

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO
CRIMINAL SESSION CASE NO.0063-2013
UGANDA:..... RESPONDENT**

VERSUS

KYASIMIRE FLORENCE & NAGAWA HASPHER:..... ACCUSED

BEFORE: HON.LADY JUSTICE MARGARET TIBULYA

J U D G M E N T

The accused were jointly indicted in two Counts of Embezzlement. In the first Count A1 (Kyasimire) was indicted with Embezzlement of assorted medical items items valued at 2,317,606/=, the property of Isingiro District Local Government.

In Count 2,A2(Nagawa) is indicted with Embezzlement of assorted medical items valued at 152,430/= also the property of Isingiro District Local Government. The brief facts of the case were that on the 13th/1/2012, PW2(Asiimwe Kifura) the District Internal Security Officer of Isingiro District,acting on information an anonymous caller intercepted A1 with a green bag. PW2 was with PW4 (CPL) Baturaine of Isingiro police station. They took A1 who was a health worker at Kikokwa health centre to Kaberebere police station. PW6 searched A1 and recovered assorted items including 5 white polythene sheets,5 pink polythene sheets a set of finid infusions,cotton wool,rolls of gauze, syringes, amoycyline cupsules which PW3 (Sam Kwesiga) verified and found them labelled "Government of Uganda".

According to PW3 the items found with A1 could not have been a first aid kit given the big quantity.

On the same day A1 was got with the items in a bag, her house was searched and more medical items including jik, coartem drugs, magnesium drugs and other assorted items were recovered.

On 14/1/12, following a tip off from an anonymous caller A2's house was searched and

two government mattresses and small quantities of drugs including 75 sachets of oral rehydratim salts,15 cycles of oral contraceptives,28 pieces of syringes were recovered. A1's house was searched the second time and two mattresses were recovered. All recovered items including four mattresses were exhibited in court.

PW5 (Jumba Ponsiano) worked with one Jerome Owagage for 3 years and knows his signature. PW7 exhibited a report that Owagage made in his case.

In the report Owagage showed the items got with the accused persons. He also showed the ownership of those items, the costing and value and quantity among other things.

In the report he commented on items where delivery notes had not been seen. According to PW7 this meant that the delivery notes were not availed to the investigating team, since all medicines delivered to the health centre are delivered against delivery notes and all drugs in a health centre belong to the Government of Uganda.

At the beginning of the trial the prosecution and the defence agreed that the accused persons were employees of Isingiro District Local Government. That fact is therefore taken as proved.

The only question to be answered is whether they stole the items in issue, the property of the Local Government.

Accused 1 (Kyasimire Florence)

PW2 (Kifura) and PW4 (Baturaine) testified that they got A1 with a bag which on being opened by PW6,was found to have assorted items including polythene sheets used to deliver by mothers,tablets,gauze,cotton wool which were found by PW3 an Inspector of Drugs to bear " Government of Uganda" lebel.

Other items including 325 Diprovera injectable vials,100 ampules of water for injection, a 5 litre and 6 litre container of jik,126 pairs of examination gloves,248 tablets of Septrin drugs a 500 tablet tin of Albendazole,24 bilster pack of coartem, half tin of paracetamol drugs, one tin of PNV tablets, magnesium tablets,2 packets of 20 stripes of Anti-acid

drugs and stripes of abdominal tablets, were all recovered from A1's house.

On 14th/1/12, two mattresses were recovered from her house.

It was PW2 and PW4's evidence that A1 was got with the bag containing medical items when she was travelling to Mbarara. She was intercepted when she was 300 metres from the Health Centre.

Theft

The Offence of Theft under S.254 (1) of the Penal Code Act is committed when one fraudulently dispossesses another of something that is capable of being stolen.

The evidence that A1 was got 300 meters away from the health centre and that she said she was going to her home in Mbarara was not controversial. Also not controverted was the evidence that the items got on her belonged to the Health Centre.

Considering the circumstances in which she was intercepted, there was what amounts of asputatim, i.e carrying away of the goods. There was no indication that there was consent from the owner of the goods. i.e to take the drugs by A1.

The items got in A1's house

Evidence was adduced that the staff quarters are separate from the Health Unit. Counsel for accused labored to show that these quarters are within the confines of the Health Unit and as such, the items got from the living quarters were still within the unit.

But it is clear from the evidence of PW3 and PW1 that the staff quarters were separate from the Health Unit PW1 said that they were 1½ kms apart. Moreover, PW3 testified that the Health Unit has store rooms for drugs for both expired and unexpired.

The defence Counsel also sought to argue that the drugs got with A1 were for first Aid purposes. This was rebutted by the evidence of PW3 that going by the quantities of the recovered drugs, they could not have been for first Aid purposes.

The fact that some of the drugs were expired came up. Given that there is a store for expired drugs should have been left and that expired drugs would ordinarily be useless to

the accused. So she must have removed them from the unit when still in consumable state and they expired after they were stolen. She cannot therefore use the fact that the drugs were expired when they were recovered as a defence.

Counsel also pointed to some contradictions in the State evidence, especially with regard to who participated in the search for the items.

However, given the fact that the items were recovered from the accused's house is not being contested. The question of who participated in the search and therefore the contradictions raised by that question is minor.

The Burden of standard and evidential burden

The burden of proof in the case is on the Prosecution and the standard of proof beyond reasonable doubt.

Okale Versus R(1965) E.A 55.

In criminal case the Prosecution discharges their evidential burden by adducing sufficient evidence to raise a prima facie case against the accused.

In this case, the Prosecution evidence showed that A1 carried the drugs from the Health Centre. First of all to where she was intercepted from on 13/1/12. Secondly that she carried the drugs and mattresses that were recovered from her house, from the health centre.

It is the law that the least removal of goods from the place where they were is sufficient – see Sula Kassika Versus Uganda C/Appeal 20/1993

The lady and gentleman assessor advised me to convict A1 for the Embezzlement of all other items other than the mattresses. They based on the fact that she was intercepted with the drugs and that the quantity of the drugs could not be said to have been intended for first Aid. They advised me to acquit A1 of Embezzlement of the mattresses on the ground that since the Government label had not been removed A1 had no intent to permanently deprive the Government of the mattresses.

I agree with the reasoning in respect to the drugs but disagree with the assessors on the issue of the mattresses. First of all, even the drugs for which I was advised to convict still bore the Government label. The non-removal of the labels cannot therefore be an indicator of good intent.

In my view the fact that the mattresses were got in the accused's house which according to the evidence of PW1 could not be used as a treatment room, since emergency cases were attended to at the Health Centre, is sufficient to show that she intended to steal these mattresses.

The Prosecution has sufficiently discharged both the burden of proof and the evidential burden in respect to A1.

For A2;

The evidence that two mattresses, contraceptives, oral rehydration salts and syringes were recovered from her house was not challenged.

I have already dealt with the issue of contradictions in evidence and my response with regard to A1 is valid in equal measure with regard to A2.

She also moved the items from the Health Centre to her house, which was not a treatment room. The assessors advised me to acquit her on the basis that the quantity of drugs was small and could have been for first Aid.

The evidence by PW5 was that though the 75 sachets of oral rehydration salts could be of small value still that quantity cannot be used for first Aid. Also that mattresses were bought for use by patients at the Health Centre not to be kept at staff houses.

I agree with that reasoning and conclude that even from A2 the State has discharged its duty. I disagree with the assessors for reasons I have given.

There is sufficient evidence to ground a conviction for Embezzlement. I therefore convict each of the accused persons of Embezzlement C/S 19(a) of the Anti-Corruption Act.

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HON.LADY JUSTICE MARGARET TIBULYA
JUDGE OF THE HIGH COURT

11th/11/2013

SENTENCE

I considered all that was said both in mitigation and aggravation of sentence. I took particular note of the State submission that the conduct of the accused persons deprived of the local communities of access to medical care even when the Government endeavored to provide it.

I have however noted the relative advanced age of each accused person and the value of the subject matter for each and the fact that they are on remand, I sentence each as follows;

A1 is sentenced to a fine of 1,000,000/= or 1 years imprisonment in default.

A2 is sentenced to a fine of 500,000/= or 8 months imprisonment in default.

ORDER:

1. The expired drugs be destroyed.

2. The unexpired drugs and medical items be returned to Kikokwa Health Centre III to be used for treatment of the local community. Right of Appeal is explained.

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HON.LADY.JUSTICE.MARGARET TIBULYA
JUDGE OF THE HIGH COURT

25th/11/2013