THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

(ANTI-CORRUPTION DIVISION)

HCT-00-AC-CN-0021/2012
(Arising from BDA-00-CR-CO-776/03)

ASP.LUYIMBAZI LEONARD AND 2 OTHERS:::::::::::::::::::: APPELLANTS

VERSUS

UGANDA:: RESPONDENT

J U D G M E N T

This appeal arises from the judgment and orders of the chief magistrate's court at Buganda Road, convicting and sentencing Opio Ben ASP and James Apodu ASP, here in after referred to as the appellants.

The background of the matter is that the appellants who were senior police officers heading Mityana police station deployed police officers for grand duties at UTL institutions and Mwera Tea Estates. These services were paid for and to facilitate the payments, the police opened a bank account named OC police Mityana. It is to this account that the users of police guard services would pay the sum of money. In others words the payee was OC police Mityana.

The payers duly obliged and drew cheques naming the drawee as "OC Police Mityana."

It would seem that none of the money ever reached the treasure or the 1GP as the demand notes made the Drawers of the cheques to believe. The appellants who operated the account also failed to account for the money received. Before court their argument was that such money was not government revenue.

The appellants were thus charged with several courts of Abuse of Office and Embezzlement. The Appellants were convicted and sentenced to prison terms ranging from one year to three years. Hence this appeal.

The appeal is grounded on the following;

1. The learned chief magistrate erred in law fact to hold that the payments received by the appellants was Government revenue whereas not.
2. The learned chief magistrate erred in law and fact to falter the appellants for having received money for a system that had been going for several years before even the appellants had been posted to Mityana Police Station.
3. The learned chief magistrate in law and fact after he had accepted and closed the prosecution case, invited and received some submissions of NO case to Answer and later accepted and reopened the prosecution case when there was already functus officio.
4. The learned chief magistrate erred in law and fact to hold and find the appellants had abused their offices and embezzled government funds when there was no evidence of a complainant and investigating officer in the case.
5. The learned chief magistrate erred in law and fact when he misdirected himself on the law regarding embezzlement there by coming to wrong conclusion that the prosecution had proved the case beyond reasonable doubt.
6. The learned chief magistrate erred in law and fact when he gave a sentence that was excessive in the circumstances.

Ground one.

On ground one, the learned counsel for the appellant submitted that since the money that was paid in by the users of police guard services was not revenue the learned chief magistrate erred to hold it as revenue. He submitted that since government was not running a guard business, “no money could be got form police because we are not trading in police work.”

With a lot of respect for counsel, this court does not accept that submission. The police is known all the time to raise money through fines and guard services. This

is not even a private arrangement as the appellants would want court to believe. It is a matter and procedure provided for under the Police Act.

Section 71 which prescribes “Employment of police officers on special duty at expense of private person”

Section 71(1) provides;

1. Any person may apply to the inspector general for a member of the force to be assigned to him or her on special duty.

Section 71(3) provides;

> “A police officer assigned on duty under subsection 2 shall be under the command of the officer in charge of police in the area to which she or he has been assigned on duty.”

Section 71(4) provides;

> “The person to whom a police officer is assigned under subsection (2) shall meet the cost of assignment.”

Section 71(5) provides for directions of where the money shall go as follows;

> “One third of any money collected under subsection (4) shall be paid into the Police Welfare Fund and the remainder into the consolidated fund.

From the foregoing it is wrong for counsel for the appellants to say there was no legal basis for the trial of the appellants. Communication from the OC station to the users of the guard service shows clearly that the appellants knew that the money received was not personal to them. This is clearly spelt out in letters from the appellants to Uganda Telecom and other users of the service.

In Exhibit P1 Luyimbazi in a letter dated 16th Oct 1998 demanded for what he headed as;

> “*RE: payment of Government revenue in respect police guards”*

He concluded the letter saying

> "*You are therefore requested to pay total government revenue shs. 2,184,000, for all that period to O/C Police Mityana for onward transmission to the inspector general of police.*"

In yet another demand note Exh P3 Apodu James wrote one headed

> "Re: Payment of government revenues"

He demanded for 2,460,000/=.

Opio Ben was the author of Ex. P4 also headed payment of government revenue.

All the letters were so clear as the money being government money, that one would find no difficulty in concluding that they did and acted the way they did well knowing that they were cushioned and acting under section 71 of the police Act.

For the foregoing reasons, the first ground of appeal must fail.

Ground Two

Counsel for the appellants attempted to justify the use of money by submitting that the practice of collecting money and use at source had gone in for a long time and that to prosecute only a few and leaving the others was a breach of the constitution as it discriminated against those prosecuted. While this court agrees that at times selective prosecution is dangerous, it is not reason to absolve those who were caught in the act however far even if there were hundreds others who might have committed the offence.

He also submitted that since the investigating officer did not testify, the trial was a nullity. Again here court differs. While it is always good to call the investigating officer to give evidence, failure to call him did not nullify the proceedings. In a case such as this one where the appellants did not deny receiving the money and failing to account for it, it was not necessary to call the investigating officer. I find no reason to fault the learned chief magistrate and ground two also fails.

Ground three.

In this ground three, learned counsel for the appellant had sought to fault the learned chief magistrate submitting that in allowing the prosecution to call further evidence when they had earlier closed was a breech because at that stage he was functus officio.

Functus Officio is Latin word literally meaning “having performed his or her duty.”

This would mean that a magistrate was left with no further authority or legal competence because his duties and functions of his jurisdiction had been fully accomplished.

In this case the learned chief magistrate would be functus officio after sentence and signature thereof.

As it is in the instant case the hearing was still on as only the prosecution had called evidence. The court could call or allow any of the parties to call further evidence as long as they would be available for cross-examination by the other party who did not summon him.

Counsel seems to have seen this position because he made no submissions about it. I find no reason to fault the procedure adopted by the court. In that regard ground three fails.

Ground four.

In this ground learned counsel criticized the Learned Trial Magistrate to having found the appellants guilty of embezzlement. He contended that since there was no “government revenue” and since there was no audit report, embezzlement had not been proved.

This court has however in dismissing ground one found that the money collected should have gone to the police Welfare fund in part and rest to the consolidated fund which it did not.

While there was no audit report, which is a serious omission, this case could still continue successfully for the prosecution because money had been received by the appellants onto the account which they operated single handedly.

The journey for the money ended with the appellant without any accountability.

The appellants were employed by the government and the money came into the possession by virtue of their positions. They had operated the account named o/c Mityana, spent and did not account. I find no reason to fault the learned chief magistrate in the circumstances in the circumstances ground four also fails.

Ground five also based on the same argument fails.

While addressing court on ground four and five, counsel for the appellants submitted that by the time the appellants were convicted and sentenced the law under which they had been charged had already been repealed and therefore any proceedings beyond the date of repeal was a nullity.

Counsel for the appellant, with respect, did not refer to the interpretation act which pronounces itself on action that was based on repeated legislation.

Section 13(2) provides as follows

> "Where any act repeals any other enactment. Then unless the contrary intention appears, the repeal shall not (13) (2) (e) affect any investigating legal proceeding or remedy in respect of any such right, priviledge, obligation, liability, penalty, forfeiture or punishment, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been posted."

The foregoing provision in my considered view saved the charges against the appellants from the Act that repealed them. The ground therefore fails.

Ground six

Counsel for the appellant had also raised the ground that the penalty meted out to the appellant was excessive.

Court record shows that the learned trial chief magistrate reached the sum he ordered each appellant to refund after careful mathematical review of how much was lost in the hands of each of them. I therefore found no reason to disturb his

findings. As for the custodial sentence the learned Chief Magistrate must have considered all that counsel submitted, and I find he was most lenient to have given the minimum three years to offenders who had sold and eaten off the sweat of junior police officers. I find no reason to disturb the sentences. The sixth ground also fails.

The sum total is that after treating the evidence as a whole to that fresh and exhaustive scrutiny as expected, it is my finding 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 prayers and accepted the appellants' instead, unjustified.

This court finds no ground to disturb the learned chief magistrate's findings which are well founded on evidence.

In the result this appeal fails and is dismissed.

……
HON.JUSTICE.MR.D.K.WANGUTUSI
JUDGE OF THE HIGH COURT

1/07/2013