

UGANDA / JUDGMENT

Uganda v Kasibo Joshua (Criminal Application No. 0206 Of 2018) [2020] UGCA 50 (18 February 2020) [2020] UGCA 50

COURT

Court of Appeal of Uganda

BEFORE

Owiny-Dollo, JA

CASE / FILE NUMBER

Criminal Application No. 0206 Of 2018

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THE REPUBLIC OF UGANDA**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

CORAM: OWINY - DOLLO DCJ, MUSOKE AND TUHAISE JJA.

MISC. CRIMINAL APPLICATION NO. 0206 OF 2018

(Arising from Court of Appeal Criminal Appeal No. 0239 of 2015, itself arising from High Court of Uganda (Anti-Corruption Division) Criminal Appeal No. 0007 of 2015; itself arising from Chief Magistrate's Court (attached to the High Court Anti-Corruption Division) Criminal Session Case No. 0080 of 2012)

UGANDA.....

VERSUS

KASIBO JOSHUA.....

RULING OF THE COURT

This application concerns the principles regarding third appeals in criminal matters. The application was brought on behalf of the Applicant, seeking certification by this Court that the intended third appeal to the Supreme Court raises a question(s) of law of great public or general importance. The third appeal would be against a decision of the Court of Appeal (Muhanguzi, Tuhaise and Madrama, JJA) in Criminal Appeal No. 239 of 2015 wherein the Respondent's appeal was allowed and his conviction by the trial Court, which had been confirmed by the first appellate Court was quashed.

Back ground

Mr. Kasibo Joshua was, in 2012, charged with several customs related offences. The facts of the case, as was accepted by the Court of Appeal sitting as a second appellate Court were that:

On 22nd August, 2011, a motor vehicle truck Reg. No. UAL 130R was driven into the compound of the Respondent and parked there. The truck was being driven by one Yusuf Kalange and was moving

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presumably from Kenya and was destined for Bujumbura in Burundi. It was loaded with goods which mainly consisted of wines. They were to be transported to Burundi. Those goods had received the necessary clearance at Malaba from where they proceeded to Kampala. They were to be transshipped (loaded on another vehicle) at SPEDAG in Kampala. The goods were not taken to SPEDAG. Instead when the driver reached Bweyogerere, near Kampala town he received a call from the Respondent who asked him to make a detour to his home in Bweyogerere.

Meanwhile, the movement of the vehicle was being monitored by officials of Uganda Revenue Authority, Uganda's tax collecting body. Those officials suspected that the vehicle had been fraudulently diverted to the Respondent's home. They went there together with other security personnel.

After gaining access into the Respondent's home, the officials found the vehicle parked. The Uganda Revenue Authority seal which had been fixed on the doors of the vehicle's carriage container had been broken. However, the goods in the said container had not been offloaded and there remained a padlock on the container door. The padlock was opened by the officials who took stock of the goods and impounded them. Those goods were later sold.

The Respondent was arrested and charged together with four other persons who are not material to this application with the following offences:- Count No. 1 of the offence of Smuggling contrary to section 319 (1) (c) of the Penal Code Act, Cap. 120. Count No. 2, of the offence of Possession of Un-customed Goods contrary to section 200 (d) (iii) of the East African Community Customs Management Act. Count No. 3 of

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the offence of Interfering with goods subject to Customs contrary to section 203 (f) of the East African Community Customs Management Act. One of the accused persons died during the trial. Two of the accused persons were acquitted upon conclusion of the trial. The appellant and one Yusuf Kalange were convicted.

The convicts appealed to the High Court which quashed Kalange's conviction but upheld the Respondent's conviction. He then appealed to the Court of Appeal which allowed his appeal, quashed his conviction and set aside the relevant sentences.

Hence this application for a third appeal. In reaching its decision, the Court of Appeal made the following findings:

- \$"1.\$ A finding that the Respondent was wrongly convicted of the \$\alpha\$ offence of smuggling. The Court observed that the Respondent was wrongly charged under the Penal Code Act, Cap. 120 for the offence of smuggling instead of the East African Community *Customs Management Act, 2004. Under the said Act, smuggling* would only be occasioned if the goods in question were moved from a partner state to a non-partner state with the intent to defraud customs revenue. Court then formed the view that the goods in issue had been moved from Kenya to Uganda which were all partner states and therefore could not have been smuggled.
- \$2.\$ The Court made a finding that the Respondent was wrongly convicted of the offence of Interference with Goods subject to customs control under section 203 (f) of the EACCMA. The Court *reasoned that although the truck carrying the goods in question* was diverted from the designated customs route to the

appellant's home, the goods were found on the truck and had not been offloaded by the time the URA officials seized them. The Respondent, had, therefore participated in diversion of the vehicle but had not interfered with goods as the URA officials' actions had prevented him from effectualising the interference.

The court made a finding that the Respondent was wrongly \$\mathfrak{Z}\$. convicted of the offence of possession of uncustomed goods.

The result of the Appeal was that the Court quashed the conviction of the appellant by the trial Court which had been confirmed by the first appellate Court for various offences, and set aside the sentences arising there from. The Applicant, which was the Respondent in the latest appeal is aggrieved with the above mentioned decision. However, there is no automatic right to lodge a third appeal in the Supreme Court. (See *Section 5 (5) of the Judicature Act, Cap. 13.)* Hence this application.

Representation

The Applicant was represented by Counsel George Okello while the Respondent was represented by Counsel Robert Ojambo as the Principal State Attorney.

Case for the Applicant

The affidavit deponed in support of the present application, raises, in paragraph 7 thereof the following points of law which are alleged to be of great public or general importance:

Whether to constitute the offence of interference with goods \$\`i_*\$ subject to customs control under section 203 (f) of the EACCMA, an accused person must have unloaded/ removed the goods from the vehicle or mode of conveyance.

- Whether diversion of goods subject to customs control from *ii* . the designated route by an accused person does not constitute the offence of Interference with goods subject to customs control contrary to section 203 (f) of the EACCMA.
- Whether to constitute the offence of possession of uncustomed *iii*. goods under section 200 (d) (*iii*) of the EACCMA, the goods ought to have been offloaded/removed from a conveying vehicle by an accused person.
- Whether goods moving from one East African partner state to *iv*. another cannot be smuggled?"

Case for the Respondent

In reply, the Respondent in his affidavit gave several answers to the averments made for the Applicant. He contended generally that the alleged questions of public importance set out in the affidavit for the Applicant are diversionary and did not raise any question of law of great public/general importance. He further averred that the Applicant seeks in the present application to appeal to the Supreme Court to have it pronounce itself on express provisions of law under the guise of questions of law of great public/general importance. He then finally averred that granting leave to appeal to the Applicant would require him to attend to the tedious Court process yet he had, "been kept in Court for a considerable period of time and at a great expense."

Court's Consideration

We have considered the submissions of counsel for either side, the law applicable as well as the authorities cited and those not cited which are generally applicable to the present application. However before we can proceed it is important to state that there is no automatic right to lodge a third appeal in the Supreme Court. Section 5 (5) of the Judicature Act, Cap 13 which provides that;

"Where the appeal emanates from a judgment of the chief" $\frac{1}{2}$ 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."

Therefore, before a third appeal may be lodged, the intended appellant must obtain a certificate from the Court of which heard the second appeal, that the matters for his/her intended third appeal raise a question or questions of law of great public or general importance under the above mentioned provision. Noteworthy though is that, the Criminal Procedure Code Act, Cap. 116, too contains provisions for third appeals. For instance **section 46** provides that:

"46. Third appeals."

Where an appeal emanates from a judgment of a magistrate grade II, and either the accused person or the Director of Public Prosecutions has appealed to the chief magistrate, and from there to the High Court, either the accused or the Director of Public Prosecutions may lodge a third and final appeal to the Court of Appeal with the certificate of the High Court that the matter raises a question of law of great public or general importance or if the Court of Appeal 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 Court of Appeal shall only give a declaratory judgment.*

Under the Criminal Procedure Code Act, Cap. 116, there can be no third appeal to the Supreme Court. The third appeal envisaged thereunder can only be made to the Court of Appeal. Those appeals would emanate from the judgment of a Magistrate Grade II. We shall advert to the Criminal Procedure Code Act later in this judgment.

The Judicature Act, Cap. 13 does not define what questions of law of great public or general importance are, or which matters would raise them so as to merit a certificate of importance to lodge a third appeal to the Supreme Court. However Courts in other jurisdictions have considered the subject and we shall make reference to some of those decisions. In *Hermanus Phillipus Steyn vs. Giovanni Gnechchi-Ruscione*, Supreme Court Criminal Application No. 004 of 2012 (unreported), the Supreme Court of Kenya laid down several principles on the subject. It considered several decisions from other jurisdictions and then laid down the principles which we have found to be persuasive. In *Hermanus Phillipus Steyn* (supra) the Court observed that:

"[60] In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. In summary, we would state the governing principles as follows:*

- (i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;*
- (ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;*
- (iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination:*

(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its

determination:

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(v) mere apprehension of miscarriage of justice, a matter most apt for $\frac{1}{2}$ resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;

(vi) the intending Applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;

(vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.

Being guided by the above principles, we would make the following observations. The alleged questions of law which are relied on by the Applicant in the present application would satisfy the criteria laid down in sub-paragraphs (i), (ii), (iii), (iv), (vi), and (vii) of paragraph 60 of the authority cited above. This is because the alleged questions of law of great public or general importance were concisely identified and well demarcated. The issues raised by those questions transcend the circumstances of the present case and would be pivotal in the administration and enforcement of customs law in this country. If those issues were to be determined in the Applicant's favour, they would have a significant bearing on the public interest in the field of enforcement of customs law. Further still, the relevant questions set out by the Applicant were all the subject of the determination by the Court of Appeal in Criminal Appeal No. 239 of 2015.

Before we take leave of this matter, we feel it necessary to make further comments on the law relating to third appeals. We start by noting that

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under the Criminal Procedure Code Act, Cap. 116, there can be no third appeals to the Supreme Court. To us, this was deliberate enacted to ensure that there is finality to criminal appeals. However, it is beyond doubt that the Judicature Act, Cap. 13 permits third appeals to the Supreme Court in the instances we have discussed above. Such third appeals, can, however, if brought by the DPP, only result in a declaratory judgment. In other words, the substance of the decision of the Court of Appeal cannot be altered. To illustrate with the present case, the Respondent who was acquitted by the Court of Appeal cannot have the conviction by the trial Court re-instated by the Supreme Court.

Therefore, and for the reasons given above, we grant certification that the questions raised to in the relevant application constitute points of law of great public or general importance to warrant a third appeal to the Supreme Court. The present application is thus allowed with no order as to costs.

We so order.

Dated at Kampala this

2020. dav of Alfonse Owiny Dollo, DCJ

Justice of Appeal

Elizabeth Musoke Justice of Appeal

Percy Night Tuhaise Justice of Appeal

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