

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**ANTI CORRUPTION DIVISION**

**CR.CS 37 OF 2010**

**UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR**

**VERSUS**

**FRANCIS ATUGONZA :::::::::::::::::::::::::::::::::::::: ACCUSED**

**BEFORE: HON. JUSTICE P.K. MUGAMBA**

**J U D G M E N T**

Francis Atugonza is charged with Abuse of Office, contrary to section 11(1) of the Anti Corruption Act. To prove its case the prosecution called eleven witnesses. PW1 was Kironde Collin Martin, PW2 was Kiiza Kenneth Alfred, PW3 was Geoffrey Muhumuza, PW4 was Asimwe Edward, PW5 was Kiracho Patrick, PW6 was Kinimi Charles, PW7 was Detective Corporal Apaga Charles, PW8 was Detective Woman Corporal Birungi Mary, PW9 was Sam Byarugaba, PW10 was Babirye Aida, while D/Sgt Wafula Anthony testified as PW11.

In his defence accused elected to keep quiet. There was no witness for the defence.

Section 11(1) of the Anti Corruption Act states:

“A person who, being employed in a public body or a company in which Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both”.

The particulars of the charge are laid out in the amended indictment and read as follows:

“Francis Atugonza between December 2007 and December 2008 in Hoima Town Council in Hoima District while serving as Chairman L.C. III (Mayor) of the said Hoima Town Council did an arbitrary act in abuse of the authority of his office and to the prejudice of Hoima Town Council to wit he illegally sold an unsurveyed piece of land on Rwentuha Road in the said Hoima Town Council, the ownership of which is vested in Hoima District Land Board”.

I should point out that before the amendment to the charge the land was stated to be the property of Hoima Town Council. It was at the close of the prosecution case the state sought to amend the charge and went ahead to amend after leave to do so was granted.

The prosecution case is that accused was L.C. III Chairman (Mayor) of Hoima Town Council at the material time. It is the prosecution case also that accused purported to sell an unsurveyed piece of land at Rwentuha Road within Hoima Town Council to Warid Telecom (U) Ltd for Shs. 60,000,000= following a sub lease agreement made between accused and the said Warid Telecom (U) Ltd. The state alleges that to prove ownership of the land accused used three dubious documents. The first was a forged lease offer dated 1/9/2007 bearing the names Francis Atugonza. The second was an alleged certification letter dated 8/1/2008 addressed to the Operations Manager of Warid Telecom (U) Ltd by Apaga Charles, L.C. I Chairman, Police Cell, Hoima Town Council. The third was a letter dated 4/1/2008 headed “To whom it may concern” signed by the acting Town Clerk Hoima Town Council, namely Kinimi Charles, purporting to

show that the land in issue belonged to accused. Some Shs. 48,000,000= was eventually paid to accused and work to construct the mast went ahead to completion. Following public complains accused was arrested and charged.

The burden is on the prosecution to prove the charge against the accused person beyond reasonable doubt. The following ingredients of the offence must be proved:

- (a) That accused was employed in a public body or a company in which the Government has shares,
- (b) That accused did or directed to be done an arbitrary act,
- (c) That the act was done in abuse of the authority of his office,
- (d) That the arbitrary act was prejudicial to the interests of his or her employer or any other person.

Regarding the employment status of accused, it was prosecution evidence he was Chairman L.C. III (Mayor) Hoima Town Council at the time material to the charge. PW2, PW3, PW4 and PW6 gave evidence to this effect. This evidence was not challenged by the defence. A Town Council is a local government. Section 3(5) of the Local Governments Act provides that the Town Council is the local government in a town. A public body according to the definition in section 1(a) of the Anti Corruption Act includes government, any department, services or undertaking of the Government. Suffice it to say that it is not disputed that by virtue of the office he held accused fell within the parameters of those persons affected by section 11(1) of the Anti corruption Act.

The prosecution must prove whether accused did or directed to be done an arbitrary act. According to the **Oxford Advanced Learner's Dictionary**, 7<sup>th</sup> edition "arbitrary" is an action, decision or rule not seeming to be based on a reason, system or plan and sometimes seeming unfair. The other meaning in the definition relates to using power without restriction and without considering other people. It is reliance on individual discretion rather than going by fixed rules, procedures or law. The prosecution case is that accused sold an unsurveyed piece of land on Rwentuha Road, within Hoima Town Council when the land did not belong to him. To support the charge exhibit P6, a letter originating from the office of the Town Clerk, Hoima Town Council, stating that accused was the owner of the land in issue was proffered in evidence. Also proffered was a letter originating from the L.C. I Police Cell, Hoima Town Council stating that the land in question belonged to accused. That letter is exhibit P7. Another of the documents tendered in evidence by the prosecution is exhibit P5 said to be a Deed of Lease between accused as sub-lessor on one hand and Warid Telecom Uganda Limited as sub-lessee on the other. A purported lease offer from Hoima District Land Board said to have been signed by the Board Secretary was mentioned also. Documents were referred to by the prosecution in court pertaining to the said offer and contesting its authenticity. Surprisingly none of those documents were tendered in evidence as exhibits by the prosecution. Prosecution led evidence to show that exhibit P6 was secured from the Town Clerk, Hoima Town Council, on the strength of a lease offer accused presented to PW6, who at the time acted as Town Clerk. The evidence of PW8 was that she signed the document exhibit P7 after it was presented to her by accused but after she had visited the land in question. Further evidence revealed that Warid Telecom Uganda Limited were in a position to enter into a lease relationship with accused after they were shown documents showing accused was owner of the land. The deed signed between accused and Warid Telecom

Uganda Limited was signed by accused as the owner of the land and Warid Telecom Uganda Limited. Witness to the signature of the accused was someone who signed on behalf of the Chairman L.C. III, Hoima. Someone presumably an Advocate from Katende, Ssempebwa and Company Advocates witnessed the signature on behalf of Warid Telecom Uganda Limited. It was contended by the prosecution that the transaction between accused and Warid Telecom Uganda Limited flouted established procedures for land acquisition in the Town Council which required Town Council authorities to sanction any developments in the Town Council in order to ensure proper planning of land use. It was further contended that as Chairperson L.C. III accused fell short of his obligations under S. 24 of the Local Governments Act where as political head he should on behalf of the Council oversee the performance of persons employed by the Government to provide services in the Council's area of jurisdiction and to monitor the provision of Government services or implementation of projects in the area under the Council's jurisdiction. In addition as Chairperson he had to abide by, uphold and safeguard the Constitution, district laws, council bylaws and other laws of Uganda as well as to endeavour to promote the welfare of the citizens in the council's area of jurisdiction. The defence on the other hand contended that the prosecution did not prove that accused forged the contested lease offer document or that he committed the offence of uttering a false document. Further the defence contended that there is a distinction between forgery and acting arbitrarily. Defence added that there was no way accused acted arbitrarily in the circumstances, since he had done what he did as an individual and not as a public officer, as alleged by the prosecution.

In the course of this judgment I have related to the way it is generally understood when a person acts arbitrarily. I have also gone through the evidence on record to check on likely aspects of

arbitrariness on the part of the accused. In **Kassim Mpanga Vs Uganda SCCA No. 30 of 1994 reported in [1995] KALR 55**, accused in spite of knowledge of set conditions went ahead and acted in breach of the specific conditions. He was held to have known that what he was doing was wrong. The act was held to be arbitrary. In the instant case certainly there was no evidence given that accused took any decision, ordered the doing of any act or stopped the taking of any action, by virtue of his office. There is no evidence of him using his office. Perhaps the only tell-tale is the stamp of office of the Chairperson L.C. III, Hoima Town Council appearing on the sub-lease Deed. But that stamp is placed against the name of someone else, not the accused's name. Accused acted as an individual but not in his official capacity. The fact that he happened also to be Chairperson L.C. III did not feature anywhere in the impugned transaction.

Next I have to consider whether the act done by accused was done in abuse of the authority of his office. One definition of abuse is that it is a departure from legal or reasonable use in dealing with a person or thing. It is to misuse. That is the definition in **Black's Law Dictionary**, 8<sup>th</sup> edition. The **Oxford Advanced Learner's Dictionary**, 7<sup>th</sup> edition defines abuse in this context as to use power or knowledge unfairly or wrongly. This court has held that an essential ingredient of the offence of abuse of office is that the facts complained of should be prejudicial to the rights of another and a right is an interest recognized and protected by law respect for which is a duty and disregard of which is a wrong. See **Ignatious Barungi Vs Uganda [1988 – 1990] HCB 68**. Perhaps of persuasion is the offence of Misconduct in Public Office in the United Kingdom. In essence it relates to abuse of the power or responsibilities of the office held. It is a common law offence where in **R Vs Dytham [1979] IQB 722** at page 723 Lord Widgery talked of "a public officer who has an obligation to perform a duty". It was held in the same case that the fact that a

public officer has acted in a way that is in breach of his or her duties, or which might expose him/her to disciplinary proceedings, is not in itself enough to constitute the offence. The prosecution referred to S. 24 of the Local Governments Act in relation to breach. They should have mentioned what exact breach the accused committed in his official capacity which gives birth to abuse of office. I find none. Abuse of office is an act or omission done in an official capacity which affects the performance of official duties. In the United States misconduct in public office is said to occur where in the capacity as a public officer the officer does an act that he knows exceeds his lawful authority or that he knows is forbidden by law to do in an official capacity. What is more, at a minimum an indictment for official misconduct must allege facts that would show the public official violated an identifiable statute, rule, or regulation and demonstrate how the public officer exceeded his lawful authority. All this is intended to show that a person should not be held criminally responsible for conduct which he could not reasonably understand to be proscribed. See **United States Vs Harris 347 U.S. 612 [1954]**. Is this not the essence of Article 28(12) of the Constitution? Recourse to S. 24 of the Local Governments Act to justify the charge of Abuse of Office is in my opinion like clutching at a straw. I find no evidence of abuse at any rate. This ingredient of the offence is not proved either.

Finally the prosecution must prove that the arbitrary act was prejudicial to the interests of accused's employer or any other person. Something is prejudicial in the context of this case if it has a harmful effect on something or if it is likely to harm. It is the prosecution case that the transaction between accused and Warid Telecom Uganda Limited was detrimental to the interests of Hoima Town Council. Warid had gone ahead and erected a communication mast without the necessary approval of the Town Council. It was urged by the prosecution that before Hoima

District Land Board allocates land it liaises with technical people to ensure planned land use. The lease between accused and Warid Telecom Uganda Limited put a stop to planned developments on the land and consequently it was an act prejudicial to the interests of Hoima Town Council. Needless to say Hoima District Land Board are the owners of the land but the Town Council is said to be responsible for development plans of land in the Town Council. The earlier indictment described the land in issue as belonging to Hoima Town Council, but following an amendment it was described as belonging to Hoima District Land Board. The defence argued that the prosecution should have shown evidence that the area in issue was a planned area. They added that in the absence of an enabling legislation the Hoima Town Council Detailed Plan of 2008 alluded to by the prosecution is meaningless and Rwentuha Close as planned is non-existent. It was their argument that in the absence of a specific law accused could not be held responsible for breach to the prejudice of anyone, let alone his employer.

I have considered the evidence of the prosecution in this matter with regard to anyone being prejudiced. No evidence was led to this effect. It is the duty of the prosecution to prove this case beyond reasonable doubt but apart from technical claims on the part of a couple of witnesses no evidence of prejudice to anyone was adduced. What is more, no evidence of prejudice attached to accused. I would find the allegation not proved.

In their joint opinion the two assessors advised me to find accused guilty and convict him. For the reasons I have given in the course of this judgment I respectfully disagree with their verdict. I find accused not guilty of the charge and acquit him accordingly.



Just an observation before I take leave of this case. This verdict which has just been delivered relates to a criminal accusation borne out of an apprehended infraction. For best results it would be better to look at the option of civil litigation before embarking on an indictment of uncertain extent.

**P. K. MUGAMBA**

**JUDGE**

**10/06/2011**