THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

NO. HCT-00-CN 0017/2015

A1. P.C ODAMA EDWARD
A2. LUKUBO BENSON } **::::::::::::::::::::::::APPELLANTS**

VERSUS

UGANDA :: RESPONDENT

JUDGMENT

BEFORE HON. JUSTICE PAUL K MUGAMBA

This appeal is brought by P.C Odama Edward (A1) and Lukubo Benson (A2) against the decision of the Grade 1 Magistrate whereby on 21st April 2015 both appellants were convicted by the court on the charge of conspiracy to commit a demeanor, contrary to section 391 of the Penal Code Act. In addition A2 was convicted on the charge of personating an official in the Inspectorate of Government, contrary to section 35 of the Inspectorate of Government Act. Each of the appellants was sentenced to 18 months' imprisonment. The appeal is against both conviction and sentence.

The four grounds of appeal read as follows:

1. The learned Trail magistrate erred in law and facts when she convicted the Appellants without properly evaluating Evidence and hence arriving at a wrong decision.
2. The learned Trial Magistrate erred in law and facts when she convicted the Appellants of the offence of conspiracy to commit a misdemeanor without properly evaluating the ingredients of the offence and hence arrived at a wrong decision.
3. The learned Trial Magistrate erred in law and facts when she based Her conviction to uncollaborate / hearsay evidence (sic) of the prosecution witnesses and hereby arrived at a wrong decision.
4. The learned Trial Magistrate erred in law and facts when she shifted the Burden of proof from the State to Appellants thereby occasioning a miscarriage of Justice.

The first appellate court, such as this is in the appeal at hand, has a duty to go through the record afresh in order that it may be able to arrive at an independent conclusion. It has however the inevitable handicap of not having had the opportunity to observe the way the witnesses testified.

Both appellants were convicted under Count IV. The charge there was conspiracy to commit a misdemeanor, contrary to section 391 of the Penal Code Act.

I find it gainful to lay out the particulars as they appeared in the charge:

> ' Lukuba Benson and No.37175 PC Odama Edward between 14th and the 20th February 2013 conspired to personate an officer of the Inspectorate of Government in order to obtain money from Kisira Baptist, the Speaker of Kaliro Town Council to allegedly halt investigations into the alleged sale of Kaliro Town Council building to Tropical Bank.'

The offence of conspiracy of necessity involves two or more persons agreeing to commit an unlawful act. It involves also an intent to achieve the objective of the agreement. It is beyond mere surmise or wilful conjecture. In ***R V Gokaldas Kanji Karia and Another*** *(1949) 16 EACA 116*, the Court of Appeal for East Africa notably stated:

> ' Certainly there was no direct evidence of an agreement but how rarely is conspiracy proved by such evidence. As Mr Southworth pertinently observed conspirators do not normally meet together and execute a deed setting out the details of other common unlawful purpose. It is a common place to say that an agreement to conspire may be deduced from any acts which raise the presumption of a common plan.'

At page 9 of the judgment the trial magistrate noted:

> 'According to PW1, A2 contacted him on phone on 14/2/13 as an officer of the Inspectorate of Government asking for money to help get rid of a case against PW1 and his colleagues. Subsequently his agent A1 met PW1 on 18/2/13 and on different occasions phone discussions were held between PW1, A1 and A2 whose transcriptions were exhibited as PEX1 (a), (b) and (c).

Given that an agreement to conspire may be deduced from any acts with the presumption of a common plan, I find it more than just chance that both accused were arrested near PW1, with the history of conversations between him and two men that seemingly had now met him for a final purpose. I opine that conspiracy to commit the misdemeanor can be deduced by the fact that the accused were found together after A1 told PW1 to wait for his boss before handing over the money. The test this circumstantial evidence must pass before I base a conviction on it is clear in my mind. It must be incompatible with the innocence of the accused and incapable of any other hypothesis other than that of guilt. See ***Uganda V Sulaiman Ndamagye*** *(1988-1990) HCB 66*. It is my opinion that this evidence is not capable of any other explanation other than the accused's guilt. The accused did conspire to commit the misdemeanor .Both A1 and A2 are therefore found guilty on count 4 and are convicted.'

With the greatest respect to the learned trial Magistrate I find no rationale for the conviction. Doubtless there is no direct evidence pointing to conspiracy. Nevertheless court went ahead to look for any evidence that could connect the two accused. One such piece of evidence is the recorded telephone conversation. But this evidence is wanting given that it was never proved A1 participated in it. Next attempt relates to A1's participation in the impersonation saga. This evidence cannot be relied upon either as it was never proved. There was conflicting evidence as the trial court in time observed. At page 6 of the judgment it was noted:

'The question in the mind of court is who of the two witnesses is telling the truth in as far as PW1 having met A1 or A2 at Uganda House on 18/12/13, especially since PW1 told court on oath that he first met A2 that was "Benjamin" on the day of arrest and A1 was "Moses". I do not find the contradiction an inconsistency minor enough to be ignored. It points to deliberate untruthfulness or a clear lapse in memory on part of one of the witnesses that can only be resolved in favour of the accused .....'

In the circumstances there is no firm evidence showing A1 was at Uganda House on 18th February 2013. There is no proof of his participation then. It was only on 20th February 2013 when A1 was arrested that his connection with the charge becomes apparent. That followed a sting operation to arrest A2 and possibly the person he operated with. A quick decision was made to apprehend A2 and in the vicinity A1 happened to be present. When A2 was arrested, A1 was also arrested and charged. In court no evidence was led connecting A1 to A2 or indeed with

the offence. It is apparent in the circumstances that A1 was arrested prosecuted and indeed convicted in the absence of any inculpatory evidence, let alone evidence relating to conspiracy. I find no evidence available to show any conspiracy existed between A1 and A2.Consequently they are both acquitted on Count IV.

The charge against A2 in count II is personating an official in the Inspectorate of Government, contrary to section 35 of the Inspectorate of Government Act. The particulars of the offence read as below:

> '**LUKUBA BENSON** on the 14th February 2013 falsely represented himself to Kisira Baptist, the Speaker of Kaliro Town Council as " Benjamin" an officer with the Inspectorate of Government Kampala, handling a complaint allocated to him in respect of selling Kaliro Town Council building to Tropical Bank, whereas he is not an officer with the Inspectorate of Government'.

On 20th February 2013 A2 was arrested near Christ the King church in Kampala. He was on an appointment with PW1 who was to pay him Shs 1,000,000/= agreed upon between the two days earlier. The process had been set in trend on 14th February 2013 when it was agreed money should be paid to that person who had rang and demanded for it. That person said he worked for the Inspectorate of Government. Following some toing and froing A2 physically turned up to retrieve the money. He had been party to the arrangement and certainly was privy to the appointment when PW1 and A2 had met earlier. Coupled with that evidence is the testimony of PW1 who stated that after he had sent Shs 20,000/=to a cell phone number by mobile means he had inquired of the agent particulars of the registered owner of the cell phone number to who the money was being sent. The name Lukubo was given in answer. That name is similar to that of A2.I have no doubt in my mind that the trial court properly found that it was the person who posited as an official from the Inspectorate of Government who could have turned up on the agreed occasion and place.

As concerns Count II, I find no ground to disturb the finding and conviction arrived at by the trial court.

This appeal has partly succeeded in that A1 and A2 stand acquitted on Count IV. In Count II the conviction of A2 is however upheld. The sentence of 18 months' imprisonment should be set aside given that A2 is no longer encumbered with the charge in Count IV and the fact that the

maximum sentence to be handed down on conviction on Count II is not so enhanced. A sentence of 10 months' imprisonment is imposed instead.

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Paul K. Mugamba

Judge

6th October 2015.