

UGANDA / JUDGMENT

Uganda v Ntambi Vicent

(Miscellaneous Application No. 139 of 2019) [2020] UGCA 2066 (15 July 2020)

[2020] UGCA 2066

COURT

Court of Appeal of Uganda

BEFORE

Musoke, JA, Muhanguzi, JA, Kasule, JA

CASE / FILE NUMBER

Miscellaneous Application No. 139 of 2019

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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Miscellaneous Application No. 139 of 2019

(Arising out of Court of Appeal Criminal Appeal No. 305 of 2015)

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Uganda ::::::::::::::::::::::::::::::

Versus

Ntambi Vicent ::::::::::::::::::::::::::::::

Coram: Hon. Lady Justice Musoke Elizabeth, JA \$20\$ Hon. Mr. Justice Ezekiel Muhanguzi, JA
Hon. Justice Remmy Kasule, Ag. JA

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\$10\$

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Ruling of the Court

The applicant applied for a certificate to issue to the effect that the applicant's intended appeal against a Judgment of this Court delivered on 11th October, 2018 in Criminal Appeal No. 305 of 2015 raises questions of law of great public and general importance.

The application is being made under Section 6(2) of the Judicature Act, Rule 38(1) of the Judicature (Supreme Court Rules) Directions SI 13-11 and Rules 41(1), 43(1) and (2) and 44(1) of the Judicature (Court of Appeal Rules) Directions, SI 13-10.

The Application is by Notice of Motion supported by an affidavit dated 06.08.2019 deposed to by the learned State Attorney 35 Joanita Tumwikirize of the office of the Director of Public Prosecutions (DPP). The respondent deposed to an affidavit dated 05.09.2019 and filed the same in this Court in opposition to the application.

At the hearing, learned State attorney Peter Mugisha appeared for the Applicant while learned Counsel Ntende Frederick Samuel was for the respondent who too was present in person.

The background to the application is that the respondent was alleged to have fraudulently acquired in June 1998 the ownership

of mailo land comprised in Kyadondo Block 229 Plot 1368 situate in Kira, Wakiso District, from one Matilda Bulya alias Nulu Bulya whom the respondent claimed to be his paternal grandmother.

After the death of Bulya on 26.08.2006, the beneficiary of her estate reported to police the alleged fraudulent acts of the respondent.

The respondent

respondent whereby he had acquired the suit land from Bulya. 50 The respondent was arrested, charged and prosecuted before Grade I Magistrate, Buganda Road Court, with Forgery C/S 347 and 349 of the Penal Code on count 1 and with uttering of false documents C/S 190 of the Penal Code on count 2 to which he pleaded not guilty. 55

The prosecution adduced evidence and at the conclusion of the case for the State, the respondent was acquitted on all counts on a no case to answer. The DPP appealed to the High Court against the acquittal of the respondent. The High Court (F. B. Jane Kiggundu, J.) allowed the appeal by holding that the prosecution evidence adduced at the trial made out a prima facie case against the respondent for him to be put on his defence. The learned Judge ordered a retrial of the respondent before another Magistrate.

The respondent, dissatisfied by the said High Court decision, 65 appealed the same to the Court of Appeal which Court dismissed the respondent's appeal by upholding the Judgment of the High Court. The Court of Appeal however amended the High Court decision in that instead of the respondent undergoing a fresh retrial before another Magistrate, the court of Appeal ordered that 70

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the respondent should present his defence to another Magistrate Grade I to the evidence on the Court record already adduced by the prosecution. The said Magistrate's Court should then proceed to deliver Judgment.

Pursuant to the above Court of Appeal decision and direction the 75 respondent presented his defence to the Grade I Magistrate at Buganda Road Court (H/W Araali K. Muhiirwa) in Criminal Case No. 1265 of 2011. The said Court convicted the respondent of all the three counts charged. The Court sentenced the respondent to a term of three years imprisonment on the first count and 2 years 80 imprisonment on each one of the two other counts, the sentences to run concurrently.

Dissatisfied the respondent appealed the conviction and sentence of the Grade I Magistrate's Court to the High Court vide Criminal Appeal No. 045 of 2015.

The High Court (Murangira, J.) determined the High Court appeal by dismissing the same on 25.09.2015. The High Court further ordered for the cancellation of the respondent as registered owner of the suit land from the Certificate of Titles and reinstate thereon

the former registered proprietor, Matilda Bulya. 90

The respondent challenged the High Court decision by lodging Criminal Appeal No. 305 of 2015 to the Court of Appeal which Court (Kiryabwire, Muhanguzi and Madrama, JJA) allowed the The conviction and sentence of the appeal on 11.10.2018. respondent was set aside and Court ordered that he be reinstated as the registered proprietor of the suit land on the Certificate of Title.

The applicant now seeks the issuance of the requisite certificate through this application so as to pursue an appeal against the Judgment of this Court in the Supreme Court.

The case of the applicant is that the decision of this Court in Criminal Appeal No. 305 of 2015 raises a substantial question and/or issue of law of great importance which the Supreme Court should determine. The question and/or issue is; whether or not the Court of Appeal was right while resolving the issues of the 105 appeal before it as a second appellate Court in Criminal Appeal No. 305 of 2015, to rely on the testimony of a witness as regards the contents of a report of a hand writing expert, which report was never formally tendered in the trial Court as an exhibit and whose author was never called to testify in Court. The issue affects the 110 evidential value and the weight of documentary evidence to be

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relied upon at a criminal or civil trial. It also affects the reliability of the evidence of experts on reports tendered in Court as exhibits and those not tendered.

applicant had already lodged in the Supreme Court 115 The Miscellaneous Application No. 2 of 2019 for leave to appeal out of time the Court of Appeal Judgment in Court of Appeal Criminal Appeal No. 305 of 2015.

The applicant prayed for the application to be allowed.

For the respondent, it was submitted, that the application ought to be dismissed for having been filed out of time. There was need to bring to an end, litigation concerning this subject matter, given the fact that the Court of Appeal delivered a very comprehensive and correct decision on the matter. There was no justification for issuance of a certificate of importance, because the learned Justices of Appeal properly approached the issues raised in the The learned Justices made no error at all as their appeal. Judgment did not extend beyond scrutinizing the prosecution and defence evidence that had been improperly assessed by the Magistrate Grade I and this fact had not been detected by the High Court as the first appellate Court. Counsel for respondent invited this Court to dismiss the application.

$\$6(2)$

In resolving this application it is noted, as the background clearly shows, that it arises out of original Grade I Magistrate's Court Criminal Case No. 1265 of 2011, the High Court Criminal Appeal 135 No. 045 of 2015 and finally Court of Appeal Criminal Appeal No. It is therefore an application that is criminal in nature. It has to be pursued under the provisions of the law governing criminal applications.

Being Criminal in nature, it is wrong of the applicant to bring this application under Section $\$6(2)$ of the Judicature Act. Section 6 of the Judicature Act has its sub-heading as being:

"6. Appeals to the Supreme Court in Civil matters."

Section $\$6(2)$ provides for Civil Appeals emanating from a Chief Magistrate or Grade I Magistrate's Courts.

As to Criminal Appeals emanating from Chief Magistrates and Grade I Courts, the applicable Section of the Judicature Act is Section $\$5(5)$ which provides:

"5. Appeals to the Supreme Court in Criminal matters:

(5). 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".*

The applicant is thus in error to bring this application under Section $\$6(2)$ of the Judicature Act. The proper Section is $\$5(5)$ of the Judicature Act.

As to the Rules, the applicant correctly brings this application 165 under Rule 38(1) of the Judicature (Supreme Court Rules) Directions which provides:

"38. Applications for Certificate of Importance or leave to appeal in Criminal matters.

(1) In criminal matters 170

- (a) Where an appeal lies if the Court of Appeal certifies that $\$ \bigcap \$$
- a question or questions of great public or general

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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 will lie in the discretion of the Court of *Appeal;*

and

- (b) if the Court of Appeal refuses to grant a certificate as referred to in 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 or general importance which would be proper for the Court to review in order to see that justice is done".

The above Rule requires the applicant to have lodged this application in Court within 14 days from the date of delivery of the Judgment, the subject of the intended appeal.

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The Court of Appeal delivered its Judgment in Criminal Appeal No. 305 of 2015 on 11.10.2018. This application was filed in this 195 Court on 06.08.2019. This was almost after ten months after delivery of the Judgment. The applicant offered no explanation at all, whether through the affidavit in support or otherwise, for the delay in lodging this application in this Court. Indeed there was no ground provided to this Court upon which this Court can 200 exercise its discretion for the extension of the period within which the application can be brought. The position is that this application was lodged in this Court ten months out of time contrary to the law.

As to the merits of this application, the fact of the application 205 having been filed in this Court out of time notwithstanding, for this Court to grant a certificate sought by the applicant, this Court must be satisfied that the intended appeal to the Supreme Court concerns a matter of law, and that that matter of law is either of great public importance or of general importance. See: **Court of 210**

Appeal Civil Application No. 0245 of 2011 Asumani Mugenyi vs M. Buwule (unreported).

A matter of great importance and/or general importance is one that generates general public interest. General public interest

- takes different forms. Such a matter may be one that does not \$215\$ affect all people, but it affects an identifiable Section of the population. By way of examples, an environmental phenomenon that adversely acts upon the quality of air or water in a particular area of the country is a matter of great and/or general importance.
- Also a statement of law made or considered by Court on a Court \$220\$ decision which may affect a considerable number of people in their particular category, say commerce, medicine, legal practice, or any other sector, or in their enjoyment of fundamental, and/or other rights, may also constitute a matter of great and/or general public
- interest. A holding by a Court of law or some other entity vested 225 with power, to so hold, which may affect the proper functioning of public institutions of governance or the Courts or any other legitimate bodies for dispensing redress or the mode of discharging of duty by public officers, may also constitute matters of general public interest. See: **Supreme Court of Kenya Application No. 230 4 of 2010: Hermanus Phillippus Steyn vs Giovanni Gnechchi-Ruscoue**, applied by the Uganda Court of Appeal in Asumani

Mugyenyi vs M. Buwule (Supra).

On the basis of the above cited two Court decisions one Kenyan and the other Ugandan, the applicant for a Certificate of 235

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Importance, has the burden to satisfy Court entertaining the application, that the issue the subject of the intended appeal, is one the determination of which goes beyond the circumstances of a particular case and has a significant bearing on the public interest. The applicant must satisfy Court that such a point of law 240 is a substantial one and that its determination in the appeal sought, will have a significant bearing on the public interest and that the same point of law had been the subject of judicial determination in the lower Courts. If the application is occasioned by a state of uncertainty in the law arising from contradicting 245 Court precedents, the applicant must show that the Supreme Court will either resolve the uncertainty or refer the same to the lower Courts, or anyone of them for due determination.

Mere apprehension of miscarriage of justice in a matter most apt for resolution in the lower Courts, or determinations of fact in 250 contests between the parties to a cause, are not in themselves per se, a basis for granting a Certificate of Importance.

Accordingly, the applicant for such a certificate has an obligation to clearly identify and concisely set out in the application and in the submissions the specific elements of general public importance

which he or she attributes to the matter for which the said certificate is sought.

It is necessary to determine whether the applicant in this application has discharged the burden as set out above so as to be entitled to be granted the sought certificate of importance.

In ground 5 of the application the applicant sets out the issue of:

"..... As to whether the lower Court has right to rely on the testimony of a witness on the contents of a report which was never tendered in Court as an exhibit nor was its author called to testify *in Court"*; as the one raising substantial questions of law or issues of great importance for which a certificate of great public or general importance is being sought.

In paragraphs 6 and 7 of the affidavit in support by learned State Attorney Joanita Tumwikirize, the applicant elaborates on the above issue as follows:

> "6. That am further informed that there was no error by the Learned Justices of Appeal in so far as the Judgment did not extend beyond scrutinizing the prosecution and defense evidence that was improperly assessed by Magistrate Grade

one and went undetected by the High Court as the first 275 appellant Court.

> That I further verily believe no error exists to fault the \$7.\$ *findings of the Court of Appeal".*

At trial, the prosecution had been required to prove beyond reasonable doubt that the respondent had committed forgery of 280 the consent to transfer, exhibit "P" and the Land Transfer, exhibit "S", Forms, whereby the land, the subject of the Criminal Charges, had been transferred from the names of the registered proprietor Nulu Bulya alias Matilda Bulya into those of the respondent. The prosecution had also to prove, beyond reasonable doubt, that the 285 two exhibits had not been signed by the said Nulu Bulya alias Matilda Bulya. The respondent could only be convicted of each one of the three counts of which he had been charged and prosecuted, on proof beyond reasonable doubt that the respondent had committed the stated forgery. 290

The crucial evidence for proof of the forgery at the trial was the evidence of the handwriting expert who testified as Pw6: P. M. Ntarirwa. The sum total of the evidence of this witness was that there was a possibility that the person who wrote the questioned signatures could also have written the sample signatures. The

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sample signatures were those of Nulu Bulya who also used the name of Matilda Bulya.

This same witness Pw6, had in cross-examination confirmed that a colleague of his, who too was a handwriting expert, with whom they worked in the same office and whose signature he knew very 300 well, had also examined the same application for consent to transfer of the same land, which form was similar to exhibit "P" of the report by Pw6, and had also examined the specimen signatures of Nulu Bulya and Matilda Bulya, and had concluded that Nulu Bulya and Matilda Bulya were two different signatures. Pw6, after 305 having acknowledged the signature of Mr. Ezati on that report and after having confirmed the genuineness of that report dated 18.03.2008 and marked Lab Number 8027, had had the said report tendered in Court as an identification

exhibit.

Their Lordships of the Court of Appeal, clearly explained why they 310 had to refer to the report of Mr. Ezati Samuel. They referred to it when they had to resolve the issue of whether or not, as a matter of law, it had been proved beyond reasonable doubt at trial, that the respondent had committed any forgery with regard to the consent to transfer and the transfer forms themselves whereby the 315 suit land had been transferred from the names of the previous

registered proprietor in title into those of the respondent. Their Lordships of the Court of Appeal stated on page 20 paragraph 3 of the Judgment.

"Notwithstanding the fact that it was not formally admitted in 320 evidence, there is testimony which was not expunged from the record about the contents of that report which evidence was not discredited".

Their Lordships then proceeded to reproduce from the report of Mr. Ezati what in actual fact Pw6 had put on the Court record at the 325 trial, as part of his answers under cross-examination, that Nulu Bulya and Matilda Bulya were two different signatures. Their Lordships thus reproduced the relevant position of Mr. Ezati Samuel's report findings dated 18.03.2008 that:

"I have examined and compared the questioned and specimen 330 signatures and found that the questioned signatures reads as *Matilda Bulya and the specimen consistently read as Nulu Bulya. This indicates that they were two different signatures.* Unless it is known or samples that indicate that the author uses both models and versions are found such signatures are 335 presumed to be signatures of different persons".

Their Lordships of the Court of Appeal made reference to the report of Ezati Samuel, so as to stress the fact that Pw6 A. M. Ntarirwa, in his being cross-examined at trial, had made it his testimony that Mr. Ezati Samuel, a handwriting expert, had in his report marked 18/03/2008: Lab No. 8027, which report Pw6 did not dispute, concluded that, as regards the consent to transfer Form which was the same as exhibit "P" examined by Pw6, that Nulu Bulya and Matilda Bulva were two different signatures.

- Their Lordships of the Court of Appeal thus concluded that on the 345 basis of the reports of the handwriting experts, namely Pw6: A. M. Ntarirwa, who actually testified in Court and Ezati Samuel, who did not testify in Court, but the contents of whose report were confirmed and brought on record by the same Pw6 while testifying at trial, there was no conclusive evidence whether the questioned 350
- signatures on the Consent Transfer Form and the Transfer Forms were forgeries. Each one was written in different style and could refer to two different people. Their Lordships of the Court of Appeal thus found that it was not possible to conclude, as a matter of law, that it had been proved beyond reasonable doubt by all the 355 evidence adduced, including that of Pw6 who also referred to that in the report of Samuel Ezati, that the respondent had committed

any forgery on the consent to Transfer Forms and the Transfer Forms.

The reverting to the handwriting report of Ezati Sammuel by Their Lordships of the Court of Appeal was because Pw6 had made part of the contents of that report to be part of his testimony to the trial Court and the evaluation of the evidence of Pw6 A. M. Ntarirwa necessitated Their Lordships of the Court of Appeal to revert to it the way they did. There is therefore no issue of transcending the 365 circumstances of the particular case that was before the Court. There is no issue having a significant bearing on the public There was no substantial point of law raised whose interest. determination, on further appeal, would have a significant bearing on the public interest. The so called substantial questions of law 370 or issues of great importance alleged by the applicant never arose and were not the subject of judicial determination in the Court of Appeal or in the lower Courts. There are no contrary precedents on the alleged issue and as such there is no uncertainty in the law that has been shown. 375

All that the applicant is trying to do by pursuing this application is due to the applicant's misapprehension that justice was not done in the matter the lower Courts and that a miscarriage of

justice was caused. Such an assertions has no foundation at all, and at any rate, does not justify, on its own, a grant of the sought 380 for certificate.

At trial, the applicant as prosecutor, attempted to prove the fact that the respondent had committed forgery in having the suit land transferred into his names from those of Nulu Bulya/ Matilda Bulya. The respondent adduced credible evidence that he never 385 committed any forgery and further that he was a beneficiary of a gift from the said Nulu Bulya/Matilda Bulya. This was the fact that constituted a contest between the applicant as prosecutor and the respondent as the accused. The Court of Appeal found that both the trial Magistrate's Court and the High Court had wrongly 390 determined this fact against the respondent. It, as a matter of law, determined the same in favour of the respondent. Such a determination cannot, on its own alone, be the basis for granting a certificate of great public or general importance.

There is therefore no basis for the applicant to assert, that there 395 was an issue that raised questions of law of great public or general importance affecting the evidential value and weight \$ \mathbf{of} \$ documentary evidence to be relied upon in any criminal or civil Court trial. There is also no foundation for the assertion that the

same issue affects reliability of expert's evidence on reports 400 tendered in Court as exhibits and those that are not. Their Lordships of the Court of Appeal just re-appraised the evidence of A. M. Ntarirwa, a handwriting expert which evidence \$Pw6\$: happened also to involve the contents of a report from Mr. Ezati Samuel, also a handwriting expert, but which all constituted the 405 testimony of Pw6 to the trial Court.

Having carefully considered everything as stated above, we have come to the conclusion that the applicant has not made out a case for the issuance of a certificate to the effect that the Applicant's intended appeal against the decision of this Court delivered on 410 11.10.2018 in Criminal Appeal No 305 of 2015 raises questions of law of great public or general importance. There is no merit in this application in this regard.

In conclusion, this application fails on the ground that it was filed out of time, but also, independent of having been filed out of time, 415 because the applicant on the basis of the merits of the application has not made out a case for the issuance of such a certificate.

The application accordingly stands dismissed.

\$20\$

No party prayed for costs and as already held, this application being essentially a criminal application, where normally the issue 420 of costs does not arise, it is only fair, in the interests of justice, that no order is made as to costs.

It is so ordered.

His Lordship Ezekiel Muhanguzi was part of the Panel of the Court that heard the application and later arrived at a decision expressed 425 in this Ruling. He has however not been able to sign this Ruling because by the time it was ready for signing His Lordship had already left this Court and assumed the office of Justice of the Supreme Court.

$\frac{157}{15.0}$ day of \$2020.\$ Dated at Kampala this. 430

Musoke Elizebeth Justice of Appeal

Ezekiel Muhanguzi Justice of Appeal

Remmy Kasule Ag. Justice of Appeal

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