THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CRIMINAL APPEAL NO. 217 OF 2012

1. **JUMA NKUNYINGI**
2. **MANDU SAMUEL ERISA……..APPELLANTS**

VERSUS

UGANDA……RESPONDENT

[The appeal is against the legality of conviction, the procedure used when entering the plea of guilty, the conviction and the sentence passed by Justice P.K Mugamba J, on the 16th day of October 2012 in Criminal Case No.184/2011.]

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ
HON. MR. JUSTICE ELDAD MWANGUSYA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This appeal arises from the decision of the High Court in Criminal Case No. AC-SC 185/2011 before Hon Justice P.K Mugamba J, dated 16th October 2012. In that case both appellants were convicted on their own plea of guilty.

The 1st appellant was convicted on count one for the offence of Abuse of Office contrary to Section 11(1) of the Anti Corruption Act and sentenced to 3 years imprisonment. Both the first and the second appellants were convicted of the offence of causing financial loss contrary to Section 20(1) of the same Act and each sentenced to two years imprisonment

Being dissatisfied with the decision of the court, each of the appellants appealed against both the conviction and sentence. The 1st appellant set out the following grounds in his Memorandum of Appeal.

1. ***The learned trial Judge erred in law by failing to follow the proper procedure for recording a plea of guilty.***

2. ***The learned trial Judge erred in law and fact by allowing the Appellant's plea of guilty even though it was clear that it was not unequivocal.***

3. ***The learned trial Judge erred in law and fact by convicting the Appellant for the offence of Causing Financial Loss C/S 20(1) of the Anti-Corruption even though it was acknowledged by both the prosecution and the court that no financial loss had been occasioned by the Appellant.*** *(Sic)*

The second appellant set out the following grounds in his own Memorandum of Appeal.

1. ***That the learned trial Judge erred in law and fact when he convicted the Appellant on his plea of guilt without following the legally approved procedure of recording a plea of guilty, conviction and sentence and thereby causing a miscarriage of justice or an injustice.***

2. ***That the learned trial Judge erred in law and fact when he failed to follow the legal steps in recording the plea of guilty to convict and sentence the appellant thereby causing a miscarriage of justice.***

3. ***That the learned trial Judge erred in law and fact in convicting the appellant based on a plea which does not amount to an unequivocal plea of guilty thereby causing an injustice to the accused person.*** *(Sic)*

The brief facts giving rise to this appeal are as follows;-

Both appellants were employees of Manafa District Local Government one as Chief Administrative Officer and the other as Chief Finance Officer.

Sometime between June 2008 and June 2012 they allegedly caused to their employer financial loss of shs. 74,795,237, when they illegally authorized the payment of that amount to M/S. Lwasakasa Enterprises (U) Ltd for road maintenance work which was never done.

The indictment upon which they were convicted is set out as follows;-

> ***"The court is informed by the Director of Public Prosecutions that JUMA NKUNYINGI and MANDU SAMUEL ERISA are charged with the following offences:-***
>
> ***STATEMENT OF OFFENCE***
>
> ***CT 1:***
> ***ABUSE OF OFFICE CONTRARY TO SECTION 11(1) OF THE ANTI-CORRUPTION ACT, 2009.***
>
> ***PARTICULARS OF OFFENCE***
>
> ***JUMA NKUNYINGI on 15th day of April 2010 at Manafa District, being a person employed in the Public Service as a Chief Administrative Officer Manafa District in abuse of authority of his office did illegally award a contract to M/S Lwasakasa enterprises (u) ltd for the maintenance of Bukhaweka- Butiru road without the approval of and knowledge of both the evaluation and contracts committees and in total disregard of the established procurement procedures, these acts are arbitrary and prejudicial to the interests of Manafa district local government.***

CT 2: CAUSING FINANCIAL LOSS, C/S 20(1) OF THE ANTI-CORRUPTION ACT 2009.

PARTICULARS OF OFFENCE

"JUMA NKUNYINGI and MANDU SAMUEL ERISA on or after the 11th day of June 2010 at Manafa District, being persons employed in the public service as chief administrative officer and chief financial officer respectively, illegally authorised and made payment of UGX.74,795,237/= (seventy four million seven hundred ninety five thousand two hundred thirty seven shillings) to M/S Lwakasaka Enterprises (U) Ltd for road maintenance work, which was never carried out, knowing or having reasons to believe that such a payment would cause financial loss to Manafa district local government." *(Sic)*

When the matter came before the High Court for trial, both appellants pleaded 'not guilty' to the indictment. Shortly afterwards Mr. Kabega, counsel for the 1st appellant, informed court that he had consulted his client and had also talked to the 2nd appellant who was unrepresented and had both agreed to change their plea.

The indictment was then read and explained to both appellants again. This time each of them pleaded 'guilty' to the indictment. The trial Judge then convicted each of them accordingly. The 1st appellant was sentenced to 3 years imprisonment on count one. Each of them was sentenced to 2 years imprisonment on count 2.

They have now each appealed against both the conviction and the sentence on the grounds already set out above.

Mr. Aggrey Bwire learned counsel appeared for the second appellant while the 1st appellant represented himself.

Both Mr. Bwire and the second appellant contended that the lower court erred when it convicted the appellants on the plea of guilt whereas that plea was not equivocal. They contended that the

procedure of taking plea as laid down in the case of ***Adan vs Republic (1973) EA 443*** was not followed and as such the convictions and sentences imposed by the court were illegal.

Both Mr. Bwire and the second appellant relied on this court's recent decision in ***Chelangat Andrew Multon Mugisha Vincent versus Uganda (Court of Appeal Criminal Appeal No. 111 of 2012***) (Unreported) and ***Sebuliba Siraji vs Uganda (Court of Appeal Criminal Apeal No. 0319 of 2009)*** (unreported).

Both the above decisions followed the decision in the case of **Adan vs R** (Supra) which is the *locus classicus* on the procedure of taking plea in this jurisdiction.

In the ***Sebuliba case*** (Supra) this court stated as follows;-

> ***"We also recall that the procedure for taking a guilty plea is clearly set out in the case of Adan Vs R (1973/ EA 445 where the East African Court of Appeal (as it then was) stated as follows:-***
>
> ***When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts which, if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed.***

The earlier case of Tomasi Mufumu v. R [1959) EA 625 decided by the same court had earlier stated that;

… it is very desirable that a trial Judge, on being offered a plea which he construes as a plea of guilty in a murder case, should not only satisfy himself that the plea is on unequivocal plea, but should satisfy himself also on record that the accused understands the elements which constitute the offence of murder ... and understands that the penalty is death.

Where the plea taken does not amount to an unequivocal plea of guilty to the offence to which the accused is convicted the conviction must be quashed (see R v. Tambukiza S/O Unyonga (1958) EA 212). We have borne the above principles in mind in the resolution of this appeal."

The trial court record set out what transpired in court on the day the appellants took plea as follows;-

"***Mr. Kabega:***

I have a short application to make to Court. After consultation with my client, my client wishes to change his plea. I have also talked to A2. He wishes to do the same. I pray court permits the two accused to make fresh pleas.

State Attorney: ***I have no objection***

Court: ***Indictment read and explained to accused persons once again.***

COUNT 1

Court: ***Have you understood the charge?***

A1: ***I have understood the charge.***

Court: ***How do you plead?***

A1: ***I plead guilty.***

Court: ***Plea of guilty entered.***

COUNT II

Court: ***Have you understood the charge:***

A1: ***I have understood the charge.***

A2: ***I have understood the charge.***

Court: ***How do you plead?***

A1: ***I plead guilty.***

Court: ***Plea of guilty entered.***

A2: ***I plead guilty***

Court: ***Plea of guilty entered***

Court: ***A1 is convicted accordingly on his own plea of guilty to count 1***

A1 and A2 are convicted accordingly on their own plea of guilty to count II

Ms. Kawuma learned Principle State Attorney who appeared for the respondent conceded the fact that the procedure laid down in the ***Adan case*** (Supra) was not explicitly followed in this particular case. However, she contended that both the summary of the case and the indictment

had been read out to the appellants and they had understood them and had each freely decided to enter a plea of guilty, as they knew what they were pleading too.

The contention by Ms. Kawuma that the summary of facts had been read to the appellants before or after taking plea is not supported by any evidence. The trial court record does not indicate that to have been the case.

The procedure laid down in the ***Adan case*** (Supra) requires that:-

> ***"If the accused does not deny the alleged facts in any material respect, the Magistrate should record the conviction and proceed to hear further facts relevant to sentence. <u>The statement of facts and the accused 's reply must of course be recorded</u>"*** *(Emphasis added)."*

In this particular case the facts were not put to the appellants and they were not recorded by the trial Judge.

The reason why a statement of facts must be read back to accused persons before a conviction on a plea of guilty can be entered is given in the ***Adan case*** (Supra) at page 449 as follows:-

> ***"The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that the accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction.***
>
> ***In the present case, not only was the statement of facts not made at the proper time, but no such statement was made at any stage."***

In the case before us the trial court record does not at all indicate that the facts were read to the appellants and that they were recorded either before or after the plea of guilty had been entered.

We find, therefore, that the plea of guilty in respect of each of the appellants was not properly entered. The convictions and sentences that followed therefore cannot stand.

In the result we allow this appeal. We quash the convictions against each of the appellants on all counts. We set aside the sentences imposed upon each of the appellants.

The appellants served one month in prison after conviction before being admitted on bail pending appeal. This is a relatively recent case having been decided in October 2012. We do not accept the argument that ordering a re-trial in the circumstances of this case would be unjust and would result into a miscarriage of justice. We take into account the fact that most of the time from October 2012 to date both appellants have been on bail.

We find that this is a proper case in which a re-trial ought to be ordered.

We accordingly order that the case file be immediately remitted to the Anti Corruption Division of the High Court for re-trial before another Judge.

In the meantime, the appellants be remanded in custody and be produced before the Anti Corruption Court within 14 (fourteen) days of this order.

Dated at Kampala this **28th** day of **September** 2015.

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HON. JUSTICE S.B.K. KAVUMA, DCJ

JUSTICE OF APPEAL

……..

HON. JUSTICE ELDAD MWANGUSYA

JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL