THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT ANTI- CORRUPTION DIVISION AT KAMPALA

CRIMINAL APPEAL NO 0016 OF 2012.

KALIBALA HENRY & 3 OTHERS ::APPELANTS

VERSUS

UGANDA ::RESPONDENT

BEFORE: HON. MR. JUSTICE D. K. WANGUTUSI.

JUDGMENT

The appellants, Kalibala Henry, Sendaula Joshua, Lumbassi Geoffrey and Namara Richard were charged, tried and convicted in the Chief magistrate's court for Conspiracy to Commit a Felony contrary to section 390 of the Penal code act. They were each sentenced to thirty (30) months imprisonment.

The facts of this case as got from the evidence were that sometime in March 2011, PW1, Kebirungi Aisha, a teller at Barclays Bank Wandegeya Branch received a call from A4 Namara Richard, who requested her to receive two disks which she would secretly use to download data and passwords of a teller and an authorizer in the bank. That with that information obtained Namara would be able to transfer money to the tune of 80 billion from the bank. Kebirungi detected the crime in that act and she secretly informed PW2 David Mayeku who was the Compliance Head.

PW2 and PW1 agreed to set a trap and PW1 Kebirungi played along with Namara's plans. She received the two disks, technically called loggers and she went ahead and downloaded the passwords of Gloria Babirye a teller and Vicky Abeja an authorizer. She then alerted PW2 who in turn alerted police. Police were deployed and PW1 then called Namara who was arrested as he attempted to receive the loggers. It was the prosecution's evidence that on arrest A4 Namara named A3 Lumbassi Godfrey A3 as the author of the crime, who in turn named Kalibala A1 as the provider of the loggers. Kalibala is said to have come along with A2 Sendaula who had a laptop for downloading the information.

In his defence, A4 Namara denied knowledge of any plan to defraud the bank and said he had gone to the bank to withdraw money and as he left he was called by PW1 and as they conversed, security men arrested him.

The other appellants opted to keep silent.

The learned chief magistrate disbelieved Namara and convicted all the appellants on the prosecution's evidence which the magistrate believed had proved the guilt of the appellants beyond reasonable doubt.

Being dissatisfied with the learned magistrate's verdict the appellants appealed grounding their move on the following;

1. ***The learned magistrate erred in law and fact when she considered and relied on the prosecution's evidence in isolation of the defence/appellants case and hence, she wrongly convicted and sentenced the appellants.***
2. ***The learned trial magistrate erred in law and fact when she convicted the appellants without paying due regard to the contradictions, both in prosecution exhibits and witness.***

3. ***The learned trial magistrate erred in law and fact when she convicted the appellants on insufficient evidence to prove the ingredients of the offence of conspiracy.***
4. ***The learned trial magistrate erred in law and fact when she did not exhaustively consider and evaluate the evidence on record and eventually wrongly convicted the appellants.***

The appellants' prayers are that the appeal be allowed, convictions quashed and sentences set aside.

In order to appreciate properly as to what constitutes an offence under section 390 of the Penal Code Act, it is important to have in mind the essential ingredients of conspiracy. These being;

1. *The existence of two or more persons in the act.*
2. *The agreement and meeting of minds of these people to commit a crime.*
3. *That failure to commit the crime is not a defence*.

In the instant case the trial court had to be satisfied that the accused that appeared before it had come together if not physically at least in mind. They had all to be proved to have understood what their coming together would lead to and that if what it would lead to was not criminal, they would still be innocent of a crime if it later turned out to be an innocent act.

In his submission counsel for the appellants, raised two grounds worth noting out of the four he had lodged.

The first one was that there was no meeting of mind of the accused, now appellants, to commit the felony complained of.

The second one was that there were such grave contradictions in the prosecution evidence that no conviction could be sustained.

On the first ground that there was no ‘meeting of minds’ counsel for the appellants submitted that none of the prosecutions witness had given evidence to show that two or more of the appellants had met and hatched out a plan to defraud the bank.

In reply counsel for the prosecution submitted that while there was no direct evidence, the act of conspiracy could be drawn from appellants’ conduct which raised the presumption of a common plan. She relied on the case of Ongodia. More so she emphasized the evidence of PW2 Mayeku where he had testified that after arresting A4.PW2 told court that while at the police A4 told police that it was A3 Godfrey Lumbassi who had given him the loggers. That when they went to Jinja Road Branch where A3 was working PW2 asked him whether he had given the loggers to A4 and that A3 said he had done so but he had also got them from A1 Henry Kalibala. That they then rung A1 using a Warid number owned by one of the police men and as PW1 testified;

“Godfrey told Henry I have got the gadgets they are ready to pick”

That Henry called back and said Royale Complex was congested, they should meet at Centenary Park and he would contact his other friend who would come with a laptop for downloading.

In the evidence of PW2 it is difficult to know the person Henry talked to when he allegedly rung back. There is no proof that he talked to A3 and since A3 did not testify there was no cross examination on this issue of Henry calling back.

From the foregoing it would it would seem as if the accused persons knew each other and they had had dealings in respect of some information technology equipment. What deal it was however, remains unrevealed.

A4 said he had got the loggers from A3. There is however no evidence at all that A3 who said he got them A1 ever knew what they were going to be used for. There is even no evidence on record to show that when A1 gave them to A3 he knew that they were going to be used to download passwords for criminal intentions.

PW2 said that when A3 rung him he told him that he had *'the gadgets ready to be picked'*.

He does not say what had been downloaded onto the loggers or that there was anything downloaded. As for A2 he was arrested because he was around and because he owned a laptop. It is now common, if not fashionable for ICT literate people to move around with laptops, I pads and other electronic equipments if not for use, at least to keep with the times. The evidence record does not show that the appellants had a *meeting of minds* in whatever transaction that took place.

Indeed one could say each of the appellants played a different part but this still had to be proved by the prosecution that A4 and at least one other party to the agreement intended or knew of any fact or circumstance that was necessary for the commission of the offence complained of. This was not shown as between A4, A3, A2 and A1 or between any of them.

In the circumstances counsel for the appellants' submission that there was no meeting of minds between the appellants is upheld.

The question however arises as to whether the relationship between an undercover and A4 could be interpreted to be a conspiracy on the part of A4. In this case PW1

would be the undercover. From the evidence it is clear that PW1 did not intend to commit the crime. The offence that A4 was charged with required proof of an intention on the part of A4 and at least one other party, that the agreement be carried out. In this case PW1 did not intend to carry out the agreement. The required mens rea on all parties was missing because the undercover, PW1 had not intended to carry out the fraud.

In other words the ***"crime of conspiracy requires an agreement between two or more persons to commit an unlawful act with intention of carrying it out"*** see **Yip Chiu-Cheung v R (1995)1 AC 111 at 118**. It is therefore safe to conclude that as in **YIP CHIU-CHEUNG Supra** that "*at least two of the parties to the agreement must have had such an intention"*

This was not shown to be the case in the instant case.

The other ground worth considering was that on inconsistencies. Counsel for the appellants submitted that PW1 and PW2 contradicted themselves on the places in which they met while setting the trap. That while PW1 stated that they met at Kampala Club, PW2 did not say they met at that place.

Furthermore that while prosecution witness said A4 was arrested at 1.00pm, the loggers are shown to have been still in use at 2.57pm and that while PW2 testified that the A4 was taken to Naguru Police Pos, PW4, 5 and 6 said it was at Makindye.

In reply counsel for the respondent submitted that these contradictions were minor and did not go to the root of the matter. While I agree with her that the contradictions on venue of meeting at Kampala Club and whether they took A4 to the Naguru or Makindye are minor. I certainly consider the contradiction in respect of the time the loggers were used most important and goes to the root of the matter.

Court says so because this whole offence revolves around the unlawful use of the loggers.

PW1 told court that she used to go with the loggers to the bank very early before the others arrived and secretly plant them on their computers.

But record on the retrieved information as exhibited shows that the earliest record was at 11.00am. Furthermore PW1 said that at the time they arrested A4, she had just given him the loggers and that it was 1.00pm.She said;

> *"So when I gave him the disks he agreed on payment and as we were still discussing he was arrested."*

The prosecution witnesses were agreed that the arrest took place at 1.00pm. PW1 said;

> *"We were arrested around 1pm."*

PW4 Obulejo Idro said;

> *"Namara kept his word and at 1.00pm, he was there and as he received the Key loggers from Aisha (PW1) he was arrested."*

He confirmed the hour during cross examination by counsel for A4. PW5 D/Sgt Mutiba Samuel one of the parties that effected the arrest said;

> *"I arrested Namara before 1.00pm between 11- 12 noon."*

While PW7 D/Assistant Inspector Orone David made it clear that around 1.00pm the loggers were in the hands of the police. He said;

> *"It was around 1300hrs when we recovered the key loggers from his pocket."*

From the foregoing, no other transaction beyond 1.00pm 23.03.11 should have been found on the loggers. Furthermore the only transactions between 7.03.11 and 23.003.11 at 1.00pm would be those concerning the complainant bank.

What was surprising; however is that there were transactions beyond 1.00pm on the date A4 was arrest. There were transactions at 2.57pm when the loggers were in possession of the police. That the loggers were still in operation at 2.57PM was confirmed by PW8 Inspector Ndabwoine Richard a police I.T specialist who, under cross examination stated;

"The machine stopped at 2.27. That is in my report pg 9,2nd line from the top."

This discrepancy in time was not minor as the respondent would want court to believe. Worse still it has not been explained away, thus rendering the loggers suspect which can only be resolved in favour of the appellants.

This court having found that there was no proof of meeting of minds of two or more of the appellants and that the movement of the loggers is questionable since it could not have been in possession of police at 1.00pm yet continuing to be used at the bank at 2.57pm, and this discrepancy remaining unexplained, its concluded that the appellants criticism of the trial court that it did not scrutinize the evidence in the case and by implication that, if it had done so would have rejected the prosecution's evidence and accepted the appellants' justified.

For the above reasons this court is of the view that the change against the appellants was not proved with the degree of certainty required and that they were in the evidence entitled to the benefit of doubt and to be acquitted.

The appeal is therefore allowed. The convictions are quashed and sentences set aside. It is so ordered.

David Wangutusi

Judge

7/27/2012