

MUGIZI LEONARD ::::::::::::::::::::APPELLANT

VERSUS

UGANDA :::::::::::::::::::: RESPONDENT

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(4) The learned trial Chief Magistrate erred in law and fact when she seemed to disregard evidence of malice by PW3 the complainant, having held that he did not come to court with clean hands.

(5) The learned trial Chief Magistrate failed to draw and adverse inference that the failure to call Enock Kaboyo as a witness and the failure to produce the finger print report were fatal to the prosecution's case.

The appellant prays that the appeal be allowed, the conviction be quashed and the sentence be set aside.

The appellant is represented by M/S Richard Mwebembezi Solicitors and Advocates who will hereinafter be referred to as Counsel for the Appellant and the Respondent is represented by Golooba Rodney who will hereinafter be referred to as counsel for the Respondent. Both Counsel filed in written submissions.

BACKGROUND

The appellant was charged with the offence of Corruption C/S 2(a) and 26(I) of the Anti-Corruption Act, 2009.

It was alleged that the appellant on 4th September 2009, at little Liz restaurant UMA show ground in Kampala district, being a public officer employed by URA as auditor, corruptly solicited and received a gratification of shs500,000/= as an inducement that he was going to assist Mr Kagwa Steven to reduce tax liabilities for his company Interspea (U)Ltd.

The appellant denied the offence and the prosecution called eight witnesses to prove their case. The appellant gave unsworn testimony and denied the offence. He never called any witness.

The trial court found the appellant guilty of the offence of Corruption to wit Soliciting and receiving a bribe Contrary to Section 2(a) and 26(1) of the Anti Corruption Act, 2009 and convicted him accordingly. The appellant was then sentenced to a fine of 240 currency points or in default imprisonment for 4 years.

It is the conviction and sentence that the appellant is appealing against.

DUTY OF 1ST APPELLATE COURT

It is the duty of the 1st appellate court to appreciate the evidence adduced in the trial court and the power to do so is as wide as that of the trial court. Where the trial court had resorted to perverse application of the principles of evidence or show lack of appreciation of the principles

of evidence, the appellate court may re-appreciate the evidence and reach its own conclusion- ***Pandya Vs Republic***[1957] EA 336, ***Kifamunte Henry Vs Uganda Criminal Appeal No.10 of 1997*** Page 5(Supreme Court).

The appellate court should give proper weight and consideration to such matters as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of doubt and the slowness of an appellate court in disturbing the finding of fact arrived at by the trial court which had the advantage of observing the witnesses – ***Okeno Vs Republic*** [1972] EA 32, ***Anim Vs Republic*** [2006] 2 EA 10 .

The appellate court should also be always mindful that the onus to prove the case against the accused beyond reasonable doubt lies on the prosecution and in event of any doubt, that doubt ought to be resolved in favour of the accused.

RESOLUTION

GROUND 1:- The learned trial Chief Magistrate erred in law and fact when she held that once there is proof of receiving a bribe, the Solicitation for the same is subsumed and proved by the prosecution.

It was submitted for the appellant that Solicitation of a bribe is an offence under S.2 of the Anti-Corruption Act and the said offence stands on its own. That it cannot be subsumed because of an alleged receiving. That the prosecution had failed to prove at all Solicitation of the bribe and the court should have held that solicitation was not proved beyond reasonable doubt. Counsel for the appellant cited the case of ***Uganda Vs Nandaula AC SC 25 of 2012*** to support this submission.

It was further submitted for the appellant on this ground that the prosecution did not at all adduce evidence of the appellant calling the complainant in respect of the said Solicitation .That no phone print outs were ever tendered in court to show how the appellant had called the complainant asking for a bribe but that on the contrary it was shown that it was instead the complainant who had called the accused several times trying to lure him into a trap organized with one Kasakya. That the trial magistrate should have in the same vein rejected the allegation of soliciting a bribe of shs 80,000,000/= (eighty million shillings) for failure by the prosecution to call one Enock Kaboyo who is alleged to have been told of the said demand by the appellant.

It was also submitted for the appellant on this issue that the trial magistrate had erred in holding that the said Solicitation was subsumed in receiving and that these were separate offences which have to be proved individually.

It was submitted for the respondent that under S 2(a) of the Anti Corruption Act an offence of corruption is committed if a person being a public officer carries out either an act of Solicitation or an act of acceptance whether directly or indirectly .It was also submitted for the respondent that in the case of ***Uganda Vs Muwonge Emmanuel Cr. Case No.738 of 2009*** it was held by Justice J.B.A Katutsi that Soliciting and Receiving as can be seen in section 2(a) of the Anti – Corruption Act are in the alternative and that once there is a receiving, then Soliciting is subsumed in the act of receiving .

That the prosecution was able to prove that the complainant was in touch with the appellant and that the two parties eventually met at Little Liz Restaurant where according to the complainant's evidence he gave the appellant shs 500,000/=. That this evidence was corroborated by PW5 Mr Ssempijja Joseph who was with him at Little Liz restaurant. That the appellant did not deny meeting the complainant at the said Little Liz and that PW6 Inspector Agnes Nabwire testified to the effect that a trap had been set to arrest the appellant with 50,000/= notes amounting to 500,000/= .Further that this evidence was corroborated by Alex Andehuni who was a security guard who saw the Appellant throw 50,000/= notes. That the appellant in his defence admitted to all events leading to his arrest save for failing to remember the fact where he received the money. That hence the appellant, who was a public official accepted directly the said money in exchange for an act or omission in the performance of his duties in relation to the complainant's tax affairs. That the appellant could therefore not deny having received 500,000/= in the presence of evidence matching the money received at the scene of crime to the money that had been recorded. That as such, once receiving is proved, then the prosecution need not prove Solicitation for the charge to stick.

It was further submitted for the Respondent that the failure to produce Enock Kaboyo as a witness and failure to produce the finger print report were not fatal to the prosecution's case. That the ingredients of the offence included proving that the appellant was a public official, that he engaged in an act Soliciting or receiving gratification for an act or omission in the course of his duties, but that how the appellant received the money was inconsequential for as long as it

could be proved that the appellant received. S.2 (a) of the Anti Corruption Act 2009 provides that:

“A person commits the offence of corruption if he or she does any of the following acts-

(a) The Solicitation or acceptance, directly or indirectly, by a public official, of any goods of monetary value, or benefits, such as a gift, favour, promise, advantage or any other form of gratification for himself or herself or for another person or entity in exchange for any act or omission in the performance of his or her public functions”;

It is therefore inconsequential whether one Solicited for or accepted any goods of monetary value or any other form of gratification for himself or herself in exchange for an act or omission in the performance of his or her public functions.

The prosecution does not need to prove Solicitation or acceptance jointly to prove the ingredients of this offence. One of those ingredients can stand alone and I respectively disagree with the holding in *Uganda Vs Muwonge Cr, case No.738 of 2009* that once there is receiving, then Soliciting is subsumed in the act of receiving.

To subsume is to include something under a large classification or group. The two words Soliciting and accepting or receiving have distinct meanings and therefore one of those words cannot be subsumed in another. But as I had stated earlier it is inconsequential how one receives a gratification as a public official to perform his or her public functions, whether it was due to Solicitation or without, the consequence is the same.

In this case it is not in dispute that the appellant was a public official. It is a fact he acknowledges in his defence having stated that he was an employee of Uganda Revenue Authority and that at the timer of his arrest he was still employed there. PW1 Joyce Kaweesa Kikulwe the Human Resource Officer at the URA also confirmed this fact. This ingredient was therefore proved beyond reasonable doubt.

The evidence of Solicitation was adduced by PW3 Kaggwa Steven who testified that the appellant had Solicited for shs 80,000,000/= from him for a favourable tax assessment. PW5 Joesph Sempijja testified that he witnessed PW3 paying the appellant shs 500,000/=.

PW6 D/W/Inspector Nabwire Agnes attached to CID testified how she gave the trap money to PW3. She also witnessed the meeting of PW3 and the Appellant. She also identified the car the

Appellant was driving which was Registration number UAH 550N. She also witnessed the appellant throw the money when he was chased by one Ogema and Oburu. This incident was also witnessed by PW4 Andehuni Alex a security guard who was then deployed at UMA and testified that he saw the driver of car Reg. No.UAH 550N throw money which was in 50,000/= notes. PW8 Ogema Tanga a police officer seconded to URA also testified how a case of Solicitation for a bribe was reported to URA by PW3 and how he organized for the trap money and how he was involved in the arrest of the appellant. This was the summary of the prosecution's evidence against the appellant. In his defence the appellant acknowledges having met PW3 and PW5 at Little Liz Restaurant on 4th September 2009 and that PW3 showed him a letter which was a reminder for him to pay tax. The appellant also acknowledges how he was then arrested on allegations of receiving a bribe. The appellant stated in his defence that the bribery allegations were purely malicious as the company of PW3 had defaulted in paying taxes and when he discovered the tax evasion PW3 wanted to revenge on him. He denied having asked for a bribe from PW3 and had nothing to do with his tax assessment after the case was handed over to management.

The trial Chief Magistrate believed the prosecution's version and disbelieved the accused's defence. The trial Magistrate was faulted for accepting evidence of Solicitation when it was not proved beyond reasonable doubt. However in her Judgment, the trial magistrate relied on the evidence of PW3 (the complainant) as proof of Solicitation. According to his evidence the appellant had demanded for shs 80,000,000/= (eighty million shilling) for a favourable tax assessment of 121 million. Initially according to this witness, his company had been assessed by the appellant to owe about 1.2 billion.

The trial magistrate found evidence of receiving shs 500,000/= by the appellant in the testimony of PW3, PW5, PW6 and PW8. PW3 reported to the agency the appellant was working with. Those who were involved in setting the trap were detectives attached to the institution the appellant worked with. These were PW6 and PW8. So if the appellant claims in his defence that these changes were framed by PW3 (the complainant) because of the tax assessment he had imposed, what can he say of PW6 and PW8 who were attached to his place of work and who witnessed the incident of him receiving the money? What motivation or collusion would PW3 have especially with PW6 and PW8? Both PW6 and PW8 witnessed the appellant throw out the money when they gave a chase. Isn't this action an inference of guilt? PW4 who was a gate keeper corroborated the version of PW6 and PW8 that the driver of car Reg. No.UAH 550N

which the appellant had was seen throwing 50,000/= notes and he had been asked to close the gate. There was therefore enough corroboration of PW3's version on what transpired on that day between him and the appellant. Their evidence was cogent since it was consistent. The appellant himself admits being at the scene of crime that time. Evidence of Solicitation can further be inferred when PW3 reported to the appellant's place of work and a trap was set. PW3 must have been convinced that the appellant would accept the money since he had asked for it in the first place. He knew the appellant would have the motivation to meet him since he was expecting a gratification from him. PW3 set a trap which he knew the appellant would fall in and hence his version of events is believable. If PW3 was set out to avenge or revenge as the appellant would want this court to believe, I would imagine that he would go out to get the likes of Nixon Twebaze and author of Exhibit P.1 who had written to him demanding for the tax arrears. The evidence of PW3 on the ingredient of Solicitation was not hearsay as he testified himself to the effect that the appellant had demanded that he pays 80,000,000/= as gratification (see page 20 of the proceedings) where PW3 states that "the truth is that when I met the accused he asked for 80,000,000/=". PW3 also states this fact in his statement to police as indicated in Exhibit D6A. So evidence of Solicitation was not hearsay. S.133 of the Evidence Act provides that;

"Subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for proof of any fact".

What is important is whether the court believes in the truthfulness of the witness.

On concluding this ground much as I agree that evidence of Solicitation cannot be subsumed in that of accepting or receiving within S.2 (a) of the Anti Corruption Act, there was evidence both direct and indirect that the appellant actually solicited for the gratification. The reasons given as proof for Solicitation by the trial magistrate may not be correct but the substance that the ingredient of Solicitation was proved stands. This ground of appeal therefore fails.

GROUND 2: The Chief Magistrate failed to properly evaluate the evidence on record and came to a wrong conclusion that all the ingredients of receiving a bribe were proved beyond reasonable doubt.

It was submitted for the appellant that the evidence of receiving a bribe was contradictory and inconsistent and the trial magistrate should have rejected the same. That the evidence of the witness who saw PW3 handing over money to the appellant was that of PW5 Joseph Ssempijja his friend and that the two contradicted each other on the way the money was allegedly handed

over to the appellant. Further that PW3 had testified that he had handed over the money to the appellant in the presence of the police but that none of the police officers testified to that effect. It was further submitted for the appellant that though finger prints were taken from the appellant as per the evidence of PW6, no report from the finger prints expert was tendered in court. Counsel for the appellant also faulted the money exhibits that were tendered as one note did not reflect what was recorded on the exhibit slip. That the chain of movement of exhibits was broken. Counsel for the appellant cited the case of ***Uganda Vs Mugisha Gregory Cr Case No.150 of 2010*** where it was held that it is the duty of every police officer to meticulously and jealously store exhibits.

The officer should watch over the exhibits the way a mother hen watches over her young ones. That the movement of an exhibit has to be recorded.

On this ground it was submitted for the Respondent that the evidence of PW3 that he gave 500,000/= to the appellant was corroborated by PW5 who was with PW3 and the appellant at Little Liz Restaurant. More evidence was adduced by PW4, the security guard who saw the appellant throw 50,000 notes. That the money exhibits were tendered in court.

That it was not fatal for the prosecution to fail to produce the said Kaboyo and the finger print report. That all the prosecution had to prove was Solicitation or receiving of any sort of gratification by the appellant and the question remained that if the matters of PW3 were out of the appellant's hands, why was he still meeting the complainant?

I agree that there were some inconsistencies in the versions of PW3, PW5, PW6 and PW8 on how the appellant received the gratification of 500,000/=. What they however all agree on is that the appellant received gratification of 500,000/= from PW3. This exercise was conducted by PW6 and PW8 who were police officers attached to the institution the appellant was working for. I do not find any ill motive or malice on their part to frame the appellant. If anything one would expect that they would be more sympathetic to the appellant than to PW3 who had tax issues. As I had stated earlier they could not have colluded with PW3 to frame the appellant. As to the inconsistencies in the version as to how the appellant received the money, it is only natural that when several people witness the same event, they will narrate it differently if one is asked to narrate his or her version of the same incident. We cannot expect them to say exactly what the other said. What was of essence is whether the appellant received money from PW3 as

gratification. Evidence led by all the said prosecution witnesses confirmed that the appellant indeed received the said money, the money was a trap that was laid for the appellant. The appellant was seen throwing money from his car and the money was exhibited. I agree with the findings of the trial magistrate that the inconsistencies with regard to the version on how the appellant received the money were minor and did not go to the root of the matter. For example on the serial number of the notes exhibited there was a discrepancy in only one letter of the notes which instead of reflecting O reflected G or Q. Unfortunately much as the submissions refer to the record of appeal which reflects this anomaly on page 53A the record I have does not have page 53A. In any case it is now settled law that the investigator's shortcomings should not prejudice the Justice of the case- ***Mbazira Siragi & Baguma Henry Vs Uganda Criminal Appeal No.70 of 2004*** (Supreme Court).

In this case the omission of the investigating officer to reflect one accurate letter on the exhibit slip should not affect the Justice of the case. The other notes were accurate and the error in the last note should not make the entire money notes exhibits inadmissible. The error is minor.

The prosecution was also faulted for not calling Enock Kaboyo and failure to tender in the expert's report on the fingerprints. Failure to tender in evidence of finger prints is not fatal to evidence of proving the ingredient of receiving. The case cited of ***Uganda Vs Muwonge Emmanuel Criminal case No.738 of 2009***, only held that such evidence would only put the matter to rest. The decision did not disregard other forms of obtaining evidence. The technology of proving finger prints is a recent innovation, would one therefore say that before the said invention one could not prove such an offence? I do not think so. As long as other evidence can be obtained like it was done in this case. It is not mandatory that an expert report on finger prints much as it would have been desirable to put the matter to rest is fatal to such a case if not produced. As to the failure to call the said Enock Kaboyo, the prosecution had discretion on whom to call as a witness. There was direct evidence on Solicitation and receipt of gratification of money by the appellant. I do not see why the appellant thinks the said Enock Kaboyo would have given adverse evidence. The accused was at liberty to call the said Kaboyo as a witness to prove how adverse his evidence would have been to the prosecution. The prosecution does not have to call several people to prove a fact. As earlier cited, S.133 of the Evidence Act provides that no number of witnesses shall in any case be required for proof of any fact. The prosecution

in their discretion chose to call the witnesses who would prove the fact that the said Enock Kaboyo would testify to.

On this ground, I find that the trial magistrate properly evaluated the evidence on record and came to the right conclusion on the ingredient of the offence of receiving a bribe by the appellant. Much as the appellant claims the matter was out of his hands, the evidence reveals that he had reduced the tax obligations of PW3 from 1.2 billion which he initially indicated, to 121million. The appellant had played his role and the rest was for management to merely implement his recommendations. That was the consideration for the gratification.

This ground of appeal therefore fails.

GROUND 3: Whether the Chief Magistrate erred when she held that the contradictions in the prosecution's case were minor.

I have already held on this ground that the contradictions of the prosecution evidence especially with regard to the events that led to the arrest of the appellant and the inconsistency in the serial number of one of the bank notes were minor and did not go to the root of this case.

This ground therefore also fails.

GROUND 4: Whether the Chief Magistrate erred when she disregarded the evidence of malice.

It was submitted on this ground for the Appellant that the trial magistrate having held that PW3 did not come to court with clean hands still went ahead to disregard the evidence of malice. That the complainant was malicious because of his intentions to continue benefiting from tax evasions and thus not affecting profits in his business.

It was submitted for the Respondent that the only logical explanation of the appellant agreeing to pay more taxes of 207,000,000/= instead of the 121,000,000/= that had been earlier assessed by the appellant is that the complainant was interested in exposing the corrupt tendencies of the Appellant.

That the complainant who is accused of malice did not take matters into his own hands but instead went to URA which advised that a trap be set.

The evidence on record reveals that the appellant conducted himself in a way to show that he had a lot of discretion to determine what PW3 could pay in taxes. Figures kept changing. This is not conduct of a straight person. It was not wrong to report the conduct of the appellant even if PW3 had defaulted in taxes. He simply didn't want to pay the bribe. If PW3 was actuated with malice, I am sure he would have involved everyone who was in the chain of demanding taxes from him like the author of Exhibit P.1 one Nixon Twebaze which was a letter of demand for taxes. I am also sure that if the complainant was actuated by malice, he would have used other agencies that were not directly involved with the appellant. PW3's actions do not demonstrate that he was motivated by malice. By involving the institution the appellant worked for to expose him demonstrated that he only wanted the appellant's own institution to verify what he alleged. The execution of the trap was done by the organization the appellant worked for! Would the appellant want to impute that the organization which he had helped to expose the tax defaults of the company the complainant worked for, were also motivated with malice to do whatever they did? I would imagine that any institution would go out to protect the image of its employee especially if they deemed that the employee was simply being maliced for his genuine actions. The appellant was only unfortunate that he dealt with a person who simply did not want to pay a bribe. I am sure that having demonstrated to PW3 that he had reduced his tax obligations, he thought PW3 would easily comply with his demand for gratification. Had the appellant acted straight from the start and maintained his ground on how he had arrived at his assessment, he wouldn't have landed into problems the way he subsequently did.

In any case, why would PW3 want to punish someone who had demonstrated to him that he had drastically reduced his tax obligations from the initial 1.2 billion shillings to 121 million when the actual assessment was placed at 207,000,000/= million? The only motive I can see in PW3 was that he simply did not want to pay a bribe and that is what every citizen should emulate even if it comes with a subsequent inconvenience or expense like it was in this case.

This ground of appeal also fails.

GROUND 5: Whether the learned trial Chief Magistrate failed to draw an adverse inference that the failure to call Enock Kaboyo as a witness and the failure to produce the finger print report were fatal to the prosecution's case.

I have already advanced reasons why I believe that failure to call the said Enock Kaboyo and failure to produce the finger print report was not fatal to this case. The prosecution had a discretion to adduce evidence they sought was sufficient to prove their case. It would not be right for this court to speculate how adverse the said evidence would have been to the prosecution's case. The accused was at liberty even with the assistance of court if he so wished, to summon or request for the said evidence to be adduced. It is therefore not for the trial court to start speculating whether evidence not adduced would have been adverse or not.

This ground of appeal also fails.

In conclusion therefore, this appeal fails and it will be dismissed. The conviction and the sentence of the trial court will be maintained.

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HON. JUSTICE JOHN EUDES KEITIRIMA
JUDGE
18TH JULY 2014