

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

COA-OO-CR- CN- 0102 OF 2010

ENG. SAMSON BAGONZA.....APPELLANT

VERSUS

UGANDA..... RESPONDENT

CORAM:

Hon. Justice S. B. Kavuma, Deputy Chief Justice

Hon. Justice Eldad Mwangusya, JA

Hon. Lady Justice Solomy Balungi Bossa, JA

JUDGMENT

The Appellant was indicted before the Anti Corruption Division of the High Court of Uganda, sitting at Kampala for two offences as follows:

Count 1 statement of offence

Abuse of office contrary to section 11 (I) of the Anti Corruption Act No. 6/2009 ***Particulars of offence***

Engineer Bagonza Samson while employed as Director of Engineering/Engineer in Chief in the Ministry of Works and Transport in the year 2007 between Kampala District and Entebbe Municipality did an arbitrary act prejudicial to the interests of the

Ministry of Works and Transport by undertaking or causing to be undertaken the additional
Construction Works on Entebbe Zana- Kibuye

Highway at the additional costs of 1,645,145,325/= without approval and or the necessary authorization under the Public Procurement and Disposal of Public Assets Act.

Count 2: Statement of Offence

Causing financial loss contrary to section 20 (I) of the Anti Corruption Act No 6/2009.

Particulars of offence

Engineer Bagonza Samson while employed by Ministry of Works and Transport as Engineer in Chief/ Director Engineering between 2007 and 2009 in Kampala District and Entebbe Municipality, in the performance of his duties did approve for payment of additional 1,645,145,325/= to Ms ENERGO Uganda Co Limited for the purported construction of additional works on Entebbe - Zana-Kibuye Highway knowing or having reasons to believe that such an act would cause Financial Loss to the Ministry of Works and Transport.

The appellant was convicted on both Counts and sentenced to two years imprisonment on the first Count and three years imprisonment on the 2nd Count. The sentences were to run concurrently.

The appellant being dissatisfied with the decision of the learned trial Judge appealed to this Court against both the conviction and sentence. The following grounds are raised in the Memorandum of Appeal.

1. The Learned trial Judge erred in law and fact when he accepted and believed the prosecution case in isolation and without consideration of the defence case thereby arriving at a wrong conclusion.
2. The Learned trial Judge erred in Law and fact when he attributed to prosecution witness matters that were not canvassed in evidence.

3. The Learned Trial Judge erred in Law and fact when he made a finding that the Appellant violated the PPDA Regulations without reviewing the evidence as a whole.
4. The learned trial judge erred in Law and fact to convict the Appellant with the offences of Abuse of office and Causing Financial Loss in absence of evidence to prove all the essential elements of the offences.
5. The Learned Trial Judge erred in Law and fact to hold that the failure to follow the PPDA Regulations was sufficient to make an inference that loss was occasioned.
6. The Learned Trial Judge erred in Law and Fact when he made the finding that because there was no competition, loss has been proved to have been occasioned
7. The Learned Trial Judge erred in law and fact to hold the Appellant responsible for loss simply because he signed the variation Order No. 1
8. The Learned Trial Judge erred in Law and Fact when he imposed the sentence of 2 years of the offence of Abuse of Office and 3 years on causing financial loss which were excessive in the circumstances.

The brief background as to the circumstances under which the two alleged offences arose is that the appellant was the Director of Engineering/Engineer in Chief in the Ministry of Works and Transport reporting to the Permanent Secretary of the same Ministry. The Permanent Secretary at the time of the alleged offences was Mr. Charles Muganzi who testified in the trial as PW1. On the 4th May 2007 the Government of Uganda signed a contract for the Rehabilitation/Resealing works on selected Roads under the CHOGM 2007 infrastructure Projects that included Kibuye - Zana (5Km), Zana- Kajansi Entebbe Airport (32Km), Roads to selected CHOGM venues, Akii Bua Road (1.2 Km) and Biryayomba. The contract was signed by the Permanent Secretary on behalf of the Uganda Government and witnessed by the appellant. The Contractor was a Company called ENERGO Project. A consultancy agreement

was also signed with BMW whose team leader/Resident Engineer in the project was Engineer Kirunda James. He testified in the trial as PW2.

The project was successfully concluded despite a number of challenges related to the urgency with which it was to be executed. During the execution of the project a number of additional works were undertaken. That led to an increase in the project costs. The additional works and the variation order that will be discussed in detail in this judgment were attributed to the acts/omissions of the appellant leading to his prosecution and conviction for the offence of Abuse of Office and causing financial loss against which he now appeals to this Court.

The appellant was represented by Mr. Macdusman Kabega, Mr. Barnabas Tumusingize and Mr. Andrew Mananura while the respondent was represented by Mr. Vincent Wagona and Mr. Andrew Odit both Principal State Attorneys.

Counsel from both parties filed written submissions which they expounded with oral ones presented in open court. The submissions covered all the grounds raised in the Memorandum of Appeal. From the grounds raised in the Memorandum of Appeal and the submissions of all counsel, the contention is whether the actions of the appellant which he does not deny, establish all the ingredients of the offences of Abuse of Office and Causing Financials Loss. In our view if ground 4 of the Memorandum of Appeal is resolved, it will wholly dispose of the Appeal. This is because it would entail a re-evaluation of the entire case to establish as to whether or not the prosecution proved all the ingredients of the offence, beyond any reasonable doubt. For ease of reference ground 4 is reproduced here under:-

“ The learned trial judge erred in law and fact to convict the appellant with offences of abuse of office and causing Financial Loss in the absence of evidence to prove all the essential ingredients of each of the offences. ”

In their submissions, both counsel set down the ingredients of the offences that the prosecution was required to prove.

For the offence of Abuse Office C/S 11 (I) of the Anti Corruption Act the following had to be established

- (a) That the appellant was a person employed in a Public Office;
- (b) That the appellant did or directed to be done an arbitrary act;
- (c) That the act was prejudicial to the interests of his employer; and
- (d) That the act was in abuse of the authority of his office.

The following ingredients were set out for the offence of Causing Financial Loss C/S 20(1) of the ACA

- (a) That the accused is employed by Government or a Public body.
- (b) That the accused does any act or omission.
- (c) Knowing or having reason to believe that such an act/omission would cause loss. The loss may be actual or inferred.

The first ingredient which is common to both offences was not disputed. The appellant himself testified on oath that he was employed in Government and whatever he did was in execution of his duties and was accountable to PW1.

The second ingredient raised the issue as to whether the appellant in the execution of his duties did or directed to be done any arbitrary Act to the prejudice of his employer. In their submissions counsel for the appellant faulted the trial judge for having found that the site meetings chaired by the appellant were in clear violation of the consultancy agreement, that the said site meetings were followed by the appellant's written and verbal/telephone instructions directed to the Project Manager which changed the scope of the contracted works and amounted to an amendment of the contract, that the procedure for committing a contract that is set under the PPDA Regulations 2326 was not followed, that the appellant arbitrarily awarded sub-contracts to KWIK Ltd and Bison Ltd and that the appellant signed variation order No. 1 without being delegated to do so by

the accounting officer.

It was submitted for the appellant that there was evidence that none of the interventions by the appellant in the execution of the contract were arbitrary. It was contended that his Permanent Secretary was aware of these interventions and so was the consultant and the contracts committee. It was submitted further that according to the Auditor General's report, no loss had been occasioned but instead it was established that there was value for money.

For the respondent, it was submitted that all the arbitrary acts alleged against the appellant had been proved. The acts as alleged by the prosecution will be discussed in great detail because they are the basis of the case brought against the appellant in respect of both counts. The respondent also explained that the Auditor General's report did not exonerate the appellant on the issue of causing Financial Loss asserting that Financial Loss could be inferred from the fact that by flouting the PPDA rules, the employer was denied an opportunity to get competitive bids.

On the second ingredient of the offence of abuse of office Black's Law Dictionary 8th Edition gives two definitions of the term arbitrary.

1. Depending on individual discretion; Spec; determined by a judge rather than by fixed rules, procedures, or Law.

2. (of judicial decision) founded on prejudice or preference rather than on reason or fact. This type of decision is termed arbitrary and capricious.

The same dictionary defines caprice as

1. Arbitrary or unfounded motivation.
2. The disposition to change one's mind impulsively

Capricious is defined as

1. (of person) characterized by or guided by unpredictable or impulsive behavior.
2. (of a decree) contrary to evidence or established rules of Law.

We observe that while the appellant had a big role to play in the implementation of the contract, there were others, including the consultant, the Permanent Secretary, the Contracts Committee, to mention but a few, who also had roles to play.

The Respondent's submissions on ground No. 4 enumerated a number of instances where the appellant is alleged to have acted arbitrarily to the prejudice of his employer. These arbitrary acts were enumerated as follows:

(i) Chaired site meetings

(ii) issued instructions for carrying out the works involving Kitubulu Walkway when the responsibility and funds for this had already been transferred from the Ministry of Works to Ministry of Local Government, and without first obtaining approval, of the contracts.

- (iii) issued instructions for carrying out additional road works on Kampala Entebbe road without first obtaining approval of the contracts Committee;
- (iv) Awarded a sub contract for road cleaning works to M/s KWIK Limited, when the same works had already been provided for and costed under the main contract, and without first obtaining approval of the contracts committee;
- (v) initiated procurement requirements by asking for quotations, thereby usurping the roles of the relevant procurement organs;
- (vi) signed on behalf of the Ministry of Works, a variation order constituting the additional works that amended the main contract, a responsibility meant for the Accounting Officer, and without obtaining the necessary approvals under the PPDA laws.

On the first allegation the prosecution relies on the minutes of the site meeting held on 25th August 2007 and chaired by the appellant. The consultant whose powers he allegedly usurped was represented by four persons including their Resident Engineer, Kirunda (PW2). The consultant also provided the Secretary to the meeting, one Solomon Balemezi. The minutes of the meeting were signed by Engineer Kirunda. The agenda included a report by the Consultant, site inspection, observations from the site inspection and conclusion. From the minutes, the meeting was consultative because a number of issues were addressed. The fact that the appellant chaired it does not take away the fact that by their nature, meetings are consultative and the decisions arising out of the meeting are collective rather than individual. The attendance of the consultant and the signature of the Resident Engineer make them part of the

process and, in our view, the appellant cannot be said to have acted arbitrarily and capriciously.

The second allegation pertained to the walkway at Kitubulu Entebbe. The Permanent Secretary testified that although the walkway was constructed before CHOGM and handed over to the Ministry of Local Government the appellant included it in the road works to the prejudice of his employer. The evidence that it was not part of the original scope of works was supported by the evidence of Engineer Kirunda (PW2) who, during cross examination, admitted that the works were necessary. The appellant explained that the works were found necessary following an inspection by a team of officials including those from the Ministry of Works and Transport. The District Engineer Kampala communicated the findings of the inspection team to the appellant who in turn instructed the consultant to obtain a quotation from the constructor for the construction of the walkway which was constructed. The construction of the walkway was identified as a Ministry of Works and Transport responsibility and not a beautification function of which the Ministry of Local Government was responsible. The construction was carried out on the recommendation of an inspection team and not at the whims of the appellant and cannot be said to have been arbitrary and capricious.

The next allegation against the appellant was that he issued instructions for road works involving the introduction of the use of wet fix. The decision to apply wet fix was reached at a meeting held on July 10th, 2007 chaired by the appellant and attended by four other Engineers from the Ministry of Works and Transport and three Engineers from the consultant led by the Managing Director Engineer P.M. Batumbya. Engineer Kirunda, (PW2), attended this meeting and the minutes were recorded by Mr. Mugoowa Emanuel the project Engineer. The minutes of the meeting tendered as Exh. D11 at the trial indicate that a long range of issues were discussed. The issues arose out of

complaints regarding the quality of the work, areas of coverage, pace of work and accidents arising therefrom. There was an in-depth analysis of the problems and recommendations aimed at finding solutions to the complaints. There was another meeting convened on the August 1st 2007 to address the problems pertaining to the running of the contract. This meeting was chaired by the Minister of Works and Transport and was attended by Engineers from the Ministry of Works and Transport, the Consultant and the Contractor. Inspection trials were conducted after this meeting. Following the trials a follow-up meeting chaired by the appellant was convened on 25th August 2007. The meeting was attended by Engineers from the Ministry of Works, the Consultant and the Contractor. It was in this meeting that it was decided that the wet fix anti stripping agent should be used on all sections that needed repair from stripping. Clearly the action of the appellant was a culmination of a series of meetings that were convened to address the problem of stripping and his said action cannot be termed were arbitrary. He was only implementing the decisions which, we believe, were for proper execution of the contract. The argument of the DPP that the actions of the appellant were not collective is not tenable because if the appellant was implementing the decisions of persons charged with the responsibility of executing a contract, we do not see any reason for holding him personally and criminally liable. The involvement of the others in the decisions negatives the element of arbitrariness. In respect of this act the prosecution contended that the Ministry of Works and Transport was made to pay for the wet fix when it was meant to be paid for by the contractor. But as will be shown in this judgment, the process of payment involved the Contracts Committee of which the appellant was not a member so that even if the appellant participated in the process, whatever role he played would not amount to acting arbitrarily and capriciously.



On the allegations that the appellant awarded subcontracts to M/s KWM %- Limited
Bison Limited for cleaning works for the Kibuye-Zana Entebbe _____



Road evidence was adduced that the appellant handpicked the two companies to the job without following the procurement procedure where there would have been competitive bidding to determine the price of the sub contractors. The prosecution adduced the evidence of **NANTUME ALLEN** (PW7) an Assistant Manager with the **KWIK** Construction Company who testified that her company did the cleaning work on Entebbe - Kampala Road which they had not applied for. They were invited for a meeting together with other companies where they were awarded the subcontract with **ENERGO** to clean the road. She did not recall the person who called her for the meeting at the Ministry of Works and Transport. The terms were negotiated in that meeting and a subcontract concluded with **ENERGO (U) Ltd.** They executed the sub contract and were paid by the contractor. It was not established that the appellant solely called the meeting and awarded the contract.

Lastly, the instructions given by the appellant on the contents of variation Order No. 1. which varied the price of the contract from Shs.6,709,078,478/=to Shs.8,354,223,802/=. The variation of the contract price was an accumulation of the activities for which this Court has found that the appellant cannot be found criminally liable. The prosecution also adduced evidence of decisions by the Contracts Committee on which the Permanent Secretary Ministry of Works and Transport relied to **“request for approval of a deviation from PPDA Regulation 262(5) in Order to introduce variation Order No. 1 valued at 24.52% of the original contract price”** This is what the Contracts Committee communicated on 5th December, 2007 through the Secretary Eng. R. Rwanga:-

“CONTRACTS COMMITTEE DECISION

Approval of submissions to Contracts Committee

This to inform you that at its 319th meeting held on 8th

November, 2007, the Contracts Committee proxnsional

approved additional works to be executed by M/s ENERGO (U) Ltd at a price of Uganda Shs. 1,645,145,325/= (Uganda shillings one billion, six hundred forty five million, one hundred forty five thousand, three hundred twenty five only) VAT exclusive. The additional works at 24.52% charges original contract sum from Ushs6,709,078,478/= to Shs.8.354,223,803/= and the department should seek clearance from PPDA in accordance with the R.262(5)”

It should be observed that by the time the contracts committee gave this approval the works from which the Variation Order arose had already been executed and the letter from the Permanent Secretary seeking the approval explained the reasons for the execution of the works without seeking approval first. This is what the Permanent Secretary communicated to the Executive Director PPDA.

“the additional works are valued at a cost of shsl,645,145,325/= (Uganda Shillings, one billion six hundred and forty five thousand, three hundred and twenty five only). Direct procurement was made by issuing Variation Order No. 1 to the works contract for M/s ENERGO Project (U) Ltd.

Single source procurement was recommended and justified for reasons:-

A. The contract for the rehabilitations/re sealing work

Zana-Entebbe, Akii Bua and Binayomba roads under CHOGM, 207 infrastructure projects (package 1), was still ongoing and a variation could be made to the contract to cater for additional works;

- B, Procurement of a new works contract would need time for mobilisation to site and to acclimatization with the project, leading to further delays and complication in its implementation of the project and unnecessary costs;**
- C. The unit rates in the additional works variations order No. 1 were as already approved in the Works Contract for M/s ENERGO (U) Ltd..**

The Contracts Committee of which the appellant was not a member approved the Variation Order. According to the Permanent Secretary who is also the Accounting Officer the variation order was justified. In his defence, the appellant testified that all the works included in the Variation Order were executed. In our view, if the Contracts Committee approved the Variation Order and the Accounting Officer not only acknowledges that the work was executed but also justified, the failure to comply with the PPDA Regulations by the appellant, whatever role he played, cannot be described as arbitrary and capricious.

This element of arbitrariness and capriciousness relating to the offence was not proved by the prosecution. It follows that the appellant should not have been convicted of the offence when an essential element of the offence was not established.

As a brief comment on the 3rd and 4th ingredients, it is to be observed that the element of consultation and involvement of others, especially the Contracts Committee would mean that whatever role the appellant played cannot be said to have been prejudicial to the interests of his employer or in abuse of the authority of his office. The Contracts Committee took care of these interests. The maxim at Common Law that ***“the deed does not make a man guilty***

unless his mind is guilty' is applicable in this case because "*mens rea*" which is an essential element in a criminal offence was lacking.

On the second count of Causing Financial Loss, the first ingredient of the offence is not in dispute as already discussed. The second ingredient of the offence relates to the act/omissions of the appellant from which loss was allegedly occasioned. These have also been enumerated and discussed. According to the definition of the offence the loss may be actual or implied. This Court has already made a finding that all the works the subject of the Variation Order were performed. From the evidence of **EDGAR AGABA** (PW6) who was the Executive Director of the Public Procurement and Disposal of Public Assets Authority the procurement of the works that led to the variation of the contract flouted the PPDA Act and the rules as a consequence of which the Authority declined to issue a retrospective Variation Order requested for by the Permanent Secretary. It has already been found that the Permanent Secretary requested for the Variation Order after a recommendation by the Contracts Committee.

~~According to Edgar Agaba~~ *"decision of the Authority was that the request was retrospective i.e. works had been undertaken and were therefore not in position to grant the variation..." Under cross examination he stated as follows*

"Yes the changes were necessary and relevant. Form PP20 must be there before the Contracts Committee makes provisional approval. By the time the committee sits PP Form 20 must be in existence. It would be wrong to sit without PP Form 20. They would have no basis to sit and decide.."

In our view, if anybody is to take responsibility for flouting of the PPDA Act and the rules, it must be the Contracts Committee which approved the works and made a recommendation to the Accounting Officer who requested for the Variation Order and made a justification for applying for it retrospectively.

Further, during the cross examination of the Permanent Secretary he was asked about an audit which was commissioned about the project and this is what he stated:-

“ This is the auditor report. I am at page 23. The report talks about Energo Contract -Entebbe Road. It talks about payment process. Certificate 1-5 are indicated as paid. Certificate No 6 for Shs1,859,789,900/= not yet paid though approved. The total amount certified was shs.8,117,794,314/= The total list as paid is Shs. 7,310,855,325/= (sic) The total paid at the time of audit was more than originally stipulated. The Auditor General observed payment made followed financial regulations the amount 1.6 billion is a large sum of money. The Auditor General does not report any loss reflected in the variation order. The report does not report that by signing for shs 1.6 billing Engineer Bagonza cause a loss. Auditors report marked Exh. D3. PPDA also filed a report marked Exh. D3.

PPDA also filed a report in respect of Entebbe Road Rehabilitation Project. I looked at it. This is PPDA Compliance Report. The report does not say there was a loss of shs 1.6 billion in respect of the Rehabilitation Project of Kampala Entebbe Road. It does not fault Engineer Bagonza. It does not make a finding that there was a loss incurred by the Ministry due to Bagonza signing a Variation ~~£3~~^-

Order . The report does not recommend disciplinary action against Bagonza for this action. It mentions some names who might have faulted, (sic) Engineer Bagonza is not one of those mentioned. Those cited for poor management of the project are: report marked exh. D4,,.”

From this testimony of the Accounting Officer, the finding of the Auditor General was that no loss was occasioned. The finding of the Auditor General is consistent with the testimony that the Contracts Committee had recommended the payment to the Accounting Officer who approved it and made justification for it to the PPDA. Mr. Andrew Odit, one of the Counsel who represented the respondent tried to explain away the Auditor General’s Report which he described as an Engineering Audit for the CHOGM projects and not a financial Audit or Value for money Audit or Forensic audit and opined that to use it as the basis to confirm that there was no loss was unfortunate. According to him an Engineering Audit does not talk Finances or Losses. But the Auditor General’s Report was produced by the appellant to show that there was no loss attributed to him. It was the only report availed to Court. The prosecution did not produce any other report. It was incumbent on the prosecution to produce a Financial Audit or Value for money Audit or Forensic Audit and a witness to explain the distinction between those other Audits and the Auditor General’s Report which was the basis for the cross examination of the Accounting Officer. On the basis of the Accounting officer’s response to the questions related to the Auditor General’s Report, we do not see the basis for counsel’s submissions that it cannot be relied upon to determine as to whether or not there was any loss attributable to the appellant. It should be emphasized that the Auditor General’s Report cannot be looked at in isolation but must be considered with other testimonies already discussed that the works were executed. There may have been some elements of mismanagement of the contract as found by the Auditor General and the Executive Director of the PPDA but evidence of

financial impropriety that would amount to criminal liability on the part of the appellant is lacking. In the circumstances, we are not satisfied that the evidence on record as it stands on this aspect of the case attains the required standard of proof of the appellant's criminal liability, namely, beyond reasonable doubt as the respondent was duty bound to prove.

As indicated at the beginning of the judgment we find that after a re-evaluation of the evidence in respect of the ingredients of the offence for which the appellant was convicted there is no need to delve into the rest of the grounds of appeal all of which stem from the manner in which the trial judge analysed the evidence and came to the conclusion that the prosecution had proved the offence of causing Financial Loss and Abuse of Office as indicted. Our own analysis of the evidence leads to a different finding. We accordingly allow the appeal, quash the conviction and set aside the sentence.

Dated at Kampala this 22nd day of May 2015

Hon. Steven B. K. Kavuma *Deputy Chief Justice*

Hon. Justice Mwangusya Eldad

Justice Court of Appeal

Hon. Lady Justice Solomy Balungi Bossa

Justice Court of Appeal

