

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED APPEALS

CRIMINAL APPEAL No.183 of 2018

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CRIMINAL APPEAL No.005 of 2019

Coram: Hon. Lady Justice Catherine Bamugemereire JA, Hon. Justice Muzamiru
M. Kibeedi JA, Hon. Justice Remmy Kasule, Ag JA)

1. LWAMAFU JIMMY
2. KIWANUKA KUNSA STEPHEN
3. OBEY CHRISTOPHER (DECEASED)
4. BOB KASANGO

(DECEASED).....APPELLANTS

VERSUS

UGANDARESPONDENT

(Appeal from the decision of the High Court of Uganda, Anti-Corruption Division, Criminal Case No.0003 of 2016 before Hon. Lady Justice Margaret Tibulya given at Kampala on the 21st day of December,2018).

JUDGMENT OF THE COURT

Introduction

This is an appeal against both conviction and sentence arising from the decision of Hon. Justice Lady Justice Margaret Tibulya, whereby she convicted the first three appellants on 8 counts of Diversion of Public Resources contrary to section 6 of the Anti-Corruption Act 2009 and 1 count of Conspiracy to defraud contrary to section 309 of the Penal Code Act. A4 was convicted on 8 counts of Theft contrary to Section 254 and 261 of the Penal

Code Act, 3 counts of Forgery of a Judicial Document contrary to Section 342 and 349 of the Penal Code Act and Conspiracy to commit a felony contrary to Section 390 of the Penal Code Act.

Background

The background of this case is that Appellant No. 1 Jimmy Lwamafa was the Permanent Secretary and Accounting Officer, Ministry of Public Service between the financial years 2011/2012 to 2013. Appellant No. 2 Kiwanuka Kunsu was the one performing the duties of Commissioner Compensation Department, Ministry of Public Service during the same period. A3 Christopher Obey, was the Principal Accountant in charge of Pensions during the same period. A4 Bob Kasango was a private legal practitioner with the Marble Law Firm of Advocates formerly known as Hall and Partners.

In response to the IMF Adjustment and Economic Re-structuring policies in 1992, the Government of Uganda retrenched 6,337 civil servants from public service. Subsequently, the retrenched civil servants under the chairmanship of their colleague, Charles Abola instructed M/S Matovu and Kimanje Nsibambi Advocates

to institute a civil proceeding against government of Uganda for unlawful retrenchment. Pursuant to these instructions, Matovu Kimanje filed HCCS No.1029 of 98; Charles Abola & 6,336 Others v Attorney General seeking a declaration of pension entitlement for the plaintiffs as well as general damages for breach of contract and conditions of civil service employment. The parties eventually arrived at a Consent Judgment, in which the AG agreed to pay UGX 7,357,283,107/= to the plaintiffs as pension arrears and the Consent Order was issued by court on the 10th of January 2000. Nevertheless, the plaintiffs petitioned court again for the award of general damages in addition to the pension entitlements that were earlier specified in the Consent Order. This application was allowed by court which awarded damages of UGX 4,500,000/= to each of the 6,337 plaintiffs in addition to the costs of the case. The case was subsequently scheduled for taxation of the bill of costs on the 4th of October 2011 before the Deputy Registrar Civil Division, His Worship John Eudes Keitirima, as then was. On the day in question, the plaintiffs were represented by Mr Orach Sebastian, an advocate from The Marble Law Firm but he was rejected by court on grounds that neither him nor his law firm appeared anywhere on the record

of proceedings as having represented the plaintiffs at any one time during the hearing of the main suit. Additionally, no Notice of Change of Advocates or Joint Appearance had been filed in court to justify Mr. Orach's appearance in the taxation proceedings. As a result, the taxation of the bill of costs was adjourned sine die pending clarification on the legal representation in the taxation proceedings. According to the Police findings, the bill of costs has since not been taxed; neither has it ever been fixed for taxation. Nevertheless, the Ministry of Public Service, on whose behalf the Attorney General was sued paid a total sum of UGX 15,487,040,200/= to Hall and Partners after the purported taxation of costs in HCCS No.1029 of 98.

On the 10th September 2012, the plaintiffs wrote to the Attorney General complaining about the unfair payment of their money to lawyers as legal fees. The complaint came as a surprise to the Attorney General and Solicitor General because the case was still before the Registrar pending taxation. Consequently, the Solicitor General wrote to A1 requesting for clarification on whether the MoPS had paid the said money as alleged by the plaintiffs and if so, on whose instructions this money had been

paid. However, A1 neither responded to the Solicitor General's letter nor took any other steps to communicate prompting investigations into the propriety of the said payments. Investigations into the impugned payments established that several offices and individuals were involved in the processing, payment and eventual receipt of the questioned funds. Following investigations in the above matter, that the Appellants were subsequently indicted, tried, convicted and sentenced accordingly.

Being dissatisfied with the whole of the decision of the Trial Judge, each of the appellants appealed to this Court against both conviction and sentence.

The Appellants jointly and severally generated a total of 42 grounds of appeal many of which were a duplication of one or the other grounds. This was evidence that Counsel did not conference on the grounds in to try and reorganise them. Given the multiplicity of Appellants, Indictments and Grounds of Appeal and the enormity of Appellants submissions it would have been helpful if Counsel had attempted to harmonise their positions. We as a court had no option but to streamline the

grounds. Broadly speaking the grounds fell in three clear categories which are as follows:

- 1. The Learned Trial Judge erred in law and in fact when she failed and or omitted to properly evaluate the evidence on record in its totality and or entirety when she ignored contradictions in the indictment of the Appellants and in the prosecution evidence thereby wrongly convicting the Appellants based on insufficient evidence.**
- 2. The Learned Trial Judge erred in law and fact when she ordered the Appellants No. 1 and 2 to compensate to the government to a tune of UGX 3,495,680,660/= (Three billion four hundred ninety-five million six hundred eighty thousand six hundred sixty shillings only) when A4 to whom the money in question was paid admitted that he took all the money.**
- 3. The Learned Trial Judge erred in law and in fact when she wrongly handed excessively harsh and severe custodial sentences against the Appellants.**

We shall deliver a fully reasoned Judgment on notice in the last week of August 2021. In brief our decisions and findings are as follows:

1. Due to the unfortunate demise of Appellant No. 3 Christopher Obey and Appellant No. 4 Bob Kasango the criminal appeals against the two hereby abate. We shall only make reference to them where their names happen to be part of a wider discussion subject to this appeal.
2. This Appeal only succeeds in part. It was wrongful for the trial court to employ both consecutive and concurrent sentences as this causes a great amount of confusion in how they should be executed by the correctional services and can hugely prejudice the appellants.
3. The sentences of imprisonment passed against Appellants No.1 Jimmy Lwamafa and Appellant No.2 Kiwanuka Kunsu by the trial Court are hereby upheld and shall be served CONCURRENTLY.
4. The orders for compensation are hereby upheld.
5. The order to bar the Appellants from holding a public office are equally upheld.

Signed this19th...day of July 2021



Catherine Bamugemereire
Justice of Appeal



Muzamiru Mutangula Kibeedi
Justice of Appeal



Remmy Kasule
Ag Justice of Appeal