THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

ANTI CORRUPTION DIVISION

CR.SC 003 OF 2010

UGANDA :: **PROSECUTOR**

VERSUS

1. **DR. RICHARD NDYOMUGYENYI**
2. **DR. MYERS LUGEMWA** ::::: :::::::::::::::::::::::::::::::**ACCUSED**
3. **MARTIN SHIBEKI**

BEFORE: HON. JUSTICE P.K. MUGAMBA

JUDGMENT

Dr. Richard Ndyomugyenyi (Al) is Programme Manager, Malaria Control Programme, Ministry of Health Dr. Myers Lugernwa (A2) is Senior Programme Medical Officer working in the same programme. Martin Shibeki (A3) also worked under the programme as Programme Assistant. All three are charged with offences said to have taken place between 2008 and 2009. In count 1 only Al is indicted. Count 2 however is against A2 and A3.

The offence with which Al is charged is corruption contrary to Sections 2(i) and 26 of the Anti Corruption Act. It is alleged therein that the accused between 2008 and 2009 at the Ministry of Health headquarters in Kampala, being Manager, Malaria Control Programme of the Ministry or Health, neglected to ensure the proper management of the requisition and distribution of anti malaria drugs. The Act defines the offence thus:

‘A person commits the offence of corruption if he or she does any of the following acts... neglect of duty”.

A2 and A3 are charged with corruption, contrary to Section 2(h) and 26 of the Anti Corruption Act. The charge alleges that the two accused between 2008 and 2009 at the Ministry of Health headquarters in Kampala being employed in the Malaria Control Programme of the Ministry of Health in the discharge of their duties caused the requisition and distribution of anti malaria drugs for the purpose of Illicitly obtaining benefits for third parties. The material charge in that Act under Section 2(h) reads:
‘A person commits the offence of corruption if he or she does any of the following acts. . any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for a third party.’

Nine witnesses were called by the prosecution. PW1 was Dr. Diana Atwine, PW2 was Francis Ntalazi, PW3 was Dr. James Ssekitolelo, PW4 was Robinah Muwanika, PW5 was Moses Muhangi, PW6 was Dr. John Bosco Rwakimari, PW7 was Ponsiano Jumba, PW8 was DetecOve Assistant Superintendant Ian Kakuru and Dr. Alex Opto testified as PW9. For the defence all the accused persons gave their defence statements unsworn. They denied any wrong doing. Anthony Esenu (DW4) was a witness for the defence.

It is the duty of the prosecution to prove the charges against the accused persons beyond reasonable doubt. Any doubt that emerges in the case for the prosecution is to be resolved in favour of the accused. Manifest from the charges are the allegations of corruption against all the accused persons with regard to drugs used in the treatment of malaria. The drugs n issue were said to have been a donation from the Peoples Republic of China to the Republic of Uganda and were meant to be distributed through referral hospitals in the regions as well as at Mulago national referral hospital. Those drugs which included Duo-cotecxin and Arco, the prosecution alleges, were found to have been grossly mismanaged in the way they were requisitioned and distributed thanks to Al’s negligence which even let his staff have illegal access to the drugs at source. Furthermore, an outfit related to as Pilgrim Project was let to receive the bulk of the

drugs to the tune of 552,000 doses while referral hospitals were given little and Mulago Hospital was given only 5,000 doses out of the requisitioned 40,000 doses. Prosecution allegation against A2 and A3 is that they took large amounts of Duocotecxin and Arca so that A2 requisitioned for 14600 doses while A3 requisitioned for 37,200 doses.

PW3 in his evidence stated that in total doses of Duo-cotecxin and Arca delivered before and after Al became Programme Manager were 452,160. It was his evidence in cross examination that Mulago Hospital received 12,321 doses of Arco and 9,731 doses of Duo-cotecxin. The evidence above was never contradicted. In the premises it is hard to believe prosecution allegation that 552,000 doses had been received by Pilgrim Project when that number Is far in excess of the total number of doses received by the Malaria Control Programme itself by way of donation from the Peoples Republic of China. There was no evidence to support the allegation that only 5,000 doses had been given to Mulago Hospital. Evidence available which PW3 gave was that Mulago was infact given more doses as already indicated. It is also worthwhile to draw from the evidence of PW6 and Al himself that no policy existed regarding distribution of drugs dnrialed by the Peoples Republic of China before or after the assunption of office by Al as Programme Manager Malaria Control Program. Evidence was tendered however of allocation of the drugs in issue to Mulago Hospital and regional referral hospitals. Exhibits P2 and P3 are relevant In this respect. Prosecution did not show that the allocations had any irregularity attending them save that of Mulago Hospital which has already been considered above and found not to agree with the allegation.

Regarding distribution of drugs to staff, once again the evidence of PW6 and PW1 agreed that requisition would be made, perfectly normal by their word, to the store at the Malaria Research Centre for supply of drugs to be distributed among the staff of Ministry of Health who were suffering from malaria or whose dependants were 5aid to be suffering from malaria, for their treatment. When PW6 was Programme Manager drugs were kept in his office but PW4 would be called upon to dispense the drugs to staff. There was an inter regnum between PW6 arid Als tenure as Programme Manager. Then A2 acted and matters remained more or less the way they had been when PW6 was in charge. Later however, when Al became Programme Manager, drugs

were taken from his office to the general office where PW4 sat and dispensed drugs as she saw fit. What qualification hc had in this regard resulted from instructions she received from A2 both through training and what she had written down for her by A2 concerning proper doses. It is not disputed she did dispense drugs. Also not disputed is the fact that she recorded particulars of drugs she dispensed and individuals to whom those drugs were distributed in a book which was exhibit P10. it will not pass without note that the method of distribution had short comings. First, there was an instance for example where as many as 50 doses would be dispensed to an individual. This of course attracts curiosity given that one person is entitled to one dose. What one person would do with so many doses would remain subject of conjecture. Also telling was admission by PW4 herself that often times she would be absent owing to poor health arid at such times she would not be privy to how drugs would be distributed. Perhaps It was owing to this in the background that Al sought to get even with another spot of bother. In a letter dated 2nd October 2009 proffered as exhibit P12 he wrote in part:

“ You recall when I visited Malaria Research Centre with I-Ion. James Kakooza sometime back. I instructed you not to release more drugs to NMCP for passive treatment of MOK staff because I was uncomfortable with the accountability of these drugs. I also gave instructions to my staff to stop for (sic) drugs from MRC for use at NMCP.

It has been brought to my attention that officers from NMCP have continued to request and collect anti malaria drugs from MRC without my knowledge, and the destination of these drugs is unclear. The list of officers who have continued requesting for drugs and the dates when drugs were collected is attached for your reference.”

Indeed appended to the letter are details of drugs, doses requested by and doses issued to both A2 and A3 between 15’ October 2008 and 20k” October 2009. For the record the doses involved were in the main Duo-cotecxin and Arca. It is noteworthy also that neither A2 nor A3 denied the veracity of those details. It is the evidence of PW3, the person to whom Al addressed exhibit P12, that not only U the drugs requisitioned for were recorded but the Intended beneficiaries were also recorded. Among the beneficiaries was Pilgrim Programme.

There is no doubt supply of drugs to Pilgrim Programme had been initiated before Al became Programme Manager of the Malaria Control Programme, It was stated during the watch of PW6 and the Minister of Health had given his blessing to the cooperation between the Malaria Control Programme and Pilgrim Programme In the wake of the deluges in the Teso sub region during 2007. Backed by no material evidence, the prosecution asserts 552,000 doses were released to Pilgrim Programme. Evidence by DW4 shows only 89,300 doses was the total number of doses Pilgrim Programme received from the Malaria Control Programme, Exhibit D18 was tendered for effect. That tally compares well with that of PW3 who stated that drugs supplied to Pilgrim Programme can be categorised into 50,500 doses of Arco and 38,800 doses of Duo cotecxin, in all 89,300 doses. In the event it cannot be accurate to state, as the prosecution alleges, that 552,000 doses could have been supplied to Pilgrim Programme by the Malaria Control Programme. It just does not add up. Factor in, the total number of drugs received as a donation from the Peoples Republic of China which as noted is far less than even 500,000, that is 452,160 according to PW3, and realise how shaky the allegation is. In short Pilgrim Programme could not have received the doses the prosecution alleges it got from Malaria Control Programme.

Related to the above is evidence of PW7 arid PW8 of having found 160,300 doses of Duo-cotecxin and Arco stored in a way that was said to be contrary to pharmaceutical requirements. No sample of those drugs was exhibited and there was nothing to recommend that the drugs allegedly seen by PW7 and PW8 were necessarily originating from the Malaria Control Programme. It was nowhere contested that Duo-coter.in and Arco were on the open market and have been on the open market before the gift from the Peoples Republic of China. The evidence of A2 that Duo-cotecxln was on the Uganda market in 2006, a year and half before the Chinese donation and that Arco had been on the open market since 2007 was never rebutted. In the circumstances neither the number of doses given by PW7 and PW8 nor the value attached to the drugs said to have been seen are helpful given failure to trace the actual origin of the drugs. My finding is that the prosecution has not proved that there was anything wrong in the way anti malaria drugs were distributed to Pilgrim Programme by the Malaria Control Programme.

I must now turn to the culpability or otherwise of Al. He is charged with corruption because of neglect of duty. It is clear from the way drugs were being dispensed, sometimes in unseemly dosages to Individuals that the system left a lot to be desired. A look at the record book, exhibit Pl0, leaves one with a sense of mundane stock taking more related to a rural shop than to a modern government institution. It is exasperating to note that no recording was ever done until Al became Programme Manager. A1's letter, whose excerpt has been laid out elsewhere in this judgment (exhibit P12) shows that all was not well in the way drugs were being requisitioned for and distributed Accused did not put in place controls for requisition and distribution of drugs, leading to abuse. The prosecution took into account all these shortcomings in the system Al headed to determine that he was negligent and proceeded to charge him with corruption. except for cases of strict liability our criminal justice system requires that besides the act, actus reus, there must be a guilty mind that is mens rea, Usually strict liability is to be found in legislation dealing with matters such **as** road traffic offences, health and safety, pollution control, possession of dangerous articles such as weapons and drugs and currency offenses, It **is** important therefore that an accused person be proved to have had the intention or necessary knowledge to go with the act in issue, In the instant case, while Al could have been negligent in his stewardship, there is no proof that he had the intention to act corruptly. The letter exhibit P12 shows his disapproval of what had been revealed to him and his desire that a new approach he made. I have noted that the charge against Al says nothing about mens rea, I find this so from my reading of it but in the circumstances I find of persuasion the guidelines given by Lord Reid in **Sweet Vs Parsley [1970] Appeal Cases page 132.** Those guidelines are three in number.

1) Wherever a section is silent as to mens rea, there is a presumption that in order to give effect to the will of Parliament words importing mens rea must be read into the provision.

2) It Is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.

3) The fact that other sections of the Act expressly require mens rea is not itself sufficient to justify a decision that a section which is silent as to mens rea creates an absolute offence. It is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament.

The prosecution has not proved, el alone shown, that Al 'wilfully' or knowingly' contributed to the alleged neglect leading to abuse. I find no evidence of corruption against Al in the circumstances.
The two Assessors in their opinion advised me, separately, to find Al not guilty. I agree with that advice for the reasons I have given above. Al is acquitted of the charge.

A2 is accused of making verbal requests for drugs and at times failing to indicate the purpose for which requisitions were made. Document 14 is a case in point. The case for the prosecution is that he made many requests which ultimately benefitted third parties. Remarkably the third parties alleged to have benefitted illicitly are neither proved to have been illicitly benefited nor even mentioned. Not even details of the drugs that went towards the benefit alleged were availed in proof of the prosecution allegations.

The charge against A3 is more or less similar to that against A2. The difference is in detail. Remarkably in a request he made on 221 December 2008, A3 got 2 boxes of Duo-cotecxin allegedly for Ministry of Health staff going for Christmas recess. Like A2 he made some requisitions without indicating the purpose they were meant for Document 23 **is** a case in point. Consequently the prosecution had A3 charged with corruption saying the requests illicitly benefitted third parties here like in the case of A2, there was no indication who the third parties were that benefitted. No quantities of the drugs involved were given even.

Before the two accused, A2 and A3, can be convicted, there must be proof of the charge brought against them. It is for the prosecution to prove the charge beyond reasonable doubt. Any weakness in the prosecution case goes to the benefit of the accused. The prosecution has nowhere proved that there were any third parties who illicitly benefitted from the acts or omissions of A2 or A3. In the event a charge of corruption cannot be sustained against A2 or 3. Both Assessors in their separate opinions advised me to find both A2 and A3 not guilty of the charge under count 2. For the reasons I have given above, I agree with their advice, I find A2 and A3 not guilty of trio charge and acquit them.

P.K. MUGAMBA

JUDGE

31/08/2010