his judgment, the situation could not be circumvented by asking another judge to deliver it on his behalf.

We believe that this is an important point of principle concerning validity of judgments and it should be divorced from the personalities and circumstances of the Court of Appeal at that time.

Learned counsel for the respondent argued that whereas Article 135(1) of the Constitution requires a duly constituted Court of Appeal to consist of an uneven number not being less than three, the said provision did not apply to delivering judgments. Counsel cited the case of **Sarah Kulata Bisangwa vs. Uganda**, SCCA No. 03 of 2018, where one Justice of Appeal had vacated the court but

two Justices were still members of the court and delivered a valid judgment.

With respect, we do not agree with this argument. This case cited by counsel and the case of **Orient Bank vs. Fredrick Zaabwe & Anor**, Civil Application No. 17 of 2007 on which the learned Justice of Appeal based his decision to deliver the impugned judgment are distinguishable from the instant case. We will consider these cases later in this judgment.

Learned counsel for the appellant requested to be heard before the impugned judgment was delivered but the learned Justice of Appeal, for inexplicable reasons, did not allow him to do so. However, the learned Justice of Appeal took time to address the parties before he delivered the impugned judgment.

The record of Appeal reads in part as follows:

> "**Mr. Mpanga [counsel for the appellant] ...**
>
> **My Lord the appellant is in court and my Lord before judgment is delivered there is a small matter technical matter we wish to raise.**
>
> **Justice Kakuru:**
>
> **We are no longer seized with jurisdiction. This matter was heard by a panel of 3 Justices constituted as follows: Hon. Justice Kavuma DCJ, Hon. Justice Opio-Aweri and Justice Kakuru myself.**
>
> **Mr. Mpanga:**

My lord.....

<u>Justice Kakuru</u>:

Sit down Mr. Mpanga. This is the judgment of the court."

Justice Kakuru then went ahead to read the judgment.

The learned Justice of Appeal seems to have anticipated what counsel for the respondent was going to say without allowing him to say it. The learned Justice proceeded to make a statement in which he mentioned a number of things all intended to prove the validity of the judgment he was going to deliver. Some of the points he made were that:

1. **After deliberations a majority view emerged and the majority judgment was written and signed by the majority on the 15th of September 2015.**
2. **It was forwarded to the Honourable the DCJ at the time for setting a hearing date or signing the judgment.**
3. **Hon. Justice Kavuma neither signed the judgment nor set it down for delivery.**
4. **At the time Justice Opio-Aweri was elevated to the Supreme Court he had already signed the judgment and the same had already been delivered to Justice Kavuma.**
5. **This judgment was signed by Hon. Justice Opio-Aweri at the time he was a Justice of Appeal and myself and it is not signed by Justice Kavuma who did not agree with it.**

Two issues arise from the approach Hon. Justice Kakuru adopted before he delivered the impugned judgment. The first issue is why he denied counsel for the appellant the opportunity to be heard.

In our respectful view the learned Justice erred to anticipate what counsel was going to say. Counsel could have wanted to raise an important constitutional issue which could have been pertinent to the delivery of the judgment. Denying the appellant the right to be heard was a fundamental error on the part of the learned Justice of Appeal. The right to be heard is a constitutional right under Article 28 of the Constitution which is made non derogable by Article 44. The right to be heard runs through all the stages of the judicial process, from the time of hearing the matter before court to the time of delivering the judgment. This is procedural justice. Justice should not only be done but should also be seen to be done. Impartiality and fairness of the court in handling matters is judged not only how the merits of the case are dealt with but also procedural matters such as this one are handled.

The second issue relates to the statement Hon. Justice Kakuru made before delivering his judgment. The matters he mentioned are mostly in the knowledge of the learned Justice alone. They cannot be found in the record of the court. It is our view that the learned Justice of Appeal was giving evidence from the bench. For a statement to be believed by court as true it must be stated in accordance with the law of evidence which requires that a person who makes a statement for court purposes makes it on oath. This of course is regardless of the status of the person making the statement.

Article 129(2) of the Constitution provides that "**the Supreme Court, the Court of Appeal and the High Court of Uganda shall be superior courts of record and shall each have all the powers**

of such a court". A court of record is defined by Black's Law Dictionary 9th Edition, p. 407 to mean "**1. A court that is required to keep a record of its proceedings. The court's records are presumed accurate and cannot be collaterally impeached.**"

It would, in our view, not be right for this court to base its decision on whether the impugned judgment was valid or not by relying on the unsworn statement shown above. Courts are strict on the manner in which matters to be believed are tendered and proved because of the importance attached to credibility and truth of matters stated in court.

Another serious matter in this case is that the impugned judgment was delivered in violation of rule 33(11) of the Court of Appeal Rules. The judgment is dated 15th January 2015 but it was actually delivered on 15th January 2018. This latter date cannot be found on the impugned judgment.

Rule 33(11) of the Judicature (Court of Appeal Rules) Directions provides:

> **"A judgment <u>shall</u> be dated as of the day when it is delivered or, where a direction has been given under sub-rule 7 of this rule, as of the day when the decision was delivered."**

The importance of observing rule 33 was emphasised by this court in the case of **<u>Komakech & Anor vs. Akol & 2 Ors</u>**, SCCA No. 21 of 2010 where the court stated:

> **With the greatest respect to the learned Justices of Appeal, the ruling of the Court of Appeal was made in**

disregard of Rule 33(5) and (6) of the Rules of that Court. These Rules were made under an Act of Parliament (Cap. 13 of the Laws of Uganda) for the proper regulation of court practice and procedure. They have statutory effect and must be followed. It is sometimes said that Court Rules are hand maids of justice, meaning they should not frustrate the operation of justice.

Furthermore, it is our considered opinion that the word "shall" used in the provisions of Rule 33 is mandatory and not directory and therefore judges should follow the procedure prescribed by the rules. These provisions are intended to ensure consistence and certainty in practice and procedure in decision making by the Court. Allowing individual judges to ignore prescribed mandatory rules can lead to undesirable consequences.

This court sent the case of **Komakech** back to the Court of Appeal for that court to handle it with a proper coram.

In the case of **Mohammad Mohammad Hamid vs. Roko Construction Ltd,** SCCA No. 01 of 2013, decided by this court, an application was heard by Mpagi-Bahigeine, DCJ, Kavuma, JA and Kasule JA. However, the ruling of the Court of Appeal was signed and delivered by Justice Kavuma, Justice Nshimye (who had not participated in the hearing), and Justice Kasule. Relying on the case of **Kamakech & Anor** (supra) this court stated:

By whatever standards, this raises suspicion and questions about, propriety of and the court's impartiality in making the ruling. Clearly, therefore, in a legal system

and tradition in which justice must not only be done but must also be seen to be done properly and impartially, the appearance on record of a person who never participated in the hearing raises genuine concern about the fairness and propriety in the decision of the court.

Again, this court sent the case back to the Court of Appeal to be handled with a proper coram. Although the above-cited authorities related to civil judgments, the need to observe the rules equally apply to criminal judgments.

The majority decision in this case considers breach of rule 33(11) of the Court of Appeal Rules as a mere technicality. With respect, we do not agree. In our respectful view, the learned Justices should have followed the above-mentioned precedents in deciding this case.

Parties involved in litigation sometimes breach the rules of court. When that happens they will pray to court to ignore the breach in the interest of substantive justice. They will cite Article 126(2)(e) of the Constitution to justify it. This argument of ignoring rules of court has been rejected in many cases. See, for example...As we stated earlier in this judgment, however, rule 33(11) of the Court of Appeal Rules is not a mere technicality. And in our respectful view, courts which are the custodians and protectors of the law should be the last ones to breach the rules of courts.

Reliance was placed by the learned Justice of Appeal on rule 33(8) of the Rules of the Court of Appeal and the case of **Orient Bank** (supra) which interpreted it to justify the validity of a judgment of a judge who has vacated court for reasons of death, retirement,

resignation and elevation to a higher office at the time of delivery of the judgment.

Rule 33(8) mentioned above provides:

"Where judgment or the reasons for a decision, has or have been reserved, the judgment of the court, or a judgment of any judge, or the reasons, as the case may be, being in writing and signed, may be delivered by any judge, whether or not he or she sat at the hearing, or by the Registrar."

In the case of **Orient Bank** (supra), on which the learned Justice of Appeal relied to deliver the judgment, this court stated:

> **...In our considered view sub rule 8 which envisions delivery of reserve judgment by a judge who did not sit at the hearing or the Registrar covers not only the scenario where a judge who sat is temporarily absent but also second scenario where a judge is no longer available by reason of death or retirement.**

We respectfully think that this holding is wrong and should not be followed. A judge who has vacated court by reason of death or retirement is no longer a judge included under rule 33(8) of the Court of Appeal Rules. When a judge dies or vacates court for whatever reason, he or she is no longer possessed of the jurisdiction to deliver a judgment of court. And if he or she cannot do so, neither can another person do so on his behalf.

If we may pose the question: Is it in the interest of justice that a judgment which was ready for delivery in January 2015 should be delivered three years later? In our respectful view "a judgment"

which is delivered three years after being kept is suspicious and raises issues of the legitimacy and integrity of the judgment.

Among the statements made by the learned Justice of Appeal there was no statement regarding where this judgment was being kept all this time before it was delivered by Justice Kakuru. We cannot accept as normal that a judgment especially in a criminal matter whose result is bound to affect the life of a person in a fundamental way should be handled by court in this irregular fashion.

We wish to add that the Constitution under Articles 144(3) and 147 and the laws made thereunder provide for removing a judge or disciplining a judge if he or she breaches the law and the Code of Judicial Conduct. In our view, the disciplining mechanism provided in the Constitution was lacking and should have been invoked to avoid this kind of unseemly situation.

In the same case of **Orient Bank** (supra) we are of the respectful view that this court laid down a wrong principle when it stated:

> **In the case of reserved judgments the writing and signing are invariably done before the time of judgment is delivered and its authenticity and validity are thus preserved up to its delivery. Where at any time before its delivery, the judgment is altered because of change of mind, the altered judgment has to be similarly authenticated and validated. In either case, the judgment is delivered as the valid judgment of the judge who prepared and signed it. We are not persuaded that the situation where the judge, having signed a reserved judgment does not alter the judgment, calls for**

speculation whether it is by choice or because the judge ceased to be a member of the court. We say this because in our view, much as the date of delivery is the day it takes effect, it is not the day the decision is made.

The above-quoted statement in our view cannot be correct. A judgment of court becomes a judgment only when it is signed, dated and delivered. These three elements are a prerequisite for a decision of a court to be called a judgment. Therefore, to say as the court said that "**much as the date of delivery is the day it takes effect, it is not the day the decision is made**" cannot be right. The fact that a "decision" was signed before it was delivered does not make it a judgment.

A court's decision is not an internal matter done in the privacy of a judge's chambers. The decision of court is a public matter delivered in open court. Before a judgment is delivered it cannot be called a "judgment" because it can be changed by court any time before delivery. It is not unusual for courts to do this. Therefore, to call a decision of the court a "judgment" before it is delivered is to use the word "judgment" loosely.

Therefore, we are of the view that the assertion in the majority decision that "**in our considered view, a judge who has appended a signature on a judgment loses the right to change their mind as soon as they cease to be on the court**" cannot, with respect, be correct for there is no judgment before the date of delivery, similarly, a judge cannot be said to have dissented to a judgment before the judgment is delivered for before that time there is no judgment to dissent to. Court becomes functus officio

only when it has delivered its judgment. Before the time of delivery it is free to alter its decision as it wishes.

Judicial power is power which is exercised by persons who have been appointed judges to exercise it in the court to which they have been appointed. Delivery of judgment is the ultimate exercise of that power. A judge who has vacated the court for whatever reason ceases to exercise that power. Under Article 126 of the Constitution judges exercise judicial power for and in the name of the people and when a judge vacates court he or she ceases to exercise that power on behalf of the people.

We note that this court considered the Indian Supreme Court case of **Surendra Singh v. The State of Uttar** (supra) in **Orient Bank** (supra) and did not agree with it. In our respectful view, the court was not right to do so. We think that the case of **Surendra Singh** (supra) represents the right principle in respect of judges who have ceased to be judges of the court.

The Indian Supreme Court stated thus in that case:

> **It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement... We say this because that is the first judicial act concerning the judgment which the court performs after the hearing. Everything else up till then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and**

exchange drafts. Those are not their judgments either, however heavily and often they may have been signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the "judgment." Now up to the moment the judgment is delivered judges have the right to change their mind...

...A judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt or conjecture ... We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft...

In the American case of **Yovino v. Rizo**, 586 U.S (2019) a judge called Reinhardt who was a member of the 9th Circuit died 10 days before the decision which he wrote on behalf of the Circuit was rendered. The court consisting of 11 members before the judge's death was split 5 to 5 except for Reinhardt's vote which made it 6 to 5. So the decision of the court was passed by a majority of 6 to 5. The six included counting the deceased judge's vote.The Supreme Court of US overturned the Ninth Circuit decision stating:

...we are not aware of any Ninth Circuit that renders judges' votes and opinions immutable at some point in time prior to their release. And it is generally understood

that a judge may change his or her position up to the very moment when a decision is released.

Under $ 46(c) [a US Statutory provision] a court of appeal's case may be decided by a panel of three judges, and therefore on such a panel two judges constitute a quorum and are able to decide an appeal – provided, of course, that they agree. Invoking this rule, innumerable court of appeals decisions hold that when one of the judges on a three-judge panel dies, retires, or resigns after an appeal is argued or is submitted for a decision without argument, the other two judges on the panel may issue a decision if they agree.

Because Judge Reinhardt was no longer a judge at the time when the decision in this case was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the juridical power of the United States after his death. But Federal judges are appointed for life, not for eternity.

There are no exceptional circumstances in this country which do not allow the application of this principle. Vacating court by judges who have not delivered their judgments is not a situation unique to Uganda. It exists in many other jurisdictions. Some jurisdictions have had to make statutory provisions to cover the situation. See, for example, the South African case of **Van Royen & Ors v. The State** 2001(4) SA 396 T. The principle is that when

a judge vacates court he or she ceases to have jurisdiction to render judgments.

Article 144(1) of the Constitution provides:

> "**A judicial officer may retire at any time after attaining the age ... and shall vacate his or her office –**
> **(a) ...**
> **(b) ...**
> **(c) ...**
> **but a judicial officer may continue in office after attaining the age at which he or she is required by this clause to vacate office, for a period not exceeding three months necessary to enable him or her to complete any work pending before him or her.**"

It is our respectful view, that three months given to retiring judges to complete any work pending before them must include delivering judgments in which they participated. To suggest that even after the retiring judges have used up the three months the Constitution gives them they should still be allowed to have their undelivered judgments delivered on their behalf would be undermining the integrity, public trust and confidence in our courts. It would, as stated earlier, also unlawfully be giving the retired judges jurisdiction to deliver judgments which jurisdiction they do not have.

Before we conclude, we would like to comment on the issue as to whether a judgment is necessarily invalid where one member or a minority of members of the panel have vacated court but a majority of members have remained in the court. This issue was properly addressed by the Court in **Orient Bank Limited** (supra). In that

case the issue was whether the decision of a panel of 5 members delivered after one member of the panel had retired was a valid decision. The decision had been challenged on the ground that there was no coram at the time of delivering the decision. In dismissing the objection this court stated:

> **We think that neither the interest of justice nor public policy would demand that a decision of five judges be invalidated because one of the judges who participated in the decision retired or died before the decision was pronounced.**

Similarly in the case of **Sarah Kulata Bisangwa vs. Uganda,** Criminal Appeal No. 03 of 2018, cited by counsel for the respondent, this court held that where a judge on a panel vacates court but a majority remains, a judgment delivered by majority of members who remain is valid.

It is our view that the two decisions cited in the above two cases, is the correct legal position. However, we wish to add that the majority of members who remain must constitute the majority of the members of the panel and concur in the decision. If, for example, a panel consists of five members and two vacate the court before the delivery of the judgment, the remaining judges can deliver a valid judgment only if they all agree in the decision. There will be no decision of court if one of those who remained dissents.

The cases of **Orient Bank** (supra) and **Sarah Kulata Bisangwa** (supra) are, therefore, distinguishable from the instant case. In the above-cited cases majority members of the panel remained and concurred in the decision. In the instant case majority members

vacated court and only one remained. The judgment was therefore rendered contrary to Article 135 of the Constitution and is invalid.

In his submission on Ground 5 learned counsel for the appellant prayed the court to send the case back to the Court of appeal so that court may rectify the errors that relate to the delivery of the impugned judgment. In our consideration of the issues relating to the impugned judgment, we found that errors were made. These errors should not be glossed over. We, therefore, do not see any valid reason why the case should not be sent back to the Court of Appeal to correct the errors which even majority members agree were made.

We see no injustice that will be suffered by the parties, especially the appellant, if this course of action is taken. It should have been the appellant to complain about the lengthy and protracted process he would have to go through if the matter is remitted to the Court of Appeal. But he is the one complaining about the process. Even if, however the appellant's counsel did not raise it, court's adherence to the Constitution and the laws and in the interest of preserving public trust and confidence in the justice system of this country, it is our view that this court should have decided to send the matter back to the Court of Appeal.

To conclude, for the reasons given above, it is our view that the judgment which was delivered by Justice Kakuru on 15th January, 2018, is invalid and of no consequence. It is our view that the case should be sent back to the Court of Appeal to correct the errors pointed out in this judgment.

Dated at Kampala this.....day of.....2019

Esther Kisaakye

JUSTICE OF THE SUPREME COURT

Jotham Tumwesigye

AG. JUSTICE OF THE SUPREME COURT