THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

ANTI CORRUPTION DIVISION
CR.CA 14 OF 2010

1. NABAGALA MARGARET

2. AJWANG BETTY } **::::: APPELLANTS**

VS

UGANDA ::::::::::::::::::::::::::::::::

BEFORE: HON. JUSTICE P.K. M

J U D G M E N T

The first appellant, Nabagala Margaret, and the second appellant, Ajwang Betty, were convicted as charged by the Senior Principal Magistrate Grade 1. They were jointly accused of corruption, contrary to section 2(a) of the Anti Corruption Act and Abuse of Office, contrary to section 11(1) and 26 of the same Act.

Grounds in the memorandum of appeal read as follows:

1. That the trial magistrate erred in fact and law when she failed to properly evaluate the evidence thereby arriving at a wrong decision.
2. That the trial magistrate erred in fact and in law when she failed to consider the Appellants' evidence and/or defence in reaching her decision.

From the above grounds it is manifest the appellants feel a different decision would have been reached by the trial court if it had properly evaluated the evidence before it as a whole. This being the first appellate court, it is enjoined to carefully go through the evidence on record so that it arrives at its own independent decision, derived from a fresh and exhaustive scrutiny, despite the fact that the opportunity to see the witnesses testify was not available to it. The case of **Dinkerrai Ramkrishan Pandya Vs R [1957] E.A 336** did relate to this.

It was alleged by the prosecution in the trial court that the two appellants, who were nursing officers attached to Mulago Hospital, solicited for money in order to offer medical services whereas the services are provided free of charge. PW1 testified on behalf of the prosecution concerning what transpired on the occasion material to this case. Furthermore a photocopy of a Shs. 5,000= note was proffered as an exhibit.

Prosecution evidence shows that when PW1 allegedly asked for testing of her blood and was told she had to pay Shs. 4,000= she was with none of the other prosecution witnesses. The two appellants, said to have been present in the room, deny they asked for any money. They deny also receipt of any money from PW1. In her evidence in chief at page 7 of the record PW1 had this to say:

> "I requested that my blood be tested; I made the request to some brown woman who later turned out to be Nabagala (A1). When I entered both accused were sharing a table. A2 was busy writing something on a piece of paper and A1 Nabagala attended to me. When I asked for the test, Nabagala told me they charge Shs. 4,000= (four thousand shillings). I gave a 5,000= (five thousand shillings) note which was already photocopied before we

came for the operation. I gave the money to Nabagala. The money was for testing blood and she had asked for 4,000= (four thousand shillings) but I had a 5,000= (five thousand shillings) note.

Nabagala put the money in a small paper box which was in front of them …"

In the above extract one is left in no doubt as to who asked and received the money according to PW1. It was Nabagala. But that is before PW1's response in cross examination where at page 9 of the record the following statement properly features:

"I arrested Ajwang because at that time I could not say who is not extorting because when I asked how much it is Ajwang who said 4,000= (four thousand shillings) and Nabagala received".

Within no time PW1 had changed her testimony to show it was Ajwang rather than Nabagala who had asked for the money. She maintained this stance when at page 10 of the record she said,

"Ajwang said I pay 4,000= (four thousand shillings)."

At the end of it all it is not clear who asked for the money. PW1 is apparently uncertain and this caused there to be two different versions of the event, both presented by her. The defence deny the event took place. Needless to say it is the duty of the prosecution to prove the truth of the occurrence and to disprove the defence using truthful and consistent evidence. **Martin Kakuba Vs Uganda [1976] HCB 339** related to a similar situation. At any rate, the only available prosecution testimony of what happened at the time is tainted with inconsistencies which are major since they go to the root of the case. Such inconsistencies should be resolved in favour of the accused since they are not satisfactorily explained. See **Alfred Tajar Vs Uganda Cr. App.**

167 of 1969 (unreported). Indeed in **Ofwono Vs Uganda [1977] HCB 233** it was held that the fact that the witnesses have been consistent and have not contradicted themselves during cross examination is one of the aids which courts apply in assessing the veracity of witnesses. Consequently, given the circumstances of the case at hand I do not find the learned trial magistrate arrived at a correct decision when she found that the two appellants solicited for Shs. 5,000=. Had she taken the defence into account she would have reached the conclusion that the prosecution case left glaring gaps which can only be resolved in favour of the defence.

There was evidence tendered of the Shs. 5,000= note said to be at the centre of the alleged offences. For the record PW1 mentioned the note in her evidence but for unexplained reasons did not mention it in her Police statement as having had a photocopy made of it before she proceeded on the operation genesis of this case. PW1, PW2 and PW6 testified that a photocopy was indeed made but there was nothing to indicate that the alleged photocopy of the note in issue had actually been made prior to the operation to net suspect staff at Mulago. To make value of the photocopy would have required an independent comparison with the actual note and certification of the same as a true copy. This sadly did not happen. Let me observe that what was received as exhibit P3 is a worthless appendage to the record for the reason given. I hold it so. The best evidence would have been the actual note properly exhibited. In cases of corruption the money given is a vital part of evidence which ought to be produced in court. The absence of the note in issue dealt another blow to the efforts of the prosecution to secure any conviction.

I should mention another matter the trial court should have examined. It is the fact that the accused persons were jointly charged. There was no indication the two accused acted in concert. Yet this is material to the charges.

In the end this appeal is allowed. The convictions on the two counts are quashed and the sentences are set side.

P. K. MUGAMBA
JUDGE
09/05/2011