

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
ANTI CORRUPTION DIVISION
HOLDEN AT KOLOLO
CRIMINAL APPEAL 17 OF 2019

UGANDA (IGG)APPELLANT

VRS

1. KINENE MOHAMMED

2. KIBAHWIRE ANNET RESPONDENTS

BEFORE GIDUDU, J

JUDGMENT

15 The state through the Inspectorate of Government filed this appeal against the acquittal of the two respondents by the learned Chief Magistrate on charges **corruption C/s 2(g) and 26 of the ACA, 2009.**

The first respondent was the head teacher whilst the 2nd respondent was the Bursar of Kitebi S.S, Kampala.

20 In June 2015, Inspectorate of government officers went to Kitebi SS to deliver a request for books of accounts for the **FY 2013/14** to enable them investigate financial impropriety at the school involving the head teacher and members of the board of governors.

Both respondents were not present at the school. Later the 2nd respondent delivered
25 the required books of accounts as requested by the Inspectorate officers.

On 26th June 2015, the investigating officer, Nalweiso Rebecca, PW1, received a call from a person who said was the head teacher. The brief call requested PW1 to receive a message through the 2nd respondent on Monday 29th June 2015.

Indeed, on Monday 29th June, 2015, the 2nd respondent delivered a message to
5 PW1 in her office. It was a white envelope containing **500,000=**

The 2nd respondent was arrested for offering a bribe as an agent. Later the 1st respondent was also arrested and charged with offering a gratification through an agent.

During the trial, the two denied the charges. The trial Chief Magistrate found them
10 not guilty on grounds that the prosecution had failed to establish the purpose for the bribe which constituted the mens rea of the offence.

The Inspectorate of Government appealed on two grounds, namely: -

- I. That the learned Chief Magistrate erred in law and fact when she made a finding that *mens rea* had not been proved against the accused.
- 15 II. That the learned Chief Magistrate erred in law and fact when she failed to evaluate the prosecution evidence as a whole leading to the acquittal of the respondents.

Mr. Mutabule Wycliff who appeared for the appellant abandoned ground two because it was vague and argued only ground one.

20 M/S Mubiru Bakkidde and Maxim Mutabingwa appeared for the 1st and 2nd respondent respectively.

Ground One:

Mr Mutabule criticized the trial Chief Magistrate for failing to find that the money given to the 2nd respondent by the 1st respondent was a bribe. He submitted that
25 because the Inspectorate was investigating the school for financial impropriety, it was implied that the message was intended to compromise the officer so that she could make a favourable report.

It was his view that even if the purpose of the message was not disclosed by the 1st respondent to PW1, it is implied that the reason money was given was to influence

her findings in favour of the 1st respondent. Further, he submitted that the message was to be given to PW1 from outside the office which meant that it was for improper motive. He was of the view that there was mens rea sufficient to convict the respondents.

- 5 He also criticised the trial court for ordering the refund of money to the 1st respondent and contended that it should be forfeited to the state.

In reply, Mr. Bakkidde, submitted that the charge sheet was defective because it made reference to investigations in file **KLA 18/06/2015** whereas the correct file number was **Gen File 35/20/2015**.

- 10 On the issue of mens rea, counsel submitted that the 1st respondent was not under investigations having joined the school in **FY 2014/15** whereas the investigations were for **FY 2013/14**.

- Further, that whilst the 1st respondent made a call to PW1, he did not disclose the purpose of the message and denies giving money to the 2nd respondent to deliver to
15 **PW1**.

He concluded that the 1st respondent was not a suspect in order to offer a bribe to **PW1**. It was illogical to send money to **PW1** who he had not met before.

Mr Mutabingwa asked court to dismiss the appeal contending that the appellant had not connected the 2nd respondent to the crime in the complaint on appeal.

- 20 He supported the trial finding that there was no mens rea against the 2nd respondent and added that this was not a case of strict liability.

He contended that the state has not demonstrated that the 2nd respondent had a guilty mind because all prosecution witnesses agree that the 2nd respondent did not know what she was carrying in the white envelope.

- 25 He referred to the evidence of PW1 who testified that the envelope was sealed and the 2nd respondent told her she didn't know what was inside. It was his view that this was evidence that the 2nd respondent was just a messenger who had even delivered the required books of accounts on three previous occasions to PW1 without a fuss.

He criticised the prosecution for charging the 2nd respondent yet she had even told the investigating officer that she didn't know what she was carrying. He referred to the evidence of **PW5, Kushemererwa Christine (SSP)**, who testified as the investigating officer that she charged the respondents because they were **assumed** to have offered a bribe. This in his view meant that no investigations were made to establish the purpose of the envelope.

Finally, he complained that the charge sheet is defective because it did not disclose the purpose for which the bribe was given because **section 2(g) of the ACA, 2009** does not create an offence.

My duty as a first appellate court is to subject the evidence to fresh and exhaustive scrutiny and draw my own conclusions without ignoring the judgment and being mindful that I never saw or heard witnesses testify.

There are two issues in this appeal that I need to resolve.

The first is the validity of the charges the respondents faced at the trial and the second is whether there was mens rea on the part of the respondents.

The facts of the case are fairly straight forward and unfold like a clock ticking. It starts with **PW1** and her colleagues from the Inspectorate of Government going to Kitebi SS to ask for documents relating to a complaint that there was financial impropriety in the school in the **FY 2013/14**.

The respondents who are vital in providing the books of accounts were not present in the school. **PW1** left her contact in the visitors' book for the 1st respondent to follow up on the request.

Indeed, the respondents provided the required documents which the 2nd respondent delivered to **PW1** on three occasions.

Two weeks after, the 1st respondent makes what is described as a brief call to **PW1** stating that on Monday, the 2nd respondent would be delivering a message to her. Indeed on the appointed day, the message was delivered.

PW1 had been suspicious of the message. She had alerted her colleagues about it who encouraged her to receive it as they would be on standby to witness it. When the 2nd respondent arrived at the office of **PW1**, she called her on phone asking to

deliver the message outside. **PW1** asked her to enter and deliver the message from the office.

The 2nd respondent entered and asked **PW1** If she had received a call from the 1st respondent. **PW1** answered in the affirmative where upon the 2nd respondent
5 opened her bag and picked out a sealed envelope and handed to **PW1**. When asked what it was, the 2nd respondent said she didn't know the contents. **PW1** opened the envelope and it was found to contain **500,000=**

The 2nd respondent was put under arrest. She cried and reached for her phone to call the 1st respondent ostensibly to report what the mission has turned out to be.
10 However, **PW1**'s colleagues stopped her from making any call. She was ordered to switch off her phone and put it on the table.

PW5 was detailed to investigate the crime of bribery. She searched the 2nd respondent, exhibited the money, obtained call records from telecom companies to confirm communication between **PW1** and the respondents, issued summons for
15 the 1st respondent and arrested him, and charged them in court.

The respondents denied committing the crimes charged. The 1st respondent denied sending the 2nd respondent with any money to bribe **PW1**. He denied seeing her at school that day. He distanced himself from the money found in the envelope.

On the other hand, the 2nd respondent maintained that she was sent by the 1st respondent to deliver a message to **PW1**. She picked it early morning from him on
20 29th June 2015 and proceeded as directed. She called **PW1** and asked to meet her outside as instructed but was directed to go inside the office which she did. She asked **PW1** if she had received a call from the 1st respondent and when **PW1** confirmed, she handed her an envelope. It turned out to be money. She wanted to
25 call the 1st respondent to tell him what had transpired but was blocked by her arresters.

The trial Chief Magistrate in her judgment resolved the issues of the validity of the charges and mens rea as follows.

At page 2 of her judgment she held that although the file under investigation was
30 Headquarters **35/02/2015**, the officer preferring the charges made reference to **Kla/18/06/2015** which was a different file but that this did not invalidate the

charges because it was a mix up that was either due to laziness or mere error which did not cause injustice or prejudice the accused during the trial. She also opined, correctly in my view that issues regarding defects in charges should always be brought up at the time of plea taking so that they are resolved before trial.

- 5 Perhaps, the issue of the charges was not well articulated in the lower court as was done on appeal. And like in the lower court, the state did not respond to them.

The two respondents were charged under **section 2(g) of the ACA, 2009**. The section is reproduced below:-

1. **Corruption**

- 10 A person commits the offence of corruption if he or she does any of the following acts—

(g) the participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner in the commission or attempted commission of, or in any collaboration or conspiracy to commit, any of the acts referred to in this section;

- 15 Clearly, **paragraph (g)**, above, is more of an explanation and does not create an offence of *corruptly offering a gratification* as the particulars of the charge sheet state. That is where the problem lies in this charge sheet.

The offence of *corruptly offering a gratification* is found in **paragraph (b) of section 2 of the ACA, 2009**.

- 20 (b) the offering or granting, directly or indirectly, to a public official, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage or any other form of gratification for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;

- 25 The charge sheet should have cited both **paragraph (b) and paragraph (g) of section 2 of the Act**. Paragraph (b) creates the offence of corruptly offering a gratification whilst **paragraph (g)** gives the circumstances where an agent is used to deliver the gratification.

- 30 Strictly speaking there was no offence in the charges before the trial court and short of an amendment; the trial should not have proceeded because the charge sheet was defective for failure to cite the law under which the particulars were framed.

Be that as it may, the trial Chief Magistrate resolved the issue of mens rea at page 7 of her judgment when she held that while the prosecution had proved that **A1**

sent money to **PW1** through **A2** it failed to prove that he did so **corruptly** because there was no evidence to show that he had an evil mind since he was not a suspect of investigations and did not stand to benefit from any favour that **PW1** would give him. This was because the period of investigation related to the time he was not a head teacher at the school.

Is this finding justified? The appellant thinks not because according to Mr. Mutabule, the money was supposed to be given to **PW1** outside office and since investigations against the school were being done by **PW1**, it is implied that the money was to influence her findings in favour of the 1st respondent.

On the other hand it was submitted for the respondents that there was no reason to give the money since neither respondent was a subject of investigation by **PW1**. Besides, the purpose had not been proved beyond reasonable doubt.

(b) Under **paragraph (b) of section 2 of the Act**, an offence is committed if the gratification is offered corruptly in exchange for any act or omission in the performance of his or her public functions;

The offer must be *in exchange for any act or omission in the performance of a public function*.

The evidence on record is that there was a general inquiry in the financial dealings of the school by the then head teacher and some of his board members in the FY **2013/14**.

None of the respondents fell in the category of the suspects. What would motivate them to offer a bribe to **PW1**? The prosecution was clear that there were no specific allegations for investigation. In fact, later the books of accounts were returned to the school according to the evidence of the 2nd respondent with no adverse findings.

Further, none of the respondents had interacted with **PW1** on the subject of money and indeed none of them had been asked to answer any allegations or explain any accusations!

The moment of finding out the purpose of the money presented itself when the 2nd respondent attempted to make a call to the 1st respondent. It is strange that **PW1** and her colleagues shut her down and stopped the call. This was either out of inexperience or ignorance. The call by the 2nd respondent would have established the purpose and would have confirmed if the 1st respondent sent the 2nd respondent or not! The purpose of the money remained a mystery.

When **PW5**, a senior police officer and a lawyer by profession, was detailed to investigate the case she failed to investigate backwards to establish the purpose of

the money the 2nd respondent carried. She was content to believe that it was a bribe without establishing what favour the 1st respondent needed from PW1!

In cross examination at page 49 PW5 stated that “we assumed it was a bribe” at page 50 she states “I didn’t investigate backwards so I couldn’t know if Anne (2nd respondent) had been sent or not” before that on the same page she testified thus “We are charging her for bribery. The decision to charge is not by me. If they get you on something funny, then you must explain yourself. She explained to me but we still charged her.”

This is a senior police officer paid to investigate serious crimes such as corruption but is so casual in her attitude that she brought a case to court without appreciating the following basic principles of criminal law.

1. It is the duty of the prosecution to prove all essential ingredients of an offence beyond reasonable doubt.
2. The burden of proof remains upon the prosecution throughout the trial except in a few exceptions.
3. In criminal cases, the prosecution must prove beyond reasonable doubt both the **actus rues** and the **mens rea**.
4. Suspicion however strong does not prove a charge.
5. The guilt of an accused is based on the strength of the prosecution evidence and not on the weakness of the defence.

If the prosecution fails to tick all the above boxes, the decision to charge a suspect in court cannot be justified. PW5 shifted the burden of proof upon the respondents and was content to come to court with only evidence of the **actus rues**.

A cardinal principal of criminal law is embodied in the *maxim actus non facit reum, nisi mens sit rea*. In **Haughton V Smith (1975) AC 476 at 491**, Lord Hailsham LC stated that the phrase means “an act does not make a man guilty of a crime unless his mind is also guilty. It is thus not the actus which is rues (guilty) but the man and his mind respectively”

The trial Chief Magistrate correctly in my view reached the conclusion that on the evidence adduced, without more, it does not establish the guilty mind to constitute a corrupt offer of a gratification as required in section 2 of the ACA, 2009. The prosecution was obsessed with the act of giving money and completely forgot to adduce evidence to prove the corrupt mind (**mens rea**) of the respondents.

If anything the 2nd respondent acted either naively or innocently trusting that the 1st respondent and PW1 had talked. When she wanted to ask the 1st respondent why PW1 was arresting her instead of receiving the message, prosecution witnesses present in the office stopped her and in the process lost vital evidence against the 1st respondent. The 2nd respondent would have been a vital witness for the state against the 1st respondent if the case had been investigated competently.

After reviewing the evidence on record, I find that the learned Chief Magistrate was justified in reaching the conclusion that there was no proof beyond reasonable doubt that the respondents acted corruptly. The submission for the appellant that there was mens rea is with respect not correct. The assumption by the investigating

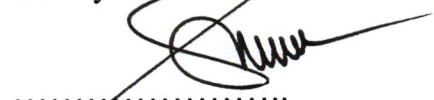
officer that there was mens rea is not supported by law or evidence.

There is one aspect regarding return of the 500,000= back to sender which the appellant complained of. I did not get a response from learned counsel for the 1st respondent on this matter.

- 5 Going by the 1st respondent's defence that he did not give any money to the 2nd respondent to pass on to PW1, I find no justification for the learned Chief Magistrate to gift him with money he distanced himself from. It follows logic that such funds should be forfeited to the state. After all, even gifts above 100,000= are supposed to be declared and most likely given to the state under the Leadership Code Act. There was no sufficient evidence to convict the two respondents on the charges brought to court.

The orders of acquittal are confirmed. The order giving the money to the first respondent is set aside and replaced with an order that the 500,000= delivered by the 2nd respondent be and is hereby forfeited to the state.

- 15 In the result, the appeal substantially fails. It is dismissed save for the order that the money will now instead be forfeited to the state.



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Gidudu Lawrence

- 20 Judge

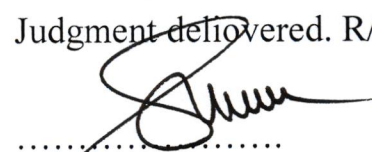
11th December, 2020

Wycliff Mutabule for the appellant

Bakidde Mubiru Amir for the 1st respondent

- 25 Mutabingwa Maxim and kabonesa Evelyn for the 2nd respondent.

Judgment delivered. R/A to the COA explained



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Gidudu Lawrence

- 30 Judge

11th December, 2020