THE REPUBLIC OF UGANDA

IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT, AT KOLOLO

CRIMINAL APPEAL NO.29 OF 2019

(Arising out of Anti-Corruption Division Criminal Case No 0079 of 2018)

MUGABO MUZAMIRU **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

BEFORE THE HON. JANE OKUO KAJUGA

JUDGEMENT

This is an appeal from the decision of Sarah Namusobya, Magistrate Grade 1 sitting at the Anti-Corruption Division delivered on 3rd December 2019 in which the Appellant was convicted of the offenses of Fraudulent evasion of payment of duty and Interference with goods under Customs control, contrary to **Sections 203(e)** and **203 (f)** respectively of the East African Community Customs Management Act. He was sentenced to a fine of US dollars 2000 on each count or imprisonment for one year in default on both counts, to run concurrently.

The appeal is against both the conviction and sentence.

The prosecution's case was that the appellant, a truck driver called Mugabo Muzamiru received a consignment of motor vehicle spare parts valued at Uganda Shillings 74,609,028 (Seventy-Four Million, Six hundred and nine thousand and twenty-eight shillings) for transportation to the Democratic Republic of Congo on Truck UAG 359L. The consignee was Kalisa Suleiman of Kisangani Congo. The truck was meant to exit Uganda through Padea customs vide entry TI UGMAL D25004 dated 14th June 2018 but instead it was diverted to a destination within Uganda where the goods were offloaded. The truck did not cross to Congo as expected. Prosecution contended that this caused loss in revenue to the government as taxes due on goods that are not in transit were lost. They also contended that this action amounted to interference with goods under customs control.

The appellant was charged together with a Christopher Bagonza, an employee of Uganda Revenue Authority (URA) who received and processed the truck through the

validation process which is the prelude to exit of the truck to Congo. He passed away before the case could be concluded. The charges against him therefore abated. It appears the owner of the goods was never arrested.

The prosecution called six witnesses and tendered several documents in support of its case. At the closure of the prosecution case, the appellant was put on his defense. He gave evidence on oath and opted not to call witnesses. His defense was that he had, contrary to the prosecution's allegations, crossed to Congo with the truck and delivered the goods to their destination and was therefore innocent of the charges. He said he travelled with the owner of the goods.

The Trial Magistrate, in her judgement found that the prosecution had proved its case to the requisite standard and convicted the appellant, hence this appeal which is founded on the following grounds:

1. The Learned Trial Magistrate erred in law and fact when she relied on a repudiated charge and caution statement to convict the appellant.
2. The Learned Trial Magistrate erred in law and fact when she relied on weak and uncorroborated circumstantial evidence to convict the appellant.
3. The Learned Trial Magistrate erred in law and fact when she convicted the appellant based on evidence full of contradictions and inconsistencies.
4. The Learned Trial Magistrate erred in law and fact when she passed a harsh sentence against the appellant of a fine of US Dollars 4000 or 1-year imprisonment.

Representation.

At the hearing of the appeal, **Albert Mooli** from Waluku, Mooli & Co Advocates represented the Appellant while **Stuart Aheebwa** of URA Legal Services & Board Affairs Department appeared for the Respondent. Both parties filed written submissions and made brief oral arguments before the Court.

Counsel for the appellant chose to argue grounds 2 and 3 together, then ground one and lastly ground four. The same order was adopted by counsel for the Respondent and shall be used by this court to resolve the appeal.

Consideration of the Appeal

This is a first appeal and as such, this court is enjoined to carefully and exhaustively re-evaluate the evidence as a whole and make its own decisions on the facts **(Kifamunte**

Henry Vs. Uganda SCCA No, 10 of 1997 and **Bogere Moses and Anor vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997**)

In **Kifamunte's case**, the Supreme Court of Uganda stated as follows:

"We agree that on first appeal from a conviction by a Judge the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has the duty to review the evidence of the case and to reconsider the materials before the Trial Judge. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing it and considering it"

Being mindful of the above, and the fact that I did not have the benefit of hearing the witnesses testify, I proceed to review the evidence that was adduced before the trial court and make up my own mind on whether the offenses of Fraudulent evasion of duty and interference with goods under customs were proved beyond reasonable doubt while considering the propriety of the judgement appealed from.

I have considered the record of proceedings and the judgement of the lower court, examined the exhibits tendered in this case and the submissions made before this court.

I will first address the question of the burden of proof, brought into issue by the provisions of **Section 223 (a)** of the **East African Community Customs Management Act**.

Burden of proof:

Once a person charged of a criminal offense pleads not guilty, there is a duty or burden to prove the case against him. **Article 28 (3) (a) of the Constitution** provides that every person charged of a criminal offense is presumed innocent until **proven guilty** or until that person pleads guilty.

The burden falls on the prosecution to prove all ingredients of the offense beyond reasonable doubt **(Woolmington versus DPP (1935) AC 462).** This duty/burden does not shift to the accused except in a few statutory cases **(Uganda versus Dick Ojok 1992-93 HCB 54)**

The imposition by statute of a burden on the accused to prove certain facts in criminal matters, is allowed by the Constitution and does not amount to an inconsistency with the presumption of innocence and the burden on the State to prove the case. **Article 28 (4)** of the Constitution refers. The interpretation of this is that the burden to prove the case is on the prosecution, but where the law shifts the same to the accused to prove

the existence of a fact or a specific aspect of the case, then the accused has to discharge this burden to the standard required in criminal matters. What the defense offers in evidence to discharge this burden becomes critical to the determination of the case, as compared to criminal trials where this statutory burden is not imposed.

The **East African Community Customs Management Act 2004** under which the appellant was charged and prosecuted, is one of the statutes that shift the burden of proof to the accused in respect of particular facts.

Section 223 (a) thereof provides:

"The onus of proving the place of origin of any goods or the payment of proper duties, or the lawful importation landing, removal, conveyance, exportation, carriage coastwise, or transfer, of any goods shall be on the person prosecuted or claiming anything seized under this act"

In deciding this appeal, this court will consider whether the appellant discharged this burden.

This court will also keep in mind the standard of proof as established in **Miller Versus Minister of Pensions** (1947) 2 ALL ER 372 at 373:

"That degree is settled. It needs not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a person as to leave only a remote possibility of his favor which can be dismissed with the sentence of course it is doubt but nothing short of that will suffice"

Resolution of the grounds of the appeal

Ground 1

The learned trial magistrate erred in law and fact when she relied on a repudiated charge and caution statement to convict the appellant

Counsel for the appellant faults the trial magistrate for relying on the charge and caution statement which was wrongly admitted as there was no trial within a trial held as required by law. Further, that the appellant was induced by PW 1 and PW6 to confess to the crime and implicate Bagonza so that he would not be prosecuted but used as a witness. Lastly, that the confession was recorded in English, a language that the appellant did not understand.

On the other hand, counsel for the Respondent supports the reliance by the trial magistrate on the "confession" based on the decision in **Matovu Musa Kassim versus Uganda** (SCCA No 27/02) where the failure of the court to conduct a trial within a trial to determine the voluntariness and admissibility of the appellant's charge and caution statement was not fatal. He argues that since the appellant and his lawyer did not object to the admission of the confession, there was no miscarriage of justice.

What is clear from both parties' submissions and even from the judgement of the trial court is that Prosecution Exhibit 1, which is the appellant's charge and caution statement was treated by all parties as a confession while in fact, it was not.

At page 5 para 4 line 3, the judgement reads, *"In PEX1, the accused **confessed** to PW1 that after parking the truck, he went to sleep in a lodge knowing that he was proceeding to Congo the next day".*

She further analyses the charge and caution statement at page 6 and states, "I *opine that the accused person made the charge and caution statement voluntarily before an officer of the rank of an inspector of police as required by the law. Moreover, a thorough perusal of PEX1 shows that it complied with the rules for recording confessions and is therefore admissible against the accused person".*

Section 23 of the **Evidence Act** deals with "confessions" to police officers. This law does not define what a confession is but case law does. **In Swami versus The Emperor (1939) 1 ALL ER 396,** it was confirmed that a confession must either admit in terms the offence or all facts which constitute the offence. In **Uganda v Yosamu Mutahanzo (1988-90) HCB 4** it was held that a confession connotes an unequivocal admission of having committed an act in law that amounts to a crime and must either admit in terms the offence or at any rate substantially all the facts which constitute the offence.

A careful reading of PEX1 shows that the appellant did not confess to any of the offenses charged or to the elements constituting the offenses. He claimed that he did not know how the goods went missing from the truck as he had gone to sleep. He did not implicate himself as having committed the offense and in fact shifts the blame to the URA officers and to his manager whom he suspected to have planned to divert the goods to Arua. His statement was exculpatory.

In the light of the above, I find PEX1 was not a confession. What is revealed in PEX1 is an admission by the appellant that he did not cross the border but fell asleep and woke up to an empty truck in the morning. Admissions are "*acknowledgements of one or more facts which fall short of supplying all of the essential elements necessary to constitute the offense charged, it is short of an admission of guilt*". To the contrary, confessions

include *"acknowledgements of all the essential elements in the crime charged and is generally defined as an acknowledgement of guilt"*. **Journal of criminal law and criminology Vol 39 No 6 (1931-1951)** on **"Validity of the admission-confession distinction for purposes of admissibility.**

The evidence Act provides that admissions are relevant in both criminal and civil matters. Sections 16, 17 and 20 of the Evidence Act refer. The elaborate procedures for admissibility of confessions set out from Sections 23 to 27 of this Act and further elaborated in numerous court decisions and guidelines/ circulars on how to record charge and caution statements are not prescribed for admissions.

Article 28 (11) of the Constitution however enshrines the principle against self-incrimination and seeks to protect an accused person from the effects of statements that may be secured through abuse of power by the State. Since the admission has the same consequence of incriminating the accused and may be relied upon to arrive at a conviction, it is vital that the trial court still establishes the circumstances under which it was made, and whether it was issued voluntarily before it can admit and rely on the same. This is to ensure that a miscarriage of justice is not occasioned.

Although dealing with the statement as a confession, the trial Magistrate was alive to this need to establish the voluntariness of the charge and caution statement. She aptly summarized the position of the law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been made voluntarily. She proceeded to analyze the evidence and arrived at a conclusion that the accused did make the statement voluntarily.

This court agrees with her findings on several grounds.

The trial court provided sufficient justification for the finding that the appellant understood some English, contrary to his claims. He owned his signature and writings on the charge and caution statement and owned up to a knowledge of basic English under cross examination. This court further notes that during cross examination of PW1 counsel for the accused suggested that he was a P6 drop out and did not know English. Interestingly during this appeal and the defense case during trial, its suggested that he stopped in P2. This contradiction aside, the appellant's academic level is in this court's view not sufficient proof that he does not understand English. In fact, this can be proof that he could understand basic English. PW1 and PW6 stated that they both spoke with him and attested to his knowledge of English. This was sufficient proof and the trial magistrate cannot be faulted in arriving at that decision.

The charge and caution statement itself shows that PW1 followed the **Evidence (statements to police officers) Rules SI 6-1** by first notifying the appellant of the case against him and then administering a caution that he did not have to say anything but if he chose to do so, then whatever he stated could be used in evidence against him. The charge and caution and the parts on PEX1 where the appellant was asked if he had understood the charge and caution are all countersigned by the appellant and he has not denied his signature and writing against the charge and caution. An admission made after such caution has been administered and understood by the appellant, as in the circumstances of this case, goes to support its voluntariness unless other factors are proven in evidence as having affected the voluntariness e.g. use of force, threat, inducement or promise.

The record shows that when the prosecution sought to tender the charge and caution statement, the defense lawyer did not object to its admission. It is generally expected, for confessions, that the trial within a trial is held when an objection is raised by the accused or on his behalf by the lawyer, repudiating or retracting it. I have carefully considered the fact that in **Matovu Musa Kassim versus Uganda**, SCCA No 27/2002 delivered on 18th August 2005, the supreme court upheld the trial Judge's reliance on a charge and caution statement admitted when the counsel for the appellant, did not oppose its admission in Court. As a result, no trial within a trial was held. The court of appeal had examined the claim of torture raised during the appellant's sworn testimony and found that it was an afterthought and a concoction. The Supreme court agreed with this and was satisfied that in the circumstances, the confession had been made voluntarily.

In the present appeal, the claim that the appellant was induced to implicate the co accused in the charge and caution statement with a promise that he would be used as a witness did not arise when PW1 was cross-examined. It arose when the appellant was giving his defense. This court finds that this ground was raised as an afterthought else it would have arisen when the charge and caution statement was being introduced. I also do not find it to be factual. If it were true, then the charge and caution would have implicated Bagonza as alleged. Nowhere in PEX1 does the appellant mention Bagonza. Indeed, the decision of the supreme court in the case of Matovu Kassim, though dealing with admissibility of confessions, applies in this instant appeal.

The trial magistrate cannot be faulted in her reliance on the admission in the charge and caution statement, especially drawing the contradictions between it and the evidence given for the appellant at trial. The admission in issue here is the appellant's claim that he did not cross the border to Congo, but went to sleep only to wake up in the morning to an empty truck. The fact that she referred to it as a confession causes

no miscarriage of justice to the appellant. Further, she did not rely on the admission alone, to arrive at the conviction. I find no reason to disturb her decision.

This ground fails.

Grounds 2 and 3:

The learned trial magistrate erred in law and in fact when she relied on weak and uncorroborated circumstancial evidence to convict the appellant

The learned trial Magistrate erred in law and in fact when she convicted the accused/appellant based on evidence full of contradictions and inconsistencies

Whereas counsel for the appellant sought to argue the above grounds together, he appears to have abandoned ground 3 as he did not make any submissions in that regard. The Respondent accordingly only addressed himself to ground two. I have carefully considered the evidence of the witnesses and do not find inconsistencies and contradictions of the kind that go to the root of the case and point to a deliberate untruthfulness on the part of the witnesses as to affect the weight to be attached to the prosecution evidence **(Alfred Tajar versus Uganda EACA Cr Appeal No. 167/69).**

This ground of appeal fails.

That leaves Ground 2

Counsel for the appellant faulted the trial Magistrate for not addressing herself to the law on circumstancial evidence in the judgement, and for relying on it when it did not meet the requisite legal standard. He argued that before drawing inference of the accused's guilt the court should have been sure that there were no co existing circumstances which would weaken or destroy the inference: **Teper Vs R [1952] AC 480** at **489.**

In the present case, he argued that there was a probable hypothetical explanation that the goods had been taken by the owner yet the trial magistrate concluded that the appellant was guilty because he did not report missing goods to the authorities. He argued that the appellant testified in his defense that he had been informed that the owner had taken his goods. There was therefore no need to report.

In addition, the court had not considered the evidence that there were certified documents on record showing the goods had been cleared to enter Congo, thus it was more probable than not that the goods had crossed. He submitted that all these

explanations cast doubt on the prosecution case, which should have been resolved in the favor of the appellant.

In oral submissions before court, he faulted the magistrate for relying on the evidence of PW5 which was part hearsay, and in which PW5 denied knowing anything about the truck. He also stated that empty trucks from Congo come with empty manifest. The truck did not come back from Congo empty so there was no empty manifest for the appellant to present. Further, he invited court to scrutinize the TI documents which reveal that the truck did cross to Congo and came back loaded.

Counsel for the respondent supported the magistrate's reliance on circumstancial evidence and that the same securely pointed to the guilt of the accused. He also says there were other pieces of direct evidence relied upon to convict, meaning this was not a case dependent squarely on circumstancial evidence.

I proceed to scrutinize the lower court's judgement in respect of the application of circumstantial evidence.

At page 7-8 it reads as follows: *"Whereas none of the witnesses saw the accused person moving or interfering with the goods, there is circumstantial evidence on record from which irresistible inference of guilt can be drawn against the accused person. The accused person had express knowledge that the goods were destined for Congo. The accused person neglected to cross the border even when he had been cleared by the Ugandan authorities to cross over to Congo. The accused conveniently went to sleep. Even when the accused person discovered that the goods had been offloaded off his truck, he did not report the incident to the authorities. He quietly acquiesced and went about his business. The circumstances surrounding the disappearance of the goods show that the accused was involved with the interference of goods under customs control and I find him culpable".*

From reading of the record of proceedings and the judgement, it is apparent to this court that the bits of evidence relied on above were drawn from the evidence of PW1 and PEX1 which contained the appellant's admission that he had not crossed the border with the goods and that they were offloaded from the Ugandan side. It also stems from the evidence of PW2 and PW3 that the truck reached Padea at about 2.30 pm on 20th June 2018 and was validated, meaning allowed to cross to Congo. The evidence of PW4 was that he never saw the truck cross to Congo. He further stated that when the goods cross the border, the TI is signed by the Congolese that they have received the goods. The evidence of both PW4 and PW6 was that the truck had not crossed the border so the goods had not been received. They had confirmed this from the customs officials on the Congo side. The officials stated that they had seen the documents but not the goods.

These officials included the Chief, other officers and the secretary from the Congolese customs office.

This court finds no fault with the trial Magistrate's finding and application of circumstantial evidence. She may not have defined it or cited the relevant cases but she clearly knew what it was and the standard required for it to sustain a conviction. The above facts pointed irresistibly, to the involvement of the accused in both offenses charged.

Careful perusal of the judgment shows that it was not the only evidence relied on to convict the appellant. As permitted by law, **Section 7(2) of the Evidence Act Cap 6** the conduct of the appellant was also relied upon. Having admitted the charge and caution statement, and believed the admission of the appellant, the magistrate drew the conclusion that his conduct was not that of an innocent party especially in not reporting the missing goods. In the charge and caution statement, he says that he asked URA officers who told him that the goods had been loaded on two other trucks and driven to **Arua**. Not knowing the circumstances under which the goods were removed, a prudent driver responsible for transportation to Congo would have made more enquiries and reported to police or the revenue authorities. The magistrate was right to find the conduct suspicious and rely on it.

Did the appellant discharge the burden of proof imposed on him by Statute?

The trial Magistrate found that the appellant had not discharged the burden to prove that duty had been paid on the goods as required by Section 223 (a) of EACCMA.

I have carefully considered the wording of the above section and its application to the facts in this case. Not only is the appellant under obligation to show that duty was paid under count 1 but also that the goods were transported or exported to Congo as he alleged in his defense in respect of count 2. To satisfy the court that there was no interference with the goods, the appellant has the burden to prove conveyance of the goods. Conveyance means the transportation of goods from one point to another.

It is not therefore enough for the appellant to raise doubts and gaps in the prosecution case over matters that he should have provided evidence of under section 223 (a) of EACCMA.

When put on his defense, the appellant gave sworn evidence but did not call any witnesses. He stated that he drove the truck with the goods to Congo Side. He also mentions several movements he made between Uganda and Congo especially when he claims he crossed back with the truck loaded. He offers no proof of immigration records or his travel document to confirm this. This was a relevant fact and is linked to the

movement of the goods since he says he is the one who transported them. Failure to produce this raised doubts on the veracity of his claims. Counsel for the appellant argued that these were irrelevant because the appellant wasn't charged with immigration offenses. This court respectfully disagrees.

Most importantly however, this court should focus on the goods and evidence of their crossing or transportation to Congo or lack of it. The appellant could have called witnesses to support the case that he took the goods to Congo. He chose not to do so. He relied on two documents, one of which was never admitted into evidence as an exhibit. This is DID1. We shall not evaluate it. The next is a T1 document issued for the appellant's truck UAG359L showing that the truck crossed back from Congo while loaded. I have carefully studied the said document and noted that it was issued on 22nd June 2018. This document falls short of proving to the court that the assorted goods that were transshipped onto the same vehicle on 18th June 2018 and transported to Padea and validated on 20th June 2020 crossed into Congo.

The prosecution through PEX5 and the testimony of PW6 and other witnesses established that the goods had not been received. The magistrate found that the appellant had failed to discharge the burden of proof while the prosecution had. I agree with her finding and find no cause to disturb it.

This ground of appeal also fails.

Ground 4.

Counsel for the appellant submitted that the learned trial magistrate erred in law and fact when she passed a harsh sentence against the appellant to a fine of US dollars 4000 or 1 year imprisonment. That the appellant did not take into consideration the mitigating factors advanced by the appellant that he is a family man, sole bread winner and suffering from hepatitis B. He further submitted that the appellant is a good citizen without prior criminal record, the offence with which he was convicted would be based on his rather inadvertent omission to report the missing goods to the authorities which he explains was because he had been made to believe that the owner of the goods is the one who had taken them.

Counsel for the appellant finally prayed that the appellant serves a non- custodial sentence like community service in the unlikely event that the court is bent on upholding the conviction.

However, counsel for the respondent submitted that the maximum sentence for those offences is 10,000 us dollars or imprisonment for 3 years. The fact that the magistrate

sentenced the appellant to 2000 us dollars fine or imprisonment of 1 year on each count to run concurrently showed that he had considered all the mitigating factors

In the case of **Kyalimpa Edward Vs Uganda, Supreme Court Criminal Appeal** No.10 of 1995, the principles upon which an appellate court should interfere with a sentence were considered. It was held that *"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal; or unless court is satisfied that the sentence imposed by the trial court was manifestly so excessive to amount to an injustice."*

The sentence can also be interfered with on appeal if an important matter or circumstance which ought to have been considered is ignored by the trial Court.

During mitigation the appellant submitted that he had spent 1 ½ years at home, he had two wives and children who are at home and also suffers from Hepatitis B.

I note that the magistrate did not examine the mitigating factors at all. It is the duty of the trial magistrate to weigh both the aggravating and the mitigating circumstances and arrive at a just sentence. In passing the sentence of USD 2,000 fine and the alternative one-year imprisonment per count, the learned magistrate concentrated only on the aggravating circumstances and seemed to ignore all factors that would have mitigated the sentence.

She stated as follows *"The convict wasted courts time by taking court through a protracted trial. He well knew he had committed the offense that caused loss of revenue to the Government. The convict is hereby sentenced to USD 2000 in respect of count 1 in default he shall serve a term of imprisonment for one year....."*

In failing to consider the mitigating factors she overlooked a vital principle in sentencing thus arriving at a wrong conclusion. In **Tumwine Alex versus Uganda**, Criminal Appeal No 219/2010 the court of appeal set aside the sentence of life imprisonment as harsh and excessive for not having considered the mitigating factors raised by the appellant. It was substituted with a lower sentence.

The Respondent's arguments that the trial magistrate had the mitigating factors in consideration when she arrived at the sentence are not borne out by the record of proceedings.

This ground succeeds.

The aggravating factors raised in this case were that the offenses were serious in nature and caused loss to the government. The goods have never been recovered and they caused unfair competition wherever they were sold.

Considering the above and the mitigating factors which I have summarized hereinabove, and the role played by the appellant in this case, this court considers a slightly lower sentence suitable.

Counsel for the appellant had prayed that I uphold the appeal and set aside the conviction and sentence.

I hereby:

a) Uphold the conviction of the appellant and dismiss grounds one, two and three of the appeal
b) I allow ground four of the appeal, set aside the sentence of the trial magistrate only where she imposed a fine and alternative of imprisonment and substitute it in that regard as follows:
   A sentence of a fine of USD 1,500 on count one, in default to a term of imprisonment for ten months
   A sentence of a fine of USD 1,500 on count two, in default to ten months' imprisonment

The imprisonment term runs concurrently in respect of both counts from the date of conviction.

.....

Jane Okuo Kajuga
Judge of the High Court
6.8.2020