

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO
CRIMINAL APPEAL NO.019/2011**

UGANDA:..... APPELLANT

VERSUS

EKUNGU SIMON PETER:..... RESPONDENT

BEFORE: HON.LADY JUSTICE CATHERINE BAMUGEMEREIRE

J U D G M E N T

(Arising out of the Judgment of Mrs Sarah Langa Siu Magistrate
Grade

One sitting at Anti-Corruption Division Kololo on 20.07.2011)

The State lodged an appeal against the Judgment of the Magistrate Grade One sitting at Anti-Corruption Division. The learned trial Magistrate, Mrs. Sarah Langa acquitted the Respondent, Ekungu Simon Peter of two counts of bribery. In Count No.1 he was acquitted of Corruptly Soliciting a Gratification Contrary to S.2 (a) and 26 (1) of the Anti-Corruption Act of 2009 hereinafter referred to as the (ACA). Similarly, in the 2nd Count the Respondent was acquitted of Corruptly Accepting a Gratification contrary to the same law stated above. I shall start by setting out section 2(a) of the ACA verbatim. The sentence is spelt out under S. 26(1).

2. A person commits an offence of corruption when he or she does any of the following acts:

(a) The solicitation or acceptance directly or indirectly, by a public official, of any good of monetary value or benefits such as a gift, favour, promise, advantage, or any other form of gratification for himself or herself or for any another person or entity, in exchange for any

act or omission in the performance of his or her public functions;

The facts which gave rise to this case were that the Respondent, who is the Sub County Chief of Ngora Sub County, ordered for the detention of the herdsman and 8 cows found grazing in the first payment of UGX 100,000 Sub County compound. Odikor Gilfasio, the Complainant (PW1) stated that his son and the 8 cows were detained until compensation was agreed. It is alleged that Respondent demanded for UGX 50,000 per cow and would not release the said cows till money was paid. Following a heated negotiation, the owner of the cows agreed to make a down payment of UGX 90,000. As a consequence Odikor borrowed UGX 10,000 to make the UGX 100,000. The Respondent then ordered Odikor to find the outstanding balance of UGX 60,000. Apparently following heated negotiations, the Sub County Chief (Respondent) had agreed to a lesser fine of UGX 20,000 per cow which translated into UGX 160,000 for the 8 cows. The Respondent allegedly imposed the fine on the Complainant for grazing cattle on the Sub County land. There is a dispute as to whether a civil agreement involving destruction of cassava stems was entered. The prosecution contended that the Agreement exhibited as "D1" was an afterthought. But the learned trial Magistrate expressed the view that the said Agreement was genuine and used it as a basis for her decision.

Having failed to produce the outstanding balance of UGX 60,000 and fearing arrest by the Sub County Chief, the Complainant, Odikor Gilfasio, sought the intervention of the office of the Inspector General of Government. In response to his complaint, a trap was laid for the Respondent. The Respondent Ekungu

Simon Peter was subsequently charged and acquitted of Soliciting and Receiving UGX 60,000 from Odikor Gilfasio.

My understanding of the facts is that this was not a straight forward dispute between two civilians squabbling over grazing rights but rather a contest between a public official and an ordinary citizen over perceived violation of grazing rights. The case raises the question regarding the Respondent's status at the material time and whether the actions he took were exercised in his official capacity. If indeed the Respondent levied a fine on the Complainant as alleged, did he do so in his private capacity or not? If he acted in his capacity as a Sub County Chief then he wouldn't this be a clear case in which the dominant party plays the role of investigator, prosecutor and executor in his own cause? We will therefore briefly examine how this conduct relates to the offence of abuse of office. We will also inquire into the issue as to whether there are established channels through which offending citizens are dealt with within the confines of the law. Further, we will examine whether the Complainant was justified in reporting the Sub County Chief to the IGG for imposing a fine on him outside the standard procedure. The course of action the Complainant took needs to be examined in comparison to his immediate employer who chose to reach a compromise so as to avoid offending the Sub County Chief.

As a first Appellate Court, it is my duty to subject the entire evidence and record to a thorough and rigorous scrutiny with a view to arriving at my own conclusion based on the evidence on record. In examining the lower Court record I take cognisance of the fact that I did not have the opportunity to see the witnesses testify first hand. I am therefore aware of this

limitation. See the cases of **Pandya v R 1957 EA 336** and **Kifamunte Henry v Uganda (Supreme Court) Appeal No.10 of 1997.**

In my view grounds No.1, 2 and 4 can be combined and summarized into one - whether the learned trial Magistrate failed to properly evaluate the evidence and thus came to a wrong conclusion?

Further grounds No.5 and 6 can be merged into one - whether the standard and burden of proof prescribed by law were properly discharged?

Ground No.3 raises a point of law that is not only central to criminal proceedings but is particularly important in corruption cases. Does all evidence require sufficient corroboration?

From the outset, let me point out that with regard to grounds No.1, 2 and 4, having carefully perused the evidence on record, it is reasonable to infer that the learned trial Magistrate was faced with two sets of facts and chose to believe the evidence of the defence. Two main pieces of evidence appeared to have swayed the learned trial Magistrate. The first being defence exhibit D1 which was an agreement relating to destruction of cassava plants. The learned trial Magistrate appears to have believed DW2 who testified that Odikor informed her that her cows had been confined because they destroyed the Sub County Chief's cassava garden and that the latter had imposed a substantial fine. DW2 also stated in her evidence that the Sub County Chief was extremely angry and she had to accept the penalty imposed in order to keep the bad situation from getting worse.

In his defence, the Appellant stated that he ordered his policemen to find (PW1) and present him to the Sub County Headquarters for having grazed his cows on Sub County land. Clearly the appellant used the instruments of power at his disposal to resolve a personal conflict. Having realised the immense power the Sub County Chief held, DW2 caved in and quickly agreed to a monetary settlement. However, PW1 stood up to the Sub County Chief and refused to be compromised despite the strongman tactics that the latter had subjected him to.

There is no doubt in my mind that a Sub County Chief is one of the frontline faces of government in local communities and they wield a lot of power that may be subject to abuse. Aware that the Sub County Chief had the power to confiscate her property, DW2 decided to reach a quick compromise. In my view, DW2's conduct should not have been treated as a weakness in the prosecution case but rather proof of the immense power that the Appellant wielded over his community. Is it any wonder that the complainants entered an agreement in which they did not contest the claim that the subject matter of the dispute was a couple of stems of cassava? In my view the learned trial Magistrate ought to have dug deeper into the facts and the law before reaching a verdict.

By not looking beyond the literal interpretation of the letter of the agreement (Exh."D1"), the learned Trial Magistrate lost a vital window of opportunity to put the facts of the case in their proper perspective. It was erroneous for the Trial Court to treat Exh.D1 as water-tight proof of the intentions of the parties.

In my view the Sub County Chief used the agreement as a pretext to extort money from his community. One would suppose that for an agreement to be enforceable it should be entered into freely by consenting parties. But the circumstances of this case paint a completely different picture. The Sub County Chief ordered police to produce before him a party to sign an agreement which was largely tilted in favour of the former. At the material time the parties were clearly not two consenting adults. The special position of power which the Sub County Chief enjoyed over his community created an environment conducive to extortion. Indeed the Respondent (DW1) in his defence conceded that he ordered his policemen to bring the complainant to the Sub County Headquarters where presumably the child and/or the cows were already detained. Clearly, the Sub County Chief has the power to arrest and detain a person, and as we have just learnt, even cattle can be remanded. It is for this reason that PW1 ran to the office of the Inspector General of Government for help. It must have taken a lot of courage for PW1 to contact a State authority, especially when his own boss (DW2) did not believe him. I therefore find that the learned trial magistrate failed to properly evaluate the evidence and thereby gave insufficient attention to the impact of the Sub County Chief's power over the parties to the agreement. Consequently, Grounds No. 1, 2 and 4 succeed.

I now turn to Ground No. 3. In Ground No.3 the learned trial Magistrate is alleged to have erred in law and in fact when she came to a conclusion that the Complainant's evidence was not corroborated thus leading to a wrong conclusion.

At page 5 of the Judgment the learned Trial Magistrate stated as follows,

“This means Abwotu and Ogellan were aware that the accused was soliciting for money from the Complainant. It is worth noting however, that the Complainant’s evidence as far as soliciting for one hundred sixty thousand shillings was not corroborated. Mrs. Ogellan instead testified for the defence confirming that her cows that were being looked after by Odikor, the Complainant, damaged the accused’s cassava garden and she paid Ninety thousand shillings after negotiating and agreeing on one hundred and sixty thousand shillings... Hence in the light of the foregoing and with the Complainant’s uncorroborated evidence, I ... find that the accused did not solicit for one hundred and sixty thousand shillings...”

Learned State Counsel (for the IGG) submitted that the learned Trial magistrate erred in law to require corroboration for PW1’s evidence. This submission was in reference to page 7 of the Judgment in which the learned Trial magistrate remarked in her conclusion that given the lack of corroboration of Pw1’s evidence, she had no option but to acquit the Appellant. To this submission Mr. Isodo for the Respondent contended that PW1 should have produced his son or the other detainee to corroborate the allegation of illegal detention. He prayed that Court agrees with the finding of the learned Trial Magistrate that PW1’s evidence needed corroboration.

In Uganda the law relating to corroboration is quite clear. Corroboration is required under; *inter alia*, the following circumstances.

1. Where there is a single identifying witness in circumstances that are less than optimal for proper identification: See the case of **Tuwamoi v R 196 EA** See also **Ug. V Turyamureeba Silvano 125/08, Leuta s/o Mkitila vs R 1963 EA, Uganda v Kasigaire Apollo UGHC 124 of 2009.**
2. Where the witness is a child of tender years; see the cases of **Kibagenyi Arab Kabili v R 1959 EA 92, Sabila v R 1967 EA 403, Solomon Oumo Mgele v R 1958 EA 53, Chila v R 1967 EA 722**
3. And until recently victim's evidence of rape required corroboration.
4. Where the evidence of an accomplice is admitted.
5. Where the charge and caution statement of an accomplice is admitted and used against an accused.

In requiring corroboration of the prosecution evidence the learned Trial Magistrate should have explained the reasons for demanding the extra layer of proof. Prosecution witness No.1, Odikor, was the prime witness, no doubt. In my thorough examination of the evidence I did not come across a situation where the identity of the respondent was in issue or where the conditions for identification were not favourable. In his own defence, the Respondent did not deny that he demanded the said amounts of money from the Complainant. Given the fact that the Respondent did not deny asking for UGX 60,000 and

that the Complainant (PW1) positively identified the Respondent in broad day light, there was absolutely no need to demand corroboration of the evidence of the eye witness in this case.

The Court takes Judicial Notice of the fact that corruption is a silent offence which is practiced in a covert manner. It is only in exceptional cases such as this one that a Complainant acts as a whistle blower. The conduct of DW2 (Ogellan) is not entirely uncommon in cases involving parties in an unequal power balance. In determining a case such as this, the trial Court is required to take a call as to which witness to believe, based on the evidence adduced before it. Whilst it is entirely the trial Magistrate's call to take a position on the propriety of the evidence adduced in court, in so doing, it is incumbent upon the magistrate to ensure that the decision is founded in the law and the evidence as adduced in the respective case.

In the instant case, the Trial Magistrate elected to believe the defence, and made her position clear quite early in her Judgment. I find that having done so, it was misdirection for her to make the unnecessary demand of corroboration from the prosecution. As earlier noted the circumstances of this case did not warrant corroboration of the prime witness' evidence. The requirement for corroboration was therefore an unnecessary legal burden. Complainants in corruption and rape cases are particularly susceptible to disbelief. There is often a tendency to regard the victims as liars. This is a stereotype which courts need to watch against - as it can lead to gross injustice. My reading of the Anti-Corruption Act 2009 regarding the evidence of the accomplices is that lack of corroboration should not be used as a blocker in Anti-Corruption cases. I therefore find that the learned Trial Magistrate misdirected herself by requiring

corroboration in a non-deserving case. For these reasons ground No.3 of the Appeal succeeds.

Concerning grounds No.5 and No.6 I find that the learned Trial Magistrate did not evaluate the evidence as a whole. Having been inclined to believe one side over the other, it was clear the prosecution evidence was not given due consideration. I therefore agree with the Counsel for the Appellant that had the learned trial Magistrate considered the evidence as a whole, she might have come to a different conclusion. I do not necessarily mean that the learned Trial magistrate should have convicted, as charged but there is a probability that she might have found that the evidence disclosed a lesser or another offence. I am particularly of the view that ingredients of the offence of abuse of office were disclosed.

Before I take leave of this case, I would like to take issue with the methods used in police traps. The mode of arrest and the requirements for search certificates during this type of arrest need to be re-examined. In this case the Accused person's officemates were ordered by the arresting officers to sign search certificates as witnesses. Clearly, they were not in the room when the money was found. They seem to have been coerced unreasonably to sign the documents.

Entrapment as a defence has been defined as a 'method of inducing a person to commit a crime he or she is not previously disposed to commit. Entrapment tends to turn villains into victims'.¹ In spite of this defence, where a person was ready, willing and able to commit the crime as charged whenever an opportunity presented itself, and was offered this opportunity by

¹ See the case of **United States v Russell 356 U.S 369**. This is United States Supreme Court's first case on the defence of entrapment.

government officers, such a person cannot claim that he was entrapped. In using this method the state must prove that the following were not their motives².

1. That they did not create the idea of committing the crime
2. That the State officials did not persuade and talk the person into such a crime.
3. That the person was ready and willing to commit the crime before interaction with State agents.

This case and particularly the narration of the appellant's arrest, highlights the challenge of using police traps as a method of proving corruption in public office. The awkwardness and confusion caused by this rather archaic and crude manner of a Sub County Chief's arrest and indeed the arrest of many other high profile popular officers means that this method requires a review and needs to be revisited. Should such an officer be handcuffed? The question also arises what to do with a search certificate during such an arrest. Clearly this method of arrest leaves the arresting officers looking bad in the eyes of the unsuspecting public and could lead to dire consequences on such officers.

The learned Trial Magistrate also referred to the cases of **Wanyama v R 1975 EA 120**, **Amuge Angella v Uganda Criminal Appeal No.15 of 2010 (Anti-Corruption Division)** and **Erisa Bukenya & 2 Others v Uganda EACA Criminal Appeal No.68 of 1972**.

² See **Jacobson v United States 503 U.S 540 (1992)**; **Sorrells v United States 287 U.S 435**; **Sherman v United States 356 U.S 369**; **Hampton v United States 452 U.S 484**. As noted earlier entrapment not a defence in Uganda but these cases throw light on why police traps can be a huge human rights issue.

Each of these cases when considered carefully is clearly distinguishable from the given facts and this distinction needs to be made so no confusion is caused. In my view **Wanyama v R (supra)** is a precedent that should be regarded with care given that the new Anti-Corruption Act (2009) has overwritten some of the considerations such as the definition of a public officer which formed the basis for that decision. Indeed the spirit of the Anti Corruption Act 2009 under s.32 reflects the need to uphold witness evidence which would have otherwise needed corroboration.

In conclusion I find that by not evaluating the evidence as a whole the learned Trial Magistrate arrived at erroneous conclusions.

The appeal is allowed. The acquittals are set aside. This Court orders that a fresh trial be instituted against the appellant before a different Magistrate.

It is so ordered.

Sgd: Hon Lady Justice Catherine Bamugemereire
Judge of the high court
5th January 2012