

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(HOLDEN AT ANTI-CORRUPTION COURT KOLOLO)

HCT-00-AC-SC-0089-2012

UGANDA::: PROSECUTOR

VERSUS

1. ENG.LUGYA GODFREY ::: ACCUSED

2. BUSINGYE HARRISON MAGEZI

BEFORE: HON. JUSTICE LAWRENCE GIDUDU

JUDGMENT

Engineer Godfrey Lugya (A1), is indicted with Abuse of Office contrary to section 11(1) and (2) of the Anti- Corruption Act and Conspiracy to Defraud contrary to section 309 of the Penal Code Act.

Busingye Harrison Magezi (A2) is indicted with fraudulent misappropriation of power and Conspiracy to Defraud contrary to sections 283 and 309 of the Penal Code Act.

The prosecution case is that A1, while employed by UBC as operations manager wrote a letter dated 7th August 2007 (exhibit P6), authorising Kings Broadcasting Service Radio (KBS), to use the technical facilities of UBC at Kigulya Hill Masindi without the authority of UBC Board and Management.

KBS which was managed by A2 used A1's letter tendered as exhibit "P6" to connect to and started operating radio services using UBC premises and equipment that is; the UBC generator, transmitter and mast without a tenancy agreement with UBC Management

which resulted into losses of revenue to UBC and excessive electricity charges. The

prosecution contends that these acts were prejudicial to UBC

It is also the prosecution case that the accused conspired to convert UBC facilities and equipment to the use of a private Radio managed by A2.

The two accused each denied the charges. A2 opted to keep quiet in his defence while A1 gave a sworn testimony. It was A1's defence that he wrote the letter in issue after KBS had applied to use UBC facilities at Kigulya hill, Masindi for Radio Broadcasting. The letter authorized KBS, to install its facilities in order to enable UBC to validate the technical specifications that KBS had put in its application, such as power capacity of its equipment, the physical size of its equipment, the height and length of their antenna's, the signal strength etc. Once these are validated then rental fees would be calculated based on these specifications.

A1 further contended that the letter he wrote granted temporary permission for only two months to install and test the equipment before being switched off until a contract is signed. He testified that KBS failed to install the equipment fully because it lacked some technical components such as an STL (Studio Transmitter Link). Since KBS had no STL, the installation failed and so it was supposed to vacate the site. He had no knowledge of how KBS found its way back to Kigulya Hill and accessed the UBC transmitter and electricity.

In criminal cases, the prosecution has the burden of proving all the essential elements of the offence beyond reasonable doubt. *Woolmington v. DPP* [1953] AC 462 followed.

On a charge of Abuse of Office contrary to section 11(1) and (2) of the Anti- Corruption Act, the prosecution must prove beyond reasonable doubt the following ingredients:-

- (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 arbitrary act was prejudicial to the interests of his or her employer or any other person
- (d) That the act was done in abuse of the authority of his office,

The first ingredient was not in contention. It was the defence case that A1 was an employee of UBC as Operations Manager and UBC is a public body established by Act 5/2005. This ingredient is proved on admission.

Did A1 do or direct to be done an arbitrary act?

The prosecution asked me to find that the A1 did commit an arbitrary act because he authored exhibit P6 which opened the way for the use of UBC facilities and equipment for free. Ms Kauma, the learned Principal State Attorney submitted that A1 had no authority to author exhibit P6.

On the contrary, Mr. Baingana learned counsel for the accused submitted that A1 had authority to author exhibit P6 as head of operations at UBC. He repeated A1's evidence that exhibit P6 was a temporary permission and once the connection failed, then A1 was exonerated from being responsible for the subsequent connections.

The issue here is whether A1 by writing exhibit P6 acted arbitrarily. The prosecution says so whilst the defence contends that it was part of A1's duties to do so.

The term arbitrary is an English word defined in the 7th edition of Oxford learner's dictionary as:-

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

The prosecution submitted that the accused broke the rules when he wrote a letter to the Information Officer Masindi authorizing the installation of KBS equipment whilst KBS had no valid tenancy agreement with UBC. The evidence of Paul Kihika, PW4, the Ag. Managing director

is that A1 could not write a letter authorizing a connection when there was no contract signed with the tenant. Engineer Batanda who took over from A1 in UBC and testified as PW6 when cross examined stated thus- “ Nobody accesses the service before the contract is signed. The process from application to grant would take two to three months.....I don’t recall whether (sic) the applicant can be connected before this part is filled”

The gist of PW6’s evidence is that an applicant has to process the application up the signing of a contract before such applicant is connected. PW6 was the head of engineering having joined UTV the precursor of UBC in 1975.

In his defence, A1 insisted that the part to be filled which PW6 mentioned could only be filled if the equipment had been connected, tested and validated. It would then be switched off to compute the fees. Payment would follow and a contract signed before reconnection. He also stated that each managing director came with their own management style. He had problems with the style of Musinguzi and now Kihika. Both suspended him at one time or another. Mr. Baingana attacked the evidence of PW4 as misleading and based on inexperience. He insinuated in cross examination that PW4 was appointed to act as MD for being an NRM cadre and not because he was suitable to hold the post.

If the evidence of PW4 was suspect then the evidence of PW6 is objective. He, like A1, has been at what is now UBC from 1975 when it was UTV and Radio Uganda. His evidence is that nobody gets connected to the UBC facility without a valid contract signed with the tenant. It was his evidence that if there is a problem with the frequency then UCC handles that with the tenant. UCC can sort out any interference or even issue a new frequency. It was his evidence that the specifications are filled in basing on the information from UCC and the physical inspection of the equipment availed by the tenant.

I was not given the benefit of evidence of a standard job description of the duties of the operations manager in order to determine the scope of his powers. I was also not availed evidence of any

manual or standard procedures manual detailing how applications for connection to the National broadcaster are made. However, the prosecution adduced the evidence of PW4 and PW6 to explain what happens when a new applicant seeks broadcasting services using UBC facilities. The evidence of PW4 was criticised in some respects by the defence. For example he (PW4) testified that A1 was reporting to the head engineering yet A1 was the boss of the head engineering. Indeed when A1 was suspended, PW6 who was the head engineering was appointed to act in that capacity meaning that A1 supervised PW6 before the suspension. It seems PW4 was catapulted to act as managing director from the ministry but had little knowledge of the job structures in UBC. I will approach his evidence with caution where it is legitimately challenged.

I will mainly rely on the evidence of PW6 who is a seasoned engineer in UBC just like A1 and is more objective in this case. He testified that there cannot be a connection to UBC facilities without a contract. His department of engineering plays a key role in processing applications for new connections. It is the engineering department that confirms space on the masts. A new application is made to the managing director and after all the technical specifications have been filled, the managing director consults the corporation secretary and the finance department to assess fees and draw up a tenancy agreement. Connection to UBC facilities follows. PW6 was not challenged on this evidence. He was emphatic that should there be interference after connection; the matter is handled by Uganda Communications Commission (UCC) and not UBC. Since the application is made to the managing director, it is that office that directs the process the application moves through and not that of the operations manager as A1 indicated.

It was the evidence of A1 that by writing exhibit P6 he was giving temporary permission and that once connection failed, P6 expired. When cross examined on this aspect, he stated that his letter (P6) did not state it was temporary permission. It was therefore, treated as open ended by the recipient. Besides, A1 testified that he verbally told KBS to remove their equipment.

It is not clear why he never wrote to the addressee of P6 that the permission had been withdrawn. Or indeed A1 should have ensured through the normal machinery at his disposal that KBS is

ejected from UBC facilities. Perhaps the reason why A1 wrote exhibit P6 which he could not withdraw in writing is found in exhibit P15 which is the charge and caution statement of A2.

Exhibit P15 was tendered by AIP Osigai Robert, PW7. It was not contested by the defence despite my prompting. A confession of an accused implicating a co-accused is only admissible where the accused implicates himself substantially to the same extent as others and exposes himself to the same risk or even to a greater risk than others. *Kyabonmaizi and others v R* (1963) EA 309 applied. The confession by A2 could be treated as accomplice evidence. As a matter of practice accomplice evidence requires corroboration but the court can rely on it if considered true. Section 132 of the evidence Act is instructive

132. Accomplice.

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Exhibit P15 is a substantial admission by A2 that he accessed UBC facilities at Kigulya hill with the help of A1. He used UBC equipment without a formal contract. He never paid a penny for the services consumed. He only had what he called a mutual understanding with A1. That is a confession which I find admissible. It was not contested either.

At page 6 of exhibit P15, A2 states “...Since the process was likely to take long, I asked engineer Luggya (A1) to allow me access to the mast and put up the equipment. It is at this stage Mr. Luggya gave me a letter addressed to the district information officer Masindi. Having delivered the letter to the district information officer, Masindi, I accessed the mast at Kigulya hill and installed my equipment.” From the evidence of PW6 who is currently holding the position A1 held before he was charged in court when read together with the excerpt quoted in the charge and caution statement of A2 contained in exhibit P15, it is clear to me that A1 had no authority to write exhibit P6. He did it for the private interests of his friend, A2. It was not in the normal course of his duties. He was approached and requested to do so. He was not prompted by the normal schedule of his

duties.

Applications for new connections are addressed to the managing director who directs how the application should be handled. A1 was not the managing director. He had no authority to grant access to UBC facilities without a formal tenancy or contract with KBS. The act of granting permission contained in exhibit P6 was an arbitrary act. It is tainted with illegalities and actuated by the private interests of A2. The explanation that he has done so in other instances only tells why he had become a subject of suspensions at UBC. Repeat wrong doing does not make a right.

If A1 had not issued exhibit P6, A2 could have processed his application in a normal way. Even when advised by PW6 to formalize his tenancy, A2 had no motivation for doing so because he treated exhibit P6 as a magic wand. It is my conclusion that exhibit 15 is corroborated by the evidence of PW6

An arbitrary act is not itself a crime unless the act is prejudicial to the interests of the employer or any other person.

The prosecution contends that the act of permitting A2 to access the facilities at Kigulya hill cost the corporation money in lost revenue. Indeed the A1 was also charged with causing financial loss but no evidence was adduced to prove the exact revenue lost and for that reason I found those counts vague and acquitted the accused.

Mr. Baingana did not attribute any prejudice to A1 submitting that there was no evidence that A1 permitted A2 to creep back to Kigulya hill.

It is not in dispute that UBC is a National carrier which conveys signals of private broadcasters for a fee as part of its revenue generating objectives.

Objective (c) in section 4 of the UBC Act, 2005, is to achieve and sustain a common carrier status. While one of its functions in section 5(e) of the Act states that UBC shall carry out signal distribution as a common carrier. Section 6(c) mandates the corporation to enter into contracts and commercial ventures for profit. The UBC Act, therefore, empowers it to do business for profit by hiring out its facilities for both TV and Radio.

It follows that to connect to the UBC facility for purposes of transmission as KBS did; it had to have a contract for which it would pay money. Indeed when KBS applied, it paid an application fee of 100,000= UGX.

According to PW4, the rates for upcountry radios like KBS the rate payable as set in 2006 is 700 USD per month. The evidence on record is that KBS connected onto the national carrier in 2007. Except for the 100,000= UGX, it paid on the application, no other fees were paid until it was switched off air on 3rd December, 2011. For about four years, KBS had free facilities of the signal carrier without paying a coin. It was indeed without a contract or tenancy agreement. On page 9 of A2's charge and caution statement, A2 told the police thus:- " I did not make any payments to Mr. Lugya (A1). I have been using this transmitter until it was picked by UBC officials. I have never made any payments for these equipment because I was waiting for the terms and conditions stipulated in the agreements between UBC and KBS" This is an admission that KBS which was managed by A2 used facilities for four years free of charge to the prejudice of UBC. The prejudice is the revenue lost for carrying the signal

for KBS free of charge; the illegal use of the UBC transmitter free of charge; the consumption of electricity by the transmitter of UBC charged on UBC free of charge. This ingredient has been proved beyond reasonable doubt. The evidence of the prosecution and an admission of A2 in his charge and caution statement (exhibit P15) rest any contention on this ingredient. It is proved beyond reasonable doubt.

Were all these acts done in abuse of the authority of office?

I have held that A1 had no authority to permit the connection of private broadcasters to UBC facilities. He was not the managing director to whom applications are addressed. He did not act on any instructions from the managing director when he chose to grant permission to KBS to connect equipment to UBC facilities. He was just approached for an illegal favour by A2 which he executed. He left exhibit P6 floating to the extent that it domiciled A2 and his KBS at Kigulya hill without a tenancy agreement for more than four years! Once at the UBC site, A2 again approached

A2 to give him a UBC transmitter to use. At first A1 refused but later in July 2011, he allowed A2 to use it “on mutual understanding” This may mean that when A1 refused at first because he knew he neither had the power nor authority to lend UBC equipment to private broadcasters. But once A2 reached a mutual understanding with him, A1 gave way and permitted an illegality to be committed. He abused the authority of his office. He just exploited his position to the prejudice of UBC. The admission by A2 renders A1’s denial that he did not know about the connection and use of the UBC transmitters by KBS to be false. A1 was a senior officer with machinery at his disposal to detect any illegal use of UBC facilities.

Indeed when cross examined by court, A1 stated thus” It is difficult to be on air without UBC’s knowledge because it has security across the country.” This means that as operations manager he was aware of the broadcasts by KBS at Masindi but because A2 had compromised him, he could not call KBS to order.

A1 was employed as operations manager by UBC to ensure that the operations of the corporation are managed efficiently and profitably. It is an abuse of that appointment to allow KBS to operate for over 4 years using equipment A1 is supposed to protect free of charge! Why then was A1 being paid a monthly salary if he could not protect the interests of his employer? If the managing director had not gone to Masindi and discovered the activities of KBS, it would still be on air to date without paying for the service. A1 lamented why he was being crucified yet he had allowed others to use the facilities without first paying money? The answer is simple, it was A1’s job to report and stop illegal connections. He failed to perform that job for which he was being paid. He takes the flak for failure to perform his responsibilities.

Mr. Baingana for A1 tried to deflect the flak to PW6 but if A1 had granted A2 permission however, illegal, how could PW6 who worked under A1 withdraw it?

On the evidence adduced when read together with the admissions by A2 and considered against A1’s defence, I find that all the essential ingredients of the offence of abuse of office have been established beyond reasonable doubt.

The gentleman assessor advised me to find the contrary on grounds that A1 had acted within his authority to write exhibit P6. He also noted that installations had to be made before verifying the specifications. On the evidence of PW4 and PW6, It is clear that no installations could be made before a formal agreement with UBC. Besides the gentleman assessor did not consider the evidential value of A2's admission that he approached A1 to give him the letter. A1 did not write it as his normal routine but was prompted to do so by his friend with whom they worked at former Radio Uganda from 1989 to 1997 and had a "mutual understanding"(See exhibit 15). I am, with respect, unable to take the advice. The prosecution has proved the case against A1 on count 1 beyond reasonable doubt.

On count 6, the two are charged with conspiracy to defraud c/s 309 of the PCA. The two are alleged to have conspired to defraud UBC of its transmitter at Kigulya hill.

The prosecution asked me to treat A2's confession as an admission of a cons piracy to defraud UBC of the transmitter. The defence submitted that the confession alone cannot be a basis for finding the two guilty.

I have already stated the position of the law governing a confession by a co-accused. It is admissible if the maker incriminates himself substantially as he does to the co-accused. The evidence by PW1, PW4, PW5, PW7, and PW9 is that the UBC transmitter, exhibit P18, was in use at Masindi by KBS radio. A1 denies authorizing its use but exhibit P15 is that he at first refused to allow its use by A2 but after a mutual understanding, he allowed. Mr Baingana for the accused persons submitted that there was no conspiracy because A1 denied it.

This conspiracy need not be an agreement following a formal meeting. Once two or more persons by their actions do an act or acts with fraudulent intent that can be seen as a conspiracy, the crime is committed. A2 admits to having a mutual understanding with A1 regarding the use of the transmitter. A2 incriminates himself as much as he does to A1. It was A1's job to ensure that UBC facilities are used for lawful purposes. It was his evidence that no station would go on air without knowledge of UBC. He was in charge of operations. For 4 years he put a blind eye on the activities

of KBS. According to mPW6, the transmitter was taken to Masindi with A1's approval and participation. They had no cable suitable to connect it for the red channel. It was A1's duty to ensure that the right cable is sourced and taken to Masindi to connect the transmitter but he did not do so. Is it because he was aware his friend A2 was using it? His inaction when considered together with the confession by A2 brings out the conspiracy theory which is a crime in count 6. The accused were no strangers to each other. A1 admits the two worked together before at Radio Uganda. It is no wonder that A2 had to approach A1 for illegal favours where he could not operate officially. It is not in dispute that when KBS which is not a charitable organization, but a limited company as per exhibit P2, used the UBC transmitter, it deprived UBC of the use of this equipment for the red channel. It was A1's duty according to PW6 to ensure that the right cables were procured to fix this transmitter but since his friend was using it, he (A1) did not bother. UBC was deprived of its equipment and did not use the transmitter for the purpose it was sent to Masindi. This was a fraudulent act for which the two are liable as conspirators. I find that the prosecution has proved the charges of conspiracy beyond reasonable doubt.

The charges in count 7 are that A2 fraudulently appropriated power from UBC meters for the use of his private radio. The state submitted that A2 admitted to using power paid for by UBC. This is contained in his confession.

The defence submitted that the evidence of PW1 was that KBS got power from the pole directly meaning no loss was caused. Further, counsel submitted that electricity belongs to UMEME which is not a complainant here and that the charges in count 7 are not appropriate. A2 kept quiet in his defence. This is his right under section 73 of the TIA and article 28(11) of the Constitution where an accused person is not compelled to give evidence in court.

The evidence of Felix Baryamwisaki, PW5, a police electrical engineer who disconnected the transmitter in issue is that it was powered from the sockets like other UBC equipment. PW1 was a watch man whose technical knowledge of power sources is as rudimentary as his little education if any. I should point out that from the evidence adduced, power sources for KBS radio was originally

from its small generator. The transmitter was in the main rack used by UBC where its other transmitters were. It was not removed from that rack according to the investigating officer, PW9. It was accessed by KBS from where it was and powered from the source other equipment were being powered from. It is not in dispute that there was only one meter belonging to UBC at the site. This evidence when read together with the admission by A2 renders the defence submission that UBC lost no power as untrue. The power is supplied by UMEME but when it is metered as it was, it becomes the property of the customer who pays for its consumption.

An offence is committed under section 283 of the Penal Code Act if one fraudulently consumes electrical power from an apparatus which is the property of another. The entire infrastructure at the hill belonged to UBC. The metered electricity was being paid for by UBC. On his own admission, A2 never paid a coin for electricity until his equipment was seized by the police. What should we call this? The defence says no offence was committed. The prosecution says an offence was committed. I would ask, was KBS ordained to consume free services while doing its business? With respect, I have great difficulty accepting the defence submissions on this count. Such act of using another's electric power without the owner's permission can only be interpreted as fraudulent conduct which is a crime in section 283 of the Penal Code Act. I find that the prosecution has proved this charge beyond reasonable doubt.

Upon full consideration of all the evidence adduced by the prosecution and the defence, I have come to the conclusion that the prosecution has proved all the essential ingredients in counts 1, 6 and 7 beyond reasonable doubt. I find A1 guilty of Abuse of office c/s 11(1) and (2) of the ACA, 2009 and convict him accordingly.

I find A1 and A2 are guilty of conspiracy to defraud c/s 309 PCA and convict each of them accordingly.

I find A2 guilty of fraudulent appropriation of electric power c/s 283 PCA and convict him accordingly.

Lawrence Gidudu JUDGE

3rd November, 2014.

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