<u>THE REPUBLIC OF UGANDA</u>

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

CRIMINAL SESSION

CASE NO. 0054 OF 2012

UGANDA (DPP) ::: PROSECUTOR

VERSUS

1. HUDSON JACKSON ANDRUA

2. ANGOL MICHAEL :: ACCUSED

BEFORE: <u>THE HON. JUSTICE DAVID WANGUTUSI</u>

<u>J U D G M E N T</u>:

The two accused Jackson Andrua and Angol Michael stand charged with abuse of office contrary to Section 11(1) of the Anti-Corruption Act 2009.

The particulars being that the two accused, between the month of September, 2010 and May 2011 at the National Forestry Authority (NFA) Headquarters in Kampala, being employed by National Forest Authority as Acting Executive Director and board member respectively, in abuse of authority of then offices did an arbitrary act prejudicial to the interest of their employer, the said National Forest Authority, to wit prepared and approval a grant of a licence to Midland Holdings for use so Hectares of land in Namanve Central Forest Reserve, without the Board approval and or following the Procurement laws, Regulations, Procedures and Requirements.

The background to this charge is fairly simple and straight forward.

On the 12th September, 2010, Midland Holdings through its Managing Director Jim W. Opolot wrote to the Executive Director of National Forestry Authority (NFA) a letter seeking 200 Acres of land in Kirinya which would be swapped with its 100 Hectares. Opolot wrote in part;

> *"The purpose of this letter is to inform you that we have 100 Hectares of land planted with very high quality trees located in Nalya, Nansese, Bujuuko Mpigi District and to request you to allocate MOW & E land to us through a land swap!*

It explained that it intended to decongest Kampala and create employment by building a satellite city. This letter, Exh. P.3 was copied to the Minister of Water and Environment Maria Mutagambwa PW5.

On the 9th November 2010, the Executive Director A1 wrote to PW5 and advised against the land swap, Exh. P.4. He instead proposed a partnership arrangement between Midland and NFA because it would promote the implementation of the Uganda Forest Policy objective of urban forestry.
He wrote;

> *"There is increasing pressure to degazette the whole of Namanve CFR. However, the CFR land and its use can be changed too while still maintaining a status as a peri-urban and urban forestry managed under a partnership arrangement with the private sector. This will be a new source of generating revenue to NFA i.e. from commercial activities."*

He advised that the land could be allocated to Midland Holdings under a management contract with NFA.

In this same letter, he hastened to add, that there were difficulties of what he purposed.

He wrote;

> *"However, recognizing that H.E the President's ban an land allocation/licensing in CFRs is still effective, the executive authorization needs to be secured."*

On the 18th November 2010, PW5 wrote to the chairperson National Forest Authority, Exh. P.5 and laid down the grounds upon which Midland Holdings application would be considered.

She emphasized that it was a swap and not a sale. She directed that the land offered by Midland Holdings in Bujuko be verified. While the Minister PW5 insisted on a swap, A1 instead on the following day, 19th November 2010 wrote to MD Midland Holdings and informed them, and I suppose rightly to that;

> *"The land swap would not be in accordance with Section 8 of the National Forest Act 2003. Therefore it is not possible to degazzette part of Namanve CFR for your proposed project."*

He advised that NFA however, intended to instead offer Midland 40 Hectares under a management contract with NFA along eco-tourism business development approach.

He warned Midland Holdings that this approach would require authorization from the Minister and H.E the President since land allocation/licensing in CFRs was halted by a Presidential directive of August 2008 which was still effective.

On 20th December 2010, A1, put the last nail in the swap coffin, when he revealed that Midland in any case had no land in Bujjuko. He said in a letter to chairperson of Board of Director, NFA; Exh. P.7.

> *"I wish to report that management verified the land in Bujjuko and established that it covers 19 hectares and it is part of Lwamunda CFR."*

This last revelation is particularly important because it brings out the character of Midland Holdings. It also meant that the original basis of swap was not in existence.

On the 18th January 2011, A1 again wrote to the Minister PW5 and informed her that Midland was found to have no land in Bujjuko and so the swap would not take place.
He advised that the partnership he had mooted earlier could still take place.

On 24th January 2011, the Minister PW5 wrote to A1 authorizing him to proceed and finalize the allocation to Midland Holdings Uganda Ltd. She however, added

"The board should support your action."

A1 must have then made a draft agreement because on the 23rd Mary 2011 he called PW1 to go and look at it. PW1 who was busy at a workshop asked A2 to go and look at the document.

On the 24th May 2011, A2 informed PW1 that the License Agreement had been signed.
PW1 then wrote a letter to A1 asking him to differ what had already been signed.
The other board members were aggrieved by the signing.
Matters reached police and the board members were summoned to the police where at they denied involvement. The police suspecting that A1 and A2 had signed the document without NFA Board and Solicitor General's approval charged the two with abuse of office.

To prove its case, the prosecution called five (5) witnesses namely; PW1 Prof. Buyinza, PW2 Sheila Kawemara a board member of NFA. PW3 Ponsiano Besese, board member NFA. PW4 Apio Grace a police officer and PW5 Maria Mutagambwa the then Honourable Minister of Water and Environment..

The accused persons called one witness

Section 11(1) of the Anti-Corruption Act with which they are charged provides;

> *"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 interest 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 (7) years or nine (9) fine not exceeding one hundred and sixty eight currency points or both."*

From the foregoing that prosecution has to prove beyond reasonable doubt, the following

(a) That the accused was employed in a public body or a company in which the government has shares.

(b) That the accused did or directed to be done an arbitrary act.

(c) That the act was done in abuse of authority of his office.

(d) That the arbitrary act was prejudicial to the interests of his or her employer or any other person.

It is necessary at this point to say that arbitrary, means

> *"An action, decision or rule not seemingly to be based on reason, system or plan and at times seems unfair or break the law."* **Uganda V Atugonza ACD CR CS 37 of 2010**, **Uganda V Kazinda ACD CR SC 138 of 2012.**

The issue as to the status of employment posed no difficulty. First accused was the acting Executing Director and the second accused was a member of the board of

National Forest Authority both positions that the defence did not dispute. Their appointment letters Exh. P1 and P.2 were tendered and accepted without contention.

A public officer was well described by **Lord Mansfield in R Vs Bembridge** (1783) 3 **Dong K. B.** 32 as a person;

> *"having an office of trust, concerning the public, especially if attended with profit by whoever and in whatever way the officer is appointed."*

He is therefore,

> *"a public office holder who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of fund provided by the public"*

R Vs Whitaker (1914) KB 1283.

Furthermore, DW3 Milly Kiwanuka, a Senior Personal Assistant to the Executive Director identified them and testified to the effect that A1 was the Executive Director and A2 a member of the Board of National Forest Authority respectively. They were therefore public officers.

As for National Forest Authority there is no doubt that it is a public body belonging to government. The prosecution has therefore discharged ii burden of proof in respect of the first ingredient,

Turning to the second ingredient, the prosecution must prove beyond reasonable doubt that the two accused did or directed to be done an arbitrary act.

As provided out earlier, an arbitrary act, is;

> *"an action, decision or rule not seeming to be based on reason, system, or plan and at times seems unfair or breaks the law."*

This arbitrary act or omission must be done willfully. Willful in this case is;

> *"deliberately doing something which is wrong knowing it to be wrong or with wreck less indifference as to whether it is wrong or not."*

It includes doing things based on individual discretion rather than going by fixed rules, procedure or law.

The prosecution case is that the two accused being public officers of National Forest Authority negotiated, entered and signed an agreement with Midland Holdings without the necessary approval.

The prosecution has referred to two types of approval, first approval of the board, secondly approval of the Solicitor General.

First, it is not in doubt, as evidenced by the various correspondences that were exhibited, that Midland Holdings applied for land.

It is also not in dispute that the two accused signed an agreement with Midland Holdings.

In their defence, the two accused told court that they did the signing with the approval of the chairman and with the knowledge of all other members. PW1 denied ever sanctioning the signing and so did PW2 and PW3 who were also board members. The story of PW1, PW2 and PW3 is supported by the fact that if the board had sat and approved, there would have been a minute to that effect.

Since the first accused was the custodian of those minutes, the duty lay on him to produce them avarest or later. In the absence of such a minute signifying the approval, I find that the board never approved the signing of the agreement.

Counsel for the accused also submitted that in any case the approval was not required. In this he relied on the National Forest and Tree Planting Act. He specifically relied on Section 53 (2) which provided

> "The official seal shall, when affixed to any document be authenticated by the signatures of the Executive Director and one other member of the Board."

Counsel submitted that the approval was not mentioned. He further cited Section 53 (4) which I reproduce here under;

> *"An instrument or contract which if executed or entered into by a person other than a body corporate would not require to be under seal may be executed or entered into on behalf of the Authority by the Executive Director, or by any member of the Board or any other person if that member of the board or other person has been duly authorized by resolution of the Board to execute or enter into the instrument or contract as the case may be."*

Counsel then submitted that since Midland Holdings was a body corporate, a resolution of the Board would not be required. To go by the submissions of counsel, would be to render the board toothless.

The answer in my view lies in the functions of the board as provided for in the Act.

These powers are found in Section 60 National Forest Authority which outlines its function. The relevant provision provide 60 (1)

"The Board is responsible for the General direction and supervision of the Authority."

Further in 60 (2) it provides

a) without prejudice to the generality of subsection (1) the board shall

b) oversee the operations of the Authority

c) provide guidance to the Executive Director and staff of the Authority.

In other words and in light of Section 66 (3) which commands that in the performance of his functions, he will be answerable to the Board, it is not right for Counsel to contend that the Boards approval was not necessary. Its approval was even made more necessary by Exh. P11 written by PW5 who was then the responsible Minister when she directed the first accused to first obtain the Boards approval before allocating any land to Midland Holdings.

There was yet the issue of whether the accused persons did not require the approval of the Attorney General before signing the agreement.
The answer to this question is found in the Constitution Article 119(4) section 29 of the Interpretation Act

a) To give legal advice and legal services to the Government on any subject

b) To draw and peruse agreements, contracts, treaties, conventions and documents by whatever name called, to which the Government is a party or in respect of which the Government has an interest.

Then it restricts the signing as in Act 119 (5) which provides;

> *"Subject to the provisions of this Constitution, no agreement, contract, treaty, convention or document by whatever name called, to which the Government is a party or in respect of which the Government has an interest, shall be concluded without legal advice from the Attorney General, except in such cases and subject to such conditions as Parliament may by law prescribe."*

The law is such that Article 119 (6) empowered the Attorney General himself to exempt any particular agreement or contract none of the parties to which is a foreign government or its agency or an international organization from the application of that clause.

This function of the Attorney General was paved on to the Solicitor General by Section 29 of the Interpretation Act which states;

> *"Any power conferred or duty imposed on the Attorney General by or under any Act may be exercised or performed by the Solicitor General*
>
> *a) In any case where the Attorney General is unable to act owing to illness or absence; and*
>
> *b) In any case or class of cases where the Attorney General has authorized the Solicitor General to do so."*

So agreements that required approval would receive it from the Solicitor General.

Statutory Instrument 10 of 1999 referred to as The Constitutional (Exemption of Particular Contracts from Attorney General's Legal Advice) Instrument, provides for the exemptions of certain contracts from need for legal advice of the Attorney General.

2(1) thereof provides that

> *"An agreement or contract involving an amount of fifty million shillings (50 m) or less is exempted from application of Article 119 (5) of the Constitution."*

The contract that the two accused and Midlands signed was 800 million (Uganda Shillings eight hundred million), which was much beyond the exemption in 2(1) of S. I 10/99.

The need for approval of the Solicitor General being a Constitutional requirement was mandatory and where any other law conflicted with Article 119, this Article would override it to the extent of the inconsistency.

Seeking approval was therefore a must not doing so amounted to breaking the law.

In reaching this finding, I am fortified by the Constitutional Court decision in **Nsimbe Holdings Ltd V The Attorney General and Inspector General of Government Constitutional Petition No. 2/2006** where in the court held;

> "Any contract, agreement, treaty, convention or document by whatever name called to which government is a party shall not be concluded without the legal advice from the Attorney General and its therefore unconstitutional to proceed without the legal advice of the Attorney General."

Refusing to seek the Board's approval and that of the Solicitor General, was not only breaking the law, but it amounted to a misuse, mishandling and misapplication of the authority the two accused had. Breaking the law which was done willfully and intentionally was an arbitrary act.

The action led the Authority into signing a bogus contract, that could have exposed it to legal action by those who had been led into thinking an everlasting agreement was being signed.

The opinion that Midland Holdings must have formed on National Forest Authority could not have been positive. The resultant arrest, changing and extracting extra judicial statements from Board members of the Authority was most prejudicial to the interest of the Board members and the Authority. The accused had no justifiable reason for acting the way they did. They did it willfully and intentionally. They acted with recklessness and indifference the sum total of which can only be concluded as Abuse of office.

The lady assessor advised the court to convict both accused persons. Because of the reasons I have given above, I fully agree with her.

Evidence having shown that each of the accused played a part in the commission of the crime, and the prosecution having proved beyond reasonable doubt the charge of Abuse of office contrary to Section 11 (1) and (2) of the Anti-Corruption Act 2009 against each of the accused, I find the first accused Hudson Jackson Andrua guilty and he is accordingly convicted as charged.

In the same vein, I find the second accused Angol Michael guilty and convict him as charged.

…………………………….

David K. Wangutusi

JUDGE

Date: …7/02/2014……………………

SENTENCING

That having been said the two convicts are all of advanced age which brings into play direction 9(4) of the Constitution Sentencing Guidelines for Courts of Judicature Practice Directions Legal Notice No.8/2013 which provides that the Court be not sentence an offender to a custodial sentence, where the offender is of advanced age. The word may in the direction adones the Court with discretion. In this case the gravity of the offence and its prevalence should be considered.

From our statistics at the Anti-Corruption Court it is seen that the offence of Abuse of Office is committed with impunity. As the Acting Executive Director, the first convict was a custodian of the country's forest cover and land, he was therefore in a position of trust, and this trust was breached by him. The manner, in which he committed the offence by leading the Board to think nothing would happen without their approval, and especially after the Minister had directed him to seek the Boards approval, cannot be ignored in this sentencing.

This act was prejudicial to his employer the Government of Uganda and its people, it was committed with premeditation and with the deliberate attempt to avoid the necessary statutory approval. These are matters that call for a prison term.

The second convict was a member of the board which he knew operated as a team, he abused the trust the other members had in him when he and the first convict deliberately breached policy, the Constitution and the Ministers clear instructions to seek approval. Abuse of Office carries a maximum prison term of 7 years.

Considering 3 and a half years as the starting point and finding that mitigating factors namely advanced age, no monetary loss to the Government, the big number of dependants outweigh the aggravating factors, I would reduce and fall below 3 and a half years and find as follows;

Because the first convict Hudson Andrua was in a managerial position and should have known better, he will be sentenced to 3 years in prison.

As for A2 he is sentenced to 2 and half years in prison.

You have a right of appeal within 14 days.

………………………………..

HON.JUSTICE.DAVID.K.WANGUTUSI

JUDGE OF THE HIGH COURT