THE REPUBLIC OF UGANDA IN THE HIGHCOURT OF UGANDA ANTI-CORRUPTION DIVISION HCT-00-AC-CN-0041-2015

KALUNGI ROBERT:::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

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

BEFORE: LAWRENCE GIDUDU, J

JUDGMENT:

The appellant is a Principal Inspectorate Officer of Government. He was charged tried and convicted of the offences of Soliciting and receiving a Gratification contrary to sections 2(a) and 26 of the Anti-Corruption Act 2009.

He was sentenced to 2 years imprisonment and ordered to refund 3 million shillings by the Magistrate Grade 1.

He appealed to this court against the conviction and filed 7 Grounds of Appeal which I summarize here below;

1. That the Trial Magistrate erred in law and fact when she convicted the appellant of a non-existent offence.
2. That the learned Trial Magistrate erred in law and fact when she convicted the appellant without proof of the ingredients of the offences charged.
3. That the Learned Trial Magistrate erred in law and fact when she attributed evidence to the prosecution witnesses which they never gave.
4. The Trial Magistrate erred in law and fact when she disregarded major contradictions in the prosecution evidence.
5. The Trial Magistrate erred in law and fact when she admitted compact disks in total disregard of the law of electronic evidence.
6. The Trial Magistrate erred in law and fact when she shifted the burden of proof to the appellant.

7. The Trial Magistrate erred in law and fact when she misconstrued the offence of corruption as amounting to soliciting and receiving a gratification.

The brief facts as accepted by the Trial Magistrate are that the appellant received information from a whistle blower that the Ministry of Education was embezzling funds by channeling them through the Director Health Tutors College Mulago.

The appellant in turn briefed his bosses at the Inspectorate of Government. As the matter was being considered by the Inspectorate of Government, the appellant made contact with the Director of the Tutors College and solicited for a bribe of 40 million to bury the investigations.

The Director of the College (PW2) informed her colleagues at the Uganda Midwives and Nurses Association who advised that the appellants demand for a bribe be reported to the Inspectorate of Government.

In the meantime, the appellant solicited for the file concerning the Tutors College to be assigned to him to investigate. Indeed the same was assigned to him. The appellant made some visits to the Tutors College repeating his demands for money from the Director Ms. Margaret Kabanga (PW2).

By this time, the office of the IGG, had received a complaint against the appellant and organized to trap him through PW2. The appellant and PW2 finally met on 25th October 2013 at a Supermarket at Total Petrol Station Ntinda where PW2 handed over 3 million shillings to the appellant as part of the bribe money.

As the appellant walked away from the Supermarket, he was chased by the police attached to the IGG who apparently shot him before he yielded to the arrest. Upon being searched, the money was not on him. He was arrested but because of his injuries he was taken to hospital for treatment before he was finally charged in court.

In his defence, the appellant denied receiving the said money. He admits meeting PW2 at the supermarket on 25th October 2013.
It was his evidence that the meeting was for him to receive documents for investigation from PW2. But when PW2 asked him to receive the documents from her car parked outside he remembered that in order to receive official documents he needs to sign for them one by one.

It is then that he advised PW2 that he will pick and sign for the documents from her office at Mulago. He then walked away only to see two men run passed him. He also increased his pace. Moments later, he heard a man shout “shoot him”. When he looked back he saw a policeman 5 meters away who instantly shot him through the back. He fell. He then realized it is PW5 who had shot him. He was asked where the envelope was, but none was found on him. The policeman lifted him into a car and they took him for medical treatment. He was admitted at Mulago and treated. He was eventually charged.

This being a first appeal, the appellant is entitled to a re-hearing of the case by this Court. My duty is to re-examine the evidence for both sides and draw my own conclusions without ignoring the judgment appealed from and also mindful that I never saw or heard the witnesses testify.

Mr. Odur learned counsel appeared for the appellant while Mr. Opia learned counsel appeared for Inspectorate of Government.

GROUNDS 1 AND 7

Mr. Odur urged these 2 grounds together. He made an interesting submission that the offence in section 2 of the Anti-Corruption Act is Corruption and not Soliciting or Receiving a Gratification.

He asked me to find that soliciting or receiving are ingredients that do not constitute offences in themselves. It was his view that these were ingredients of the offence of corruption. He referred me to Article 28 clause 12 of the Constitution of the Republic of Uganda for the proposition that no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.

He went on to argue that the charge sheet was defective for charging the appellant with offences which are not defined and in the alternative he submitted that it was wrong to consider solicitation as a complete offence and receiving as another offence.

According to him Solicitation and receiving are one offence of corruption.

Mr. Opiya for the respondent supported the conviction contending that the charges against the appellant were specific and were well particularized which made the appellant aware of the charges against him.

It was his view that though corruption is the heading in section 2 of the AntiCorruption Act the specific offences in that section include soliciting or receiving a gratification and where both have been established then separate counts are stated in the charge sheet.

Mr. Opiya asked me to find that Article 28 (12) of the Constitution was complied with because the appellant faced specific charges of soliciting for a gratification in Count 1 and receiving a gratification in Count 2.

In both counts the punishment section 26 of the Act was cited.

I wish to note that the issue of defective charge sheet which according to the appellants counsel cited a non-existent law is being canvassed for the first time on appeal.

It is trite law that objections to the charge sheet or indictment should be taken at the earliest opportunity before the prosecution adduces evidence. An advocate as an officer of the court is required to bring to the attention of court any defect so that the court either orders a rectification or makes an appropriate order to prevent the trial proceeding on defective charges. This saves the time of everybody involved in the case.

As regards the charges the appellant faced in the trial court, the same were created by the Anti-Corruption Act of 2009 whose preamble states “An act to provide for the effectual prevention of corruption in both the public and private sector ”

It’s true that in section 2 of the said Act, a person commits the offence of corruption if he does any of the acts in paragraphs (a) up to (i) under that section.
In paragraph (a) the act of solicitation or acceptance of a gratification in exchange of any act or omission in the performance of one’s public functions are listed as constituting offences of corruption.

It follows that the statement of offence would read “corruption contrary to section 2(a) and 26 of the Anti-Corruption Act”. The particulars of the offence would then bring out the issue of either solicitation or acceptance of a gratification.

I should also observe here that solicitation constitutes a complete offence separate from receiving and should constitute a separate count in the charge sheet. If the solicitation yielded

into receipt then receiving constitutes another offence within the meaning of section 2(a) of the Act.

The issue is, did the failure to use the word corruption in the two statements of offence in the charge sheet it defective? Did failure to use the word corruption in the statements of offence violate Article 28 (12) of the Constitution of the Republic of Uganda?

Section 85 of the MCA Cap 16 states that every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

The important point in section 85 of the MCA is for the charge to give reasonable information to an accused as to the nature of the offence charged.

Further, section 42(2) of the MCA provides that the validity of any proceedings instituted or purported to be instituted under subsection (1) shall not be affected by any defect in the charge, or complaint, or by the fact that a summons, or warrant was issued without any complaint or charge, or in case of a warrant without a complaint on oath.

A similar provision exists for trials in the High Court. Section 139 of the TIA Cap 23 provides that no finding , sentence or Order passed by the High court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the indictment unless there is occasioned a failure ofjustice.

And in determining whether there was a failure of justice, the court is required to determine whether the objection could and should have been raised at an earlier stage.

In other words the objection to the charge sheet or indictment should not be raised as an afterthought; it should be taken at the earliest stage of the proceedings.

Whatever error or defect there may be, in the charge sheet the validity of the proceedings that follow cannot be questioned unless such error is material to the merits of the case and involves a miscarriage ofjustice.

(Saied J) as he was then was in Uganda versus Dickens Elatu and Anor criminal revision No.71/1972 (unreported) observed that it is not every obvious irregularity and defect in the

charge sheet that makes it bad in law. The test which must be applied is whether the effect of the defect in the charge on the trial and conviction of the accused amounted to a failure ofjustice.

A conviction cannot be quashed upon a mere technicality which has caused no embarrassment or prejudice to the accused. Similar holdings are found in the cases of Uganda versus Mpaya 1975 HCB 245 and Sosi Peter Opare versus R 1962 EA pg 661.

It follows therefore that the failure to use the word corruption in the statement of offence is a pure irregularity which does not render the proceedings a nullity.

It was not shown in the submissions how the appellant was prejudiced or embarrassed during his trial by such omission.

It is my finding that the particulars of the offence brought out sufficient information that disclosed fully the charges the appellant faced and he was able to participate in the proceedings by defending himself against the specific acts of soliciting for and receiving a gratification .

Grounds 1 and 7 of the Memorandum of appeal hereby fail.

GROUNDS 2,3,4 AND 6

Mr. Odur argued these Grounds together and raised the following issues;

(i) That the contradictions in the prosecution evidence were fatal and should have been resolved in favor of the appellant. Examples were the dates when the appellant visited PW2's office, the specific amount demanded etc.

(ii) Burden of proof: learned counsel contended that the Trial Magistrate at page 14 of her judgment shifted the burden of proof to the appellant and blamed him for not calling his supervisor.

(iii) Hearsay evidence: learned counsel contended that evidence of receipt of money by the appellant was not credible because no money was found on the appellant upon arrest and that the evidence of PW1, PW3 and PW8 was just hearsay.

Mr. Opiya for the respondent supported the trial magistrate's finding that any contradictions in the prosecution evidence were minor. And where they occur they are attributed to memory failure due to passage of time between the time the offence was committed and the time of the

trial.

On the issue of shifting the burden, Mr. Opiya contended that the appellant read the judgment out of context. He argued that the calling of the appellant's supervisor was very critical if he wanted court to believe him that he never solicited for money. This is because the prosecution case is that the appellant had started soliciting for money even before the file was allocated to him.

On failure to recover the exhibit, Mr. Opiya submitted that the same was correctly described and the last person to hold the exhibit is the appellant. He asked me to infer that the appellants running away which led to a chase meant that somehow he had opportunity to dispose of the exhibit.

The law on contradictions or inconsistencies in witness testimonies is now well settled. Whereas it is true to say that minor discrepancies might be explained away by inordinate delay before the accused was brought to trial, grave inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. See Uganda versus Kiggundu 1978, HCB 283, citing with approval Taylor versus Uganda EACA 169.

Inconsistencies in the prosecution case is fatal if they are grave or if the testimonies are found to be mere deliberate lies.

Mr. Odur for the appellant contended that the prosecution witnesses were deliberate liars and their evidence should have been rejected by the Trial Court. For example, he cited a dispute as to when the appellant is supposed to have visited the complainant's office at Mulago. He submitted that one of the dates in the visitors' book was a Saturday which according to him meant that the visits to the complainant were fabricated. Further he complained that it was not clear who reported the case to the IGG. He criticized the Trial Magistrate for finding that the contradictions were minor and did not affect the credibility of the prosecution case.

The testimony of John Baptist Mujuzi PW6, who is the handwriting expert, in my view resolves the complaint regarding the dates when the appellant is alleged to have visited the complainant. At page 30 and 31 of the proceedings, PW6 after examining the handwriting of the appellant, with the entries in the complainant's visitors' book, made a finding that the disputed handwriting

in the visitors' book and signatures bear close resemblance with the specimen signature and handwriting of Mr. Kalungi.

He explained further that where two handwritings resemble, the conclusion is that they were either made by the same person or by two people that include a forger who tries to copy the others handwriting.

He however dismisses the issue of a forger reasoning that a person who is forging another's handwriting writes slowly and carefully trying not to make a mistake and that therefore the flow of the pen keeps breaking. This was not the case with the entries in the complainant's visitor's book.

It was his evidence that the handwriting in the visitors' book was written by the appellant with the intention of denying his handwriting and signature in future. Because the words were written fairly fast and almost automatically without paying attention to the formation of letters which would have pre-occupied the person forging the handwriting.

On the basis of Mr. Mujuzi; s evidence, I am satisfied that the appellant visited the complainant on the dates attributed to him in the visitors book and the complaint regarding the said dates is not justified in the circumstances.

As regards the issue as to who reported the case to the IGG, I do not find merit in this complaint because the appellant was arrested and prosecuted by the IGG. It is not clear to me what the complaint in this issue was intended to achieve

In the circumstances of this case and from the testimonies of PW2 and PW8 the report and arrest of the appellant by the IGG is not in dispute to warrant any finding of a contradiction.

The Trial Magistrate in my view had sufficient justification to find that there were no material contradictions that would raise a reasonable doubt in the prosecution evidence as contended by the appellant counsel.

Mr. Odur contended that at page 14 of the judgment the Trial Court shifted the burden of proof by blaming the appellant for not calling his Supervisor to testify. Mr. Opiya for the Respondent asked me to find that the complaint is taken out of context. At page 14, the Trial Magistrate was dealing with the appellants defence that the IGG officials had connived with

PW2 the complainant to frame him on the present charges in order to cover PW2 for the fraud she had committed.

The trial Magistrate dismissed the frame up theory and observed that when the appellant was testifying in his defence, he avoided eye contact which made her believe that he was untruthful. She held that if indeed the appellant's conduct of the investigations against PW2 had been honest, he should have called one Jamil who is his supervisor at the Inspectorate of Government to vouch for him regarding the integrity of his conduct.
The question is, did this observation indicate that the trial magistrate had shifted the burden of proof to the appellant? The importance of Jamil according to the Trial Magistrate was to find out if he had authorised the appellant to investigate the case before it was allocated to him.

It is trite that an accused person who has pleaded not guilty to a charge has no duty to prove his or her innocence during the trial. Indeed even when the court has found a case to answer against an accused person, such person may opt to keep quiet. But where an accused person offers to make a statement in his or her defence, the court is entitled to evaluate the credibility of that defence vis-a- vis the prosecution case.

While an accused person should not be convicted on the weakness or inadequacy of his or her defence, where the accused opts to make a statement, the trial court is entitled to evaluate the contents of that defence and point out the strength and weaknesses as it weighs the same against the prosecution evidence.

My understanding of the context of the Judgment at page 14 is that the trial Magistrate was making an evaluation of the appellants defence and was entitled to point out any aspects she considered either weak or strong provided that such weakness was not the basis for convicting the appellant. The conviction should always be base on the strength of the prosecution case.

Reading the judgment as a whole, I do not find that the trial magistrate shifted the burden of proof to the appellant just by making that remark at page 14 of the 21 page judgment.

Mr. Odur also submitted on the issue of hearsay evidence. He contended that the evidence of PW2 that she gave the appellant an envelope with 3 million shillings was not supported. It was his view that PW1, PW3, and PW8 gave hearsay evidence and should not have been believed

regarding the receipt of money by the appellant.

Mr. Opiya for the respondent supported the conviction of the appellant even when there was no money found on him because the appellant conducted himself in a manner that showed that he had received the money. It was his contention that the running away of the accused gave him opportunity to throw away the money because he knew it would incriminate him. He also asked me to find that the meeting of the complainant by the appellant in a Supermarket was proof that he had gone to receive a bribe.

I understand Mr. Odur to imply that the evidence of PW2 regarding the giving of money to the appellant needed to be supported by other evidence. There is no legal justification for that submission because the charges the appellant faced in the lower court do not require corroboration either by practice or by law.

It was not necessary to have other eye witnesses to see the appellant receiving money and pocketing it. On the contrary the events that followed the appellant's departure from the supermarket speak for themselves. The appellant was ordered to stop, he refused to stop, he was chased, and he was shot at before he fell.

If I may ask why would a Principal Inspectorate Officer go to meet a suspect he is investigating in a supermarket before he has gathered any evidence? Why would such a Senior Officer run away in broad daylight from a police officer who he works with to the extent that he had to be shot at before he was disabled from his flight? Is this the conduct of a responsible Senior Officer charged with investigating crime? Such conduct in my view points to the irresistible inference that the appellant was guilty.

He was fully aware of the criminality of his mission and once an officer of the law confronted him he took to his heels which is logical to say that the running away gave him opportunity to throw away the exhibit. It is a fact that if he had not been shot and injured, he would not have stopped.

While the evidence of PW2 does not require corroboration to prove the charges against the appellant, there was sufficient circumstantial evidence in the accuseds conduct to draw an irresistible conclusion that the appellant had gone on a criminal mission at the supermarket and

was caught as he left the scene of the crime.

Perhaps I should state here that evidence regarding an exhibit that has not been produced in court is admissible provided the witnesses are able to correctly describe the exhibit which they saw.

It follows therefore that mere failure by the prosecution to produce the exhibit is not fatal to the prosecution case where the exhibit has been properly described by the witnesses that saw it. From this record it is explainable that the accused run away with the exhibit and must have disposed it off before he was arrested.

Further the money was not only photocopied and there serial Numbers recorded but the prosecution also tendered exhibit P5 which is the photocopies and serial numbers of the 3 million shillings, signed for from the Inspectorate of Government by PW2 on 25th October 2013. The Trial court was therefore not dealing with a hypothetical case but had the correct and true images and full particulars of the serial numbers of the exhibit.

Therefore, I find no merit in Grounds 2, 3 ,4, and 6. The four Grounds hereby fail.

GROUND 5

The criticism here is that a compact disk was admitted in evidence in contravention of sections 8(2) of the Electronic Transactions Act 2011 and 29 of the Computer Misuse Act 2011.

Mr. Opiya for the respondent countered this argument by submitting that evidence of PW8 proved the authenticity of the CD.

Further, that even if the CD was excluded there was ample evidence from PW2 that the appellant had consistently demanded for the bribe.

Apart from pointing out sections 8 and 29 of the Electronic Transactions Act and Computer Misuse Act respectively, Mr. Odur did not explain to me what the problem was with the CD. Section 8 of the Electronic Transactions Act, waives the application of rules of evidence to deny admissibility of data message or electronic record in legal proceedings. The section however requires the court to establish the integrity of the means with which that electronic record was generated, stored, and communicated.

The same provisions are found in section 29 of the Computer Misuse Act. In her rather lengthy judgment, the trial Magistrate admitted the CD through PW4 and Assistant Coordinator at Institute of Languages and Communication at Makerere University who recorded the CD and did the translation. At page 7 of her judgment, the trial magistrate observes that she listened to the CD where the complainant identified her voice and that of the appellant and the message there is for the two to meet the following day at a supermarket in Ntinda.

On the facts on the record, which are even admitted by the appellant, the meeting took place the following day 25th October 2013. In a nutshell the message in the CD was true. It's not clear to me why the appellant complains of something that actually happened. I find no merit in Ground 5 and dismiss the same.

Upon full consideration of the evidence on the record, I find that there was sufficient incriminating evidence against the appellant on the charges preferred.

The conclusion by the trial magistrate that the conduct of the appellant who is a Senior Investigating Officer, in meeting a potential suspect in a private supermarket allegedly to receive official documents, was a criminal scheme to receive a bribe is justified. The accuseds defence that he remembered that official documents are received from official places and changed his mind to walk away and his subsequent running believing the police were chasing a thief was to say the least an incredible defence which can be a total lie

There was sufficient evidence to justify the accuseds conviction on the two counts which leads me to the conclusion that the appeal lacks merit and is dismissed.

LAWRENCE GIDUDU
JUDGE
28/April/2016