

(Arising from HCT-00-ACD-00 CR.SC 0132 – 2019)

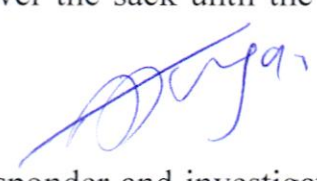
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**Before: Hon Lady Justice Margaret Tibulya.**

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The crux of the state case was that on 31st May 2018 at about 5:00 am **Pw1 (Wamanga Sulaiman)** saw the Respondent and a driver of Budadiri Health center's vehicle load suspicious luggage on the vehicle, and drive towards the gate. **Pw1** demanded to search the vehicle before they could exit the facility. In the process of conducting a search he came across a sack in which he suspected that there were human drugs. **Pw2 (Nakanyolo Albert)** joined **Pw1** at this point. **Pw1** off-loaded the suspicious sack, and in the process of searching it, the Respondent went to him and told him that it contained things he was taking to his children, and he physically struggled with them to block them from searching the sack.

The account of (Pw3) **Godagi Muniru** who operates a shop opposite the facility gate corroborates that of **Pw1** and **2** in material particulars in relation to the above events. When (Pw3) **Godagi Muniru** saw the Respondent struggling with Pw1 and 2 over the sack he went to the scene and held the sack. Upon touching it, he thought that it contained Coartem drugs, but when he tried to check it, the respondent grabbed it and ran away with it, but Pw1, 2 and 3 followed him. According to Pw3, the respondent threw the sack at the Theatre and went back to the vehicle. By the time P w1, 2 and 3 went back to the gate the respondent and the driver had left the facility. Pw1 and 2 watched over the sack until the Police and District officials came to the scene.



When **Pw7 (Naguli Amunon)**, the first police responder and investigating officer in this case got to the scene, **Pw1** informed him that he grabbed the drugs from the vehicle and took them to his (**Pw1's**) house. **Dw3 (Imenen Angella Rose)** and **Dw4 (Muyomba Simon)** similarly testified that the Askari told them that he had taken the drugs to his (**the Askari's**) house. According to Pw7, he with others went to Pw1's house and recovered the drugs.

**Fumbala Davis (Pw4)** was called to the police station where he found a half-full sack containing Coartem drugs totaling to **1485 doses**. He determined that the drugs were part of those he had delivered to Budadidiri Health Center on 30<sup>th</sup> May 2018 on the basis of the expiry date and the batch number (**No. QK 71971**) he saw on them.

According to **Betty Edea (Pw5)** after the drugs were recovered, a stock taking exercise was conducted and it was established that the Coartem drugs in the store were less than those which had been delivered the previous day.

**Dw4 (Muyomba Simon)** however stated that when they entered the store, they found that all drugs were still in the store.

According to **Betty Edea (Pw5)** and **Pw6 (Maloba Gertrude)** the Respondent had a copy of the key to the store, a fact **Dw1(Dr Chebet)** and **Dw3 (Angella Imenen)** refute.

The Respondent denied the allegations and maintained that the prosecution witnesses bore a grudge against him and planted the drugs on him at the behest of the District Health Officer (**Wabomba Nicholas**).

**The appeal is premised on the following grounds;**

1. The Learned Trial Magistrate erred in law and fact when he found that there were grave inconsistencies in the prosecution evidence, thereby wrongly acquitting the Respondent.
2. The Learned Trial Magistrate erred in law and fact when he believed the defence case of a grudge in total disregard to the evidence on record thereby erroneously acquitting the Respondent.
3. The Learned Trial Magistrate erred in law and fact when he engaged in speculation and imported extraneous matters into the case thereby arriving at a wrong decision.
4. The Learned Trial Magistrate erred in law and fact when he wrongly found that the accused didn't have access to the drugs by virtue of his office, thereby occasioning a miscarriage of justice.



It is now settled that the role of a first appellate court is to reappraise the evidence and subject it to an exhaustive scrutiny before drawing its own conclusions, bearing in mind that it did not see the witnesses testify (**Kifamute Henry Vs Uganda (Criminal case No 10/1997)**). The prosecution bears the burden of proof, and must prove all ingredients of each of the offences beyond reasonable doubt.

**The Learned Trial Magistrate erred in law and fact when he found that there were grave inconsistencies in the prosecution evidence, thereby wrongly acquitting the Respondent.**

#### The Law

The Black's law dictionary defines an inconsistency in the following terms:

*"not consistent, two or more items that are not the same or are contradictory. Mutually repugnant or contradictory: Contrary, the one to the other so that both cannot stand but the acceptance or establishment of the one implies the abrogation or abandonment of the other: in speaking of inconsistent defences or the repeal by a statute of all laws inconsistent herewith"* (2<sup>nd</sup> Edition ["https://thelawdictionary.org/inconsistent/"](https://thelawdictionary.org/inconsistent/)title="INCONSISTENT">INCONSISTENT</a>).

Consistent jurisprudence however makes a distinction between minor and grave inconsistencies and points to the fact that only grave inconsistencies will be fatal to the case. A grave inconsistency was defined in **Richard Munene vs The Republic** (CA NO 74 OF 2016) in the following terms;

*"it is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and*

fundamental to the main issues in question and thus necessarily creates some doubts in the mind of the trial court (emphasis added) that an accused person will be entitled to benefit from it.”

In their submissions, the Appellant assailed the lower court’s judgment on the ground that the Trial Magistrate erroneously categorized four aspects of evidence as major contradictions. In his reply the respondent highlights eight aspects of the state evidence (including the four which the appellant cites), and invited the court to find that they were grave and warranted his acquittal by the lower court.

The court determines that only a few of the eight aspects of evidence cited by both parties are contradictory as will be shown shortly. The only issue in relation to the contradictory aspects of evidence is whether the contradictions were grave as to support the lower court findings.



I am persuaded by the *ratio decidendi* in the case of **Uganda Vs Kavuma Crim session case 819/2016**, that the gravity of a contradiction will depend on the centrality of the matter it relates to in the determination of the key issues in the case, and that the question is whether or not the contradictory elements are material to the determination of the case.

The court will now proceed to determine whether the eight aspects of evidence which form the basis of the complaint in the first ground of appeal are contradictions indeed.

1. **Pw1 (Suleiman Wamanga)** stated on page 6, paragraph 1 of the record of proceedings that “... I reported on duty at 8.00 am on 30<sup>th</sup>/5/2018..., I kept watching it (vehicle) the whole day and night”, while **Pw2 (Nakanyolo Albert)** stated on page 10 paragraph 2, line 9 that “... my duty ended on 30<sup>th</sup>/5/2018 at 6pm, my colleague (**Pw1**), came and took over.



The court determines that Pw1 and 2 indeed contradicted themselves as to who was on duty on the 30<sup>th</sup>/5/2018, but that the contradiction cannot by any standards be categorized as grave, being that the issue of whether or not **Pw1** and **Pw2** were on duty on 30<sup>th</sup>/5/2018 is not relevant to the key issue in the case; whether the respondent stole the drugs on 31<sup>st</sup> May 2018.

2. While **Pw2 (Nakanyolo Albert)** at page 13 of proceedings, states that the Doctor was present on 30<sup>th</sup> May 2018, and was part of the stock taking exercise of the new delivery of drugs around 3pm, **Pw1 (Suleiman Wamanga)** does not state so. In cross examination (page 7 of the record of proceedings) Pw1 states thus "...they verified drugs on 30<sup>th</sup> May 2018, I was around, people present were **Nasar, Giso, chairman, Edea Betty, David Fumbula**, I was present....and if drugs were not verified on 30<sup>th</sup> may 2018, court should take me as a liar.."

In my view the fact that a witness mentions something which another witness does not mention is not a contradiction. The fact that a witness doesn't mention the occurrence or existence of a fact or set of facts can be accounted for by the possibility that he was not specifically asked about that fact (as seems to have been the case here) or that he simply forgot to mention it. I find that there was no contradiction in this instance.

3. At page 10 of the record of proceedings **Pw2 (Nakanyolo Albert)** states thus "....my duty ended on 30<sup>th</sup> May 2018 at 6:00 pm, my colleague Pw1 came..."

On the other hand, **Pw1** stated that he was at the health facility on 30/5/2018 at 3:00 pm and witnessed the verification of drugs.

On the basis of **Pw2's** evidence above, the respondent maintains that there was a contradiction since **Pw1** could not have been at the health facility on 30/5/2018 at 3:00 pm and witnessed the verification of drugs.

The court however determines that there was no contradiction in this regard either. The evidence that **Pw2 (Nakanyolo Albert)**'s duty on 30<sup>th</sup> May 2018 ended at 6:00 pm "**and Pw1 came**" does not contradict **Pw1's** evidence that he witnessed the verification of drugs at 3:00 pm on the same day. The two witnesses were clearly testifying about two separate occurrences.

4. **Pw1 (Suleiman Wamanga)** at page 9 of the record of proceedings states that "... the main gate was not open except the small gate..." and again states on page 7 paragraph 1 that the Doctor disappeared and left with the vehicle and the driver.

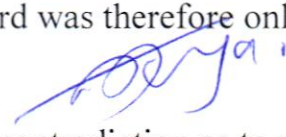
The respondent wonders how the Doctor could have left the facility when **Pw1** had not opened the gate. The court again determines that there is no contradiction in **Pw1's** evidence in this regard. The submission that this piece of evidence is contradictory seems to be premised on the narrative that the respondent was not at the scene on the material day. The respondent however (at page 56 par 1 line 2 of the proceedings), states that "**the actual truth is that when I reached the gate there was an incident between driver, and the Askari's and me**", meaning that he was actually at the scene when the occurrences complained about took place. The fact that there is no evidence as to how he managed to exit the facility is of no consequence since he obviously exited at some point.

5. **Pw5 (Edea Betty)** states on page 21 that "... we did stock-take, there were discrepancies in coartem tablets, anticunet, and RDT for payment tests."



**Pw7 (Naguli Amunon)** in cross examination at page 38 of the proceedings states thus; "...we counted the drugs... begun with the new stock, and we were told the new stock was intact". **Pw8 (Sgt Egwangu)** also stated that they were informed that the drugs in the new stock were intact.

The court again finds no contradiction in this evidence, principally because **Pw 7 and 8's** evidence that the drugs in the new stock were intact was clearly hearsay and points to the possibility that they did not participate in the reconciliation of the amount of drugs they got in the store with the amount that had been there before the theft. This is the reason they both say that they were told that the new stock was intact. The only direct evidence about the reconciled amount of drugs was that of **Pw5 (Betty Edea)** who was clear that there was a discrepancy between the amount of drugs which had been in the store, and those found when the stock taking exercise took place. The alleged contradiction in this regard was therefore only imaginary.

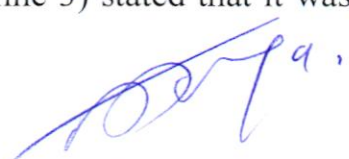
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6. The respondent maintains that there was a contradiction as to who informed the authorities about the theft of the drugs at 5.30 am on the 31/5/2018. **Pw1 (Wamanga Suleiman)** stated that he called the DHO first and then other District Officials (page 7 paragraph 1 line 3), while **Pw2 (Nakanyolo Albert)** stated that he communicated to **Pw7 (Naguli Amunon)** who was the OC Busulani police station (**page 11 par 1 line 9**). **Pw7** however states that it was not Pw2 but the District CID officer (**page 34 par 5 line 1 of the record of proceedings**) who informed him about the theft.

The court determines the above evidence is contradictory indeed but that the contradiction is minor since the issue of who informed Pw7 about the theft is not central to the determination of the key issues of whether the respondent



stole the drugs in issue. The contradictory elements are therefore immaterial to the determination of the case. There is moreover no evidence pointing to deliberate dishonesty by any of the concerned witnesses.

7. It is contended that there was contradictory evidence about the colour of the bag in which the drugs were found in that at page 6 paragraph 2 lines 8-9 **Pw1(Sulaiman Wamanga)** stated that the bag was brown in colour, at **page 10 paragraph 3 line 7 Pw2 (Albert Kanyolo)** stated that the bag was yellow, while Pw3 (at page 15 paragraph 2 line 3) stated that it was cream in colour.

  
The court fully agrees with the respondent that this was contradictory evidence, but determines that the contradiction is minor since the existence of the bag is not contested. What its color was is not central to the determination of the key issues in this case. The contradictory elements are therefore not material to the determination of the case. There is moreover no evidence pointing to deliberate dishonesty by any of the concerned witnesses. The Trial magistrate was in error when he discounted the evidential value of the bag on account of those contradictions.

8. There is the alleged contradiction in the testimonies of **Pw1 (Wamanga Suleiman)** and **Pw2 (Nakanyolo Albert)** about when each of them was on duty. Pw1 stated that on the 30/05/2018 he reported for duty at 8:00 am and was on duty the morning of 31/5/2018 at 5.30am (**page 7 paragraph 4 line2**), while Pw2 states that on 30/5/2018, he was on duty till around 5.30 pm and that his duty ended at 6: 00 pm.

The court considers that the contradiction is not grave principally because the presence of both witnesses at the scene and their participation in the apprehension of the respondent is not contested. The exact time each of them reported for duty on the material days is not central to the determination of the key issues in this case, and it is immaterial to the determination of the case. There is moreover no evidence pointing to deliberate dishonesty by any of the two witnesses.

On the whole the court is in agreement with the Appellant that any contradictions in the state evidence were minor as I have demonstrated. I find that the learned trial magistrate indeed erred in law and fact when he found that there were grave inconsistencies in the prosecution evidence, and therefore wrongly acquitted the respondent. The first ground of appeal succeeds.



### **Grounds 2 and 3**

**2. The Learned Trial Magistrate erred in law and fact when he believed the defence case of a grudge in total disregard to the evidence on record thereby erroneously acquitting the Respondent.**

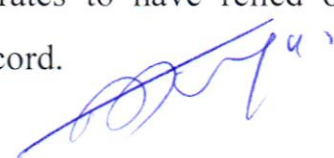
**3. The Learned Trial Magistrate erred in law and fact when he engaged in speculation and imported extraneous matters into the case thereby arriving at a wrong decision.**

The Respondent's defence was that these charges were the result of a conspiracy between the prosecution witnesses and the District Health Officer (**Dr. Nicholas Wabomba**) because of a grudge the DHO held against him. Agreeing with the Respondent, the Learned Magistrate noted that during the hearing he had observed a lot of unease and negative emotions between the parties which he interpreted as a reflection of bad blood between the accused and some of the prosecution witnesses



especially **Pw5 (Betty Edea)** the stores officer and **Pw6 (Gertrude Maloba)** who at times worked in stores. On the basis of his observations, the learned magistrate agreed with the testimonies of DW3 and Dw4 (**the chairman management committee**) that in an effort for accused to improve the hospital services, some people were affected and they designed the mechanism to eliminate him.

I am alive to the fact that I did not see the witnesses testify. The lower courts observations about the demeanor of witnesses which formed the basis for the learned Magistrate decision are however not part of the record. Nowhere during the hearing did the learned magistrate indicate that a particular witness exhibited negative emotions, and so it was irregular for the learned magistrates to have relied on observations he had kept to himself and are not part of the record.



Further to that, there is no evidence supporting the finding that the prosecution witnesses were used by the DHO to fight the Respondent. While **defense exhibit 10** evidences some disagreements between the respondent and **Dr Wabomba**, it is understood that those disagreements were purely work related and cannot be the basis for the finding that **Dr Wabomba** colluded with any of the prosecution witnesses to frame the respondent. **Exhibit D.7** relates to staff deployment and has nothing to do with **Dr Wabomba**.

**Pw1 and Pw2** (at pages 9 Para 1 line 3, and 14 Para 2 line 2-5 of proceedings) maintain that they had no knowledge of a grudge between the **Dr. Wabomba** (DHO) and the Respondent. **Pw8** doesn't also state that the Respondent had a grudge with Dr. Wabomba. Pw1 and Pw2 were clear that they were not part of any racket to frame the respondent (**pages 9 Para 2 line 6, and 14 para 2-3 of proceedings**).



In agreement with the appellant therefore, the court finds that the learned Trial Magistrate erred in law and fact when he believed the defence case of a grudge in total disregard of the evidence on record, and when he engaged in speculation and imported extraneous matters into the case thereby arriving at a wrong decision. The second and third grounds of appeal succeed.



**The Learned Trial Magistrate erred in law and fact when he wrongly found that the accused didn't have access to the drugs by virtue of his office, thereby occasioning a miscarriage of justice.**

At page 13 para 2 of the Judgment the learned trial magistrate made a finding that the accused never had the store keys and that he never worked in the store. **Pw5's (Betty Edea the storekeeper)** evidence that the respondent handed to her one key of the store and that he kept a copy of the key so that in case of any emergency he could access the medicine was not challenged in cross examination.

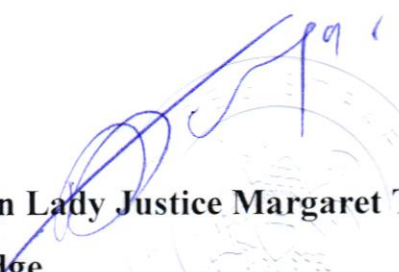
Her evidence was lent credence by that of Pw 1 and 2 that the Respondent had every key of the facility (**page 7 para 1 line 3 of the proceedings**) and that he and **Pw5 (Betty Edea the storekeeper)** had keys to the store (**pages 9 para 1 line 5, and 11 para 2 line 1-2 of the proceedings**).

The Respondent's assertion that the new store had only one key was rebutted by **Pw5 (Betty Edea)**'s evidence that the new store where drugs were stolen from is where the respondent would pick emergency items such as gloves and stiches (**page 24 para 3 & 4 line of proceedings**). **Pw6 (Gertrude Maloba)** supported the above account confirming that the Respondent and Pw5 were the only personnel with keys to the store (**page 29 para 2 line 1-2 of the proceedings**).

The above evidence contradicts the lower courts finding that the respondent did not have access to the drugs by virtue of his office. The Appellant's complaint in ground 4, that the learned Trial Magistrate erred in law and fact when he wrongly found that the accused didn't have access to the drugs by virtue of his office succeeds, and with it the whole appeal.

In conclusion, the court finds that the Appellant adduced sufficient evidence to prove that on 31<sup>st</sup> May 2018 at Budadiri Health centre IV, Sironko District while employed by Sironko District Local Government as a Medical officer the respondent stole 1485 blisters of Arthemether Lumefamtrine (anti-malaria drugs), from the centre, worth **5,833,822/=** the property of Sironko District Local Government, to which he had access by virtue of his office.

In the result, the judgment and orders of the lower court are hereby set aside. An order of conviction for the offence of embezzlement of drugs is entered against the respondent.

  
**Hon Lady Justice Margaret Tibulya**  
**Judge**

**26<sup>th</sup> August 2021.**