

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO 001 OF 2018
(ARISING OUT OF CASE NO: HCT-00-AC-C0-0061-2014)

UGANDA.....APPELLANT

VS

JANE N. MPEIRWE & 2 OTHERS.....RESPONDENTS

Judgment

Before Lady Justice Margaret Tibulya

This is a judgment on appeal from the judgment and orders of a Grade 1 court sitting at Kololo. The back ground to the appeal is that Pw3 (**Geraldine Ssali**) was being investigated by the IGG's office over allegations of abuse of Office, bribery and causing financial loss and A1 (**Jane Mpeirwe**) was part of the investigation team. She is wife to Arthur Mpeirwe (A2) a private Legal practitioner. A3 (Kaguta) was the Resident District Commissioner of Wakiso District at the time.

In July 2013, A3 (Kaguta) met Pw3 (**Geraldine Ssali**) and told her that he knew the investigators. Further that they could clear her of any wrong doing if she gave them some money. He subsequently called her on a number of occasions over the issue. She reported the matter to the IGG's office where she was given Recording equipment.

At one time A3 rung and asked her to meet him at SOHO Restaurant along Kitante road. When she met him he repeated what he had told her at their first meeting. She however refused to give them money.

In September 2013 **A3 (Kaguta)** again proposed to meet her at Lubowa Quality Super market. While there A2 who A3 introduced as the husband of A1 and who he said knew the office of the IGG very well also came. A3 told her to speak to him (**A2-Arthur Mpeirwe**) since he and Jane Mpeirwe (**A1**) were the same. A3 also told her that A1 was in the car, and suggested that she goes to meet her there. As Pw3 was going to meet A1, A3 removed from her the bag in which she had put the recorder. Because of that she was only able to record the discussions which were held before the bag was taken away. In the car A1 told her that her matter was very complicated, and that she had to give them 300m/=, a suggestion Pw3 refused. She advised A1 to go ahead and write the report since she could defend herself in a higher court.

Still in September she got another call from A3 who told her that they wanted to meet her at SOHO Restaurant. That phone conversation was not recorded. She went to SOHO and found A3 sitting with A2 inside the restaurant. The state sought to corroborate P3's evidence in this regard through the testimony of Pw4 (**Asaba Rukyarekere**). He testified that on 2nd October 2012 at about 7:00pm he was at SOHO restaurant and saw A2 and A3 who he knew well. A2 and A3 sat on the same table and were later joined by Pw3. Pw3 was putting on a navy blue skirt and blouse. A3 was in a light coloured shirt, casual blue long sleeved shirt and A2 was putting on a dark suit (navy blue or black). According to Pw3, A2 was putting on a dark suit and A3 was in a short sleeved light coloured shirt.

Pw3's further evidence was that while at that table, A3 introduced A2 to her again. A2 told her that he used to work for IGG and is the one who actually writes reports for A1, and that she did not need to see A1. When Pw3 told them

that she did not have money A3 suggested that she should state what she can manage, even 50m/=. Pw3 said she did not have even that and she left. That conversation was not recorded because she had not pressed the button of the recorder properly.

Whenever she recorded the conversations with the accused persons, Pw1 (**Jackline Nababi Semwezi**) would pick the recording gadget from her office and take it to get whatever information will have been recorded.

Pw3's further evidence was that A3 again called her saying that A1 would like to see her the next day at 3:00pm at A2's chambers. He gave her the directions to A2's chambers and reminded her to go with **something**. Pw3 called Pw1 (**Jackline Nababi Semwezi**) and asked her if she could provide some money since the suspects now wanted money. Pw1 (**Jackline Nababi Semwezi**) gave her 3m/= with which she went for the meeting, armed with a video/audio recorder. A2 received her, offered her a seat and told her to wait for A1.

A1 also soon came and told her that they were working on her file and that things were not looking good for her. When Pw3 informed her that she had only 3m/= on her, A1 laughed, suggesting that she was a joker. She rejected the 3m/= and advised her to come up with a better figure (**at least 20m/=**) before they could talk.

She also told Pw3 that the report did not look good but if she took something for her, it could be written in her favour. Pw3 phoned Pw1 (**Jackline Nababi Semwezi**) who came for the gadget and the money. She told her that the money was rejected since it was not enough.

It was in evidence that after every meeting with the suspects and recording what will have transpired, Pw3 handed over the recorder to Pw1 (**Jackline Nababi Semwezi**). Pw1 would take off the recorder whatever will have been recorded and immediately return it to Pw3 for further use.

Other evidence is that Pw1 (**Jackline Nababi Semwezi**), using a CD/DVD burning program called Nuroburn copied the contents from the recording gadget onto CD'S and DVD'S, which she gave to Pw5 (**Katongole**) for onward transmission to Pw6 (**Buwule**) of the institute of Languages Makerere University for translation and transcription.

The four CD's are;

- **Exhibit P5**, marked "**initial meeting**", representing the events of the first meeting between Pw3 and A3 (**Kaguta**) at SOHO.
- **Exhibit P6**, marked "**being taken away**" representing the events of September 2013 at Quality Supermarket when Pw3 meet A2 and A3 while A1 was in the vehicle. Pw3's bag was taken away from her as she went to talk to A1.
- **Exhibit P7**, marked "**reminder to meet**" is about a meeting between Pw3 (**Geraldine Ssali**) and A3 (**Kaguta**). A3 tells Pw3 to bring any amount of money she could afford and gave her A1's number.
- **Exhibit P8**, marked "**Video**", about the meeting between Pw3 and A1 in A2's chambers, at which A1 rejected the 3m/=.

A1 (Mpeirwe Jane Tushemererwe) denied that she solicited for Shs.300million/= or any sum of money from Pw3 (**Geraldine Ssali**) in order to write a favourable report. Neither did she abuse her office. Writing reports is not her duty. A2 (**Mpeirwe Arthur**) is her husband, but he has never participated in any solicitation. Daniel Kaguta has never participated with her to solicit for money from Pw3.

Around early 2013 she was assigned to investigate alleged corruption and mismanagement in NSSF by the top managers. She interacted with Geraldine Ssali (**Pw3**) a number of times. Pw3 offered her money on a number of occasions in order to compromise her but as a seasoned investigator who was trained in

covert action techniques she kept her in suspense. She pretended to be friendly to her, playing on her psychology in order to get useful information to her.

These charges are motivated by malice from Kasirye (the Director of Operations at Inspectorate of Government) who years back investigated a matter in regard to alleged mismanagement and abuse of office by the staff of Uganda Electoral Commission. The then IGG Hon Justice Jotham Tumwesigye found that Kasirye mishandled that case and demoted him. Kasirye thought A1 was the one who reported him, and he has never risen to the rank of Director. He has always treated A1 with contempt and hatred to the extent of not even greeting her. He is using Geraldine Ssali who is his friend to fabricate evidence against her.

A2 (Arthur Mpeirwe) owns a law firm at Colline house, where he receives clients from all walks of life. He has never received Geraldine Ssali and Rukyalekere but it is possible that if those people went there maybe they were in a group and he never took any particular notice of them. His office is accessible by his wife. She has gone there many times but she has never had a meeting at his office, unless it happened in his absence and he never got to know about it.

He does not discuss with his wife her duties. He doesn't even know the kind of work she does as an investigator. He doesn't discuss specifics of cases she is handling. He has never visited a place called Soho and has never until recently gone to Quality shopping center as he was living in Naalya at that time. Kasirye Steven who knows him very well as A1's husband only intended to destroy his wife's job and marriage.

A3 (Kaguta Daniel) maintained that the charges against him are concocted and a fabrication. He knew Geraldine Ssali in her official capacity as the Ag. Managing Director for NSSF. When NSSF had a lot of wrangles in Lubowa she

wrote to him as head of security in the District to intervene since the matter had turned bloody. He investigated the matter and found that both NSSF and the so called squatters had land titles. He wrote to Geraldine Ssali advising her to seek Court redress. Three days later he got information that Geraldine and her staff were forcing people off the land and grading it. A3 directed the Officer in charge of Lubowa to intervene and he impounded the grader and their driver. He opened a case of criminal trespass against Geraldine Ssali. This is the beginning of a grudge between him and Pw3.

The appeal is premised on the following grounds;

1. the learned trial magistrate erred in law and in fact when she held that electronic evidence such as CD/DVD with their transcriptions/translations tendered by prosecution was tampered with and hence unreliable,
2. the learned trial magistrate erred in law and in fact when she held that there were serious contradictions and inconsistencies in the contents of prosecution exhibits and witnesses, hence she wrongly acquitted the respondents of the offences of corruption.
3. the learned trial magistrate erred in law and in fact when she over ruled the prosecutions application to have the video and audio exhibits marked Exhibit P.5, P.6, P7 and P8 played in open court for Pw3 (**Geraldine Ssali**) to identify and explain the contents.
4. the learned trial magistrate erred in law and in fact when she held that the evidence of Pw4 (**Asaba Rukyarekere**) was unworthy of credence and hence unreliable to believe.
5. the learned trial magistrate erred in law and in fact when she believed the accused's testimonies in isolation of the prosecution's case and hence she wrongly acquitted the respondents of all the above offences.

6. the learned trial magistrate erred in law and in fact when she did not exhaustively consider and evaluate the evidence on record and eventually wrongly acquitted the respondents.

This being the first appellate Court in this matter, it has a duty of re-evaluating the evidence and come to its own conclusion bearing in mind that it did not have the opportunity to see the witnesses testify, see **Kibuuka Vs Uganda, (2006) 2 E.A 140.**

Ground 1 and 2 were jointly argued.

- 1- The Learned trial Magistrate erred in law and fact when she held that electronic evidence such as CD, DVD with their transcriptions/translations tendered by prosecution was tempered with and hence unreliable.**
- 2- The Learned trial Magistrate erred in law and fact when she held that there were serious contradictions and inconsistencies in the contents of prosecutions exhibits and witnesses, hence, she wrongly acquitted the Respondents hereof of the offences of corruption.**

It was argued that the learned Magistrate wrongly rejected vital prosecution exhibits on the pretext that there was a break in the chain of their movement. The appellant maintains that the chain of movement of the electronic evidence was never broken.

Pw1, Pw3, P5 and Pw6's evidence is that;

- a) The recording gadget was from the Inspectorate of Government. Ms. Nababi Jackline (**Pw1**) would deliver it to Pw3 (**Ms. Geraldine Ssali**) who after every round of use would return it to her (**Pw1**). She transferred/copied the contents of the recorder unto CD's and DVDs.
- b) The CDs and DVDs were then handed over to the exhibit office (**Ms. Birabwa Sauda**) for custody.

c) They (CDs and DVD's) were later given to Mr. Katongole Gonzaga (Pw5) who took the same to Mr. Buwule Vincent (Pw6) of Makerere University Institute of Languages for transcription and translation.

d) When the Institute of Languages executed the above works, the CDs/DVDs inclusive of the transcribed and translated versions, were handed over back to **Mr. Katongole Gonzaga**, who took the documents back to the exhibit store until prosecution commenced and the Prosecutor retrieved the same.

The appellant argues that the observation by the trial court that; "*when there is break in that chain or movement of exhibits, the authenticity of the exhibits is questionable*" was erroneous. There is no evidence that the exhibits were tampered with. No prosecution witness was challenged on the movement of the exhibits. No evidence was led either in examination in chief or cross examination to prove that the exhibits were tampered with.

For the respondent it was argued that;

1. There was no record of this movement to guarantee the integrity of the recordings. They cited Pw6's evidence that the unclear words show lack of definite clarity in the recording, and that it could be that it was tampered with.
2. The trial magistrate clearly observed that there was breakage in the chain of movement of exhibits.
3. Further that the learned trial magistrate correctly made the finding that the breakages in the chain of custody and the handling of the evidence make the evidence of the recordings manifestly unreliable and incomplete.

I will start with the trial magistrate's observation that the evidence in this case **heavily relied on recordings** which are susceptible to manipulation. It cannot be true that this case **heavily relied on recordings**. This is because the person who interacted with the

suspects and heard what they said (**Pw3**) gave direct evidence about what was said, by who, when and where.

The recordings only bear conversations by persons who Pw3 identified through direct evidence. Since the recordings by nature could not and did not bear all evidence that would complete the whole story, they only had a corroborative value to her testimony. It was erroneous to give them undue prominence in the case as though they could stand alone without further explanation by Pw3. On the contrary, it is Pw3's evidence which was the mainstay of the state case.

Turning to the complaints raised in the 1st and 2nd grounds of appeal, there was obviously a misunderstanding of the concept of "**chain of movement of exhibits**". In my view the concept of chain of movement of exhibits is about continuity and it involves the movement of something from one place to another. Basically it is a question of whether the thing at point "A" is the same thing at point "B".

In this case the trial magistrate faulted the prosecution evidence on the ground that there was **no record** of movement of exhibits. At page 6 of the lower court judgment she said thus, "**whereas there is a record of the storage of the CDs from Pw1 to the exhibits officer as seen in D1 to D4 there is no record of their movement from Pw3 to Pw1 initially, from Pw1 to Pw5, from Pw5 to Pw6 and from Pw6 back to Pw5 which remained unsatisfactorily explained to Court. Pw1 only testified that the operation or investigation was covert and so she could not keep documenting her actions.**"

It is clear from the above paragraph that the learned magistrate was alive to the fact that the chain of movement of the CD's as testified to by the people who took custody of them at various points in time was not broken but her concern was that there was no record to support their evidence.

The issue of the absence of a record of movement of the exhibits in my view goes to the credibility of the evidence of the witnesses who testified that they indeed had their custody. It is not an issue of breakage in the chain of movement of the exhibits.

A record of movement of the exhibits only evidences the fact that the exhibit moved from one point to another. It is only relevant to, and not part of the chain, in so far as it evidences the fact that an exhibit was at a particular point at a given time.

In this case direct evidence of the movement of the CD'S was given by the various witnesses. There is no basis for doubting their evidence that they took custody of those CDS at the points in time they said they did.

A record of movement is only one category of evidence that the exhibit was indeed at a particular point at a given time. Oral evidence is another category of evidence which can be given to prove where an exhibit was, when. There is therefore no basis for discounting that evidence and preferring a written record instead, especially given the explanation that the person who was being investigated (A1) was working with the investigating organization (The OIGG). A lot of care had to be taken so that clues were not left about what was going on.

I agree with the appellant that the learned trial magistrate misdirected herself when she found that there was a break in the chain of movement of the exhibited CD's on the mere basis that there was no written record of the movement of the exhibits.

I reiterate my finding that a written record would have only evidenced the movement of the exhibits. It could not be part of that chain. In this case the chain of movement of the CD's was intact and was never broken. The first and second grounds of appeal succeed.

The alleged contradictions in the prosecution evidence.

As part of the second ground of appeal, the appellant had complained that the learned trial magistrate erred in law and in fact when she found that there were serious contradictions and inconsistencies in the contents of the prosecution exhibits and witnesses. They however seem to have dropped this complaint though the respondents took up, maintaining the view that there were contradictions in the prosecution evidence. They specifically pointed to Pw3's evidence that the 300m/= was asked for at the second time of meeting while Pw1 said that at the time the report was made to

IGG, and at the time the gadget was given to Pw3, the 300m/= was known as the amount involved.

It may be or may not be true that there was a contradiction in that regard. I however find that it is not major considering that Pw3's evidence that the 300m/= was demanded for at some stage is there for all to see. A contradiction as to the stage at which it was demanded for cannot be said to be major.

Another argument was that though the prosecution maintains that A1 demanded for 300m/= when she met Pw3 in her car at Lubowa, the transcripts of the CD which is supposed to evidence their interaction does not bear a record of it. This submission is misleading in my view. It is in evidence that when Pw3 met with Pw1 at Lubowa, A3 took from her the bag in which she had put the recorder. It is therefore not strange that the transcript does not bear a record of the conversation in which the 300m/= was mentioned.

Ground 3

The Learned trial Magistrate erred in law and fact when she overruled the prosecution's application to have the audio and video exhibits marked PE5, PE6, PE7 and PE8 played in open court for Pw3 (Ms. Geraldine Ssali) to identify and explain the contents.

The complaint was that the prosecution on Page 96 applied for the CDs marked (PEX 5, PEX 6, PEX 7 and DVD marked PEX8) to be played in open court to enable Pw3 (**Geraldine Ssali**) who recorded the conversations to hear, see and explain what transpired in the audio and video to court.

The trial court at page 96 last paragraph overruled the Prosecution and rejected the replay of the audio and video in court. However, when delivering judgment, at page 14 paragraph 2 of the judgment, the Trial Magistrate observed that regarding the video (**P8**), no face is shown of A2 meeting with Pw3, and that whereas the name Arthur is mentioned in the recording, that Arthur could be anyone other than A2.

It was argued that the above observation implies that the trial Magistrate was able to watch or view the above exhibits from her Chambers in the absence of parties. This is more so because, she was not the Magistrate who heard the case when the audios and video were played and thus exhibited in court. It was submitted that it was erroneous to view an exhibit in the absence of both parties.

They cited the finding in **Salau Dean Vs. Republic [1966] E.A, 272** where it was held that it was wrong for a trial Magistrate to have any tape played over in the privacy of his or her chambers in the absence of appellant.

For the respondents it was argued that for the court to have denied a witness who met the suspects and recorded the conversations of the CDs, a chance to identify the voices and faces in the video could not but be a grave misdirection especially since the same court took the view that these recordings were the main evidence for the prosecution. Further that the prosecutions prayer was for only Pw3 to identify faces and voices, and nothing more.

I should be clear that the court's decision not to allow Pw3 explain the contents of the exhibits was very strange and erroneous. First of all it meant that Pw3 was denied a chance to identify the key actors in the transactions and their roles in the whole matter. Secondly, the evidential value of the CD's was watered down since their contents were not explained to the court by the person who had direct nexus to them.

Thirdly and most important, a judicial officer sitting alone and viewing or listening the CD as the record suggests she did translates into turning herself into a witness. That evidence did not come to her through the due trial process. Worse still there was no chance for the parties to cross examine her on her findings.

I find that it was erroneous for the trial Magistrate to reject prosecutions prayer to have the audio and video recording by Pw3 played in open court. The third ground succeeds as well.

Ground 4

The Learned trial Magistrate erred in law and fact when she held that the evidence of Pw4 Mr. Asaba Rukyalekere was unworthy of credence and hence unreliable to believe.

This ground arises out of comments by the trial Magistrate at page 14 paragraph 4 of the judgment where she is said to have questioned why Pw4 reported the matter to IGG and labeled him as having been overzealous.

The appellant asserted that those observations were erroneous, and that (Pw4) Asaba Rukyarekere was simply an eye witness whose testimony was meant to corroborate that of Pw3 who was an eye witness. The appellant maintained that although corroboration was not a legal requirement, Pw4's testimony was very vital in as far as it confirmed material facts alluded to by Pw1 and Pw3.

I am careful to avoid faulting the decision of the learned magistrate to disbelieve Pw4's testimony on grounds of his unconvincing demeanor, since the trial court is the only judge of demeanor. I will only comment on the fact that the learned magistrate seems to have left defence counsel to hijack the court process, and went on to torment the witness with a volley of irrelevant questions. The kind of questions which were put to the witness, e.g how he performed at "O" and "A" levels, the particulars of the subjects he took at those levels and at the Law development centre etc and this over a number of days, should have been ruled out of order on the basis of **Ss. 158 and 159 of the Evidence Act.**

S.158(1) provides that, *"If any question asked relates to a matter not relevant to the suit or proceedings, except in so far as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may if it does not so compel him, warn the witness that he is not obliged to answer it."*

S. 159. *“No such question as is referred to in section 158 shall be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded”.*

The court should have come in to protect Pw4 from irrelevant and at times outrightly very hostile questions from counsel for the respondents. It is even more appalling that when evaluating the evidence the same court was quick to point to this witness's poor performance at the hearing to discredit him.

Grounds 5 and 6

5. The Learned trial Magistrate erred in law and in fact when she believed the accused testimonies in isolation of prosecution's case and hence, she wrongly acquitted the Respondents of all the above offences.

6. The Learned trial Magistrate erred in law and in fact, when she did not exhaustively consider and evaluate the evidence on record and eventually wrongly acquitted the Respondents.

The subject of the complaint in these two grounds are the following comments by the learned magistrate;

“Whereas Pw4 told court on oath that he knew A2 when he was counsel in land concerning him, A2 told court he had no recollection of dealing with PW4 in a land transaction. This court assessed the demeanor of all witnesses, save for PW1. PW4 was subjected to grueling cross examination that led him to reveal that he could barely recall several details relating to his personal life. That he could recall seeing three people he knew at a restaurant, at which he said there were many other people, five months after it happened and saw it as fitting detail to be reported to the IGG is not believable. He could not recall the details of the news in March that led him to make a statement with IGG. If the news related to

solicitation by A1 which A1 was not even present at the meeting at Soho according to PW3, it is worth wondering why PW4 was so zealous a citizen to report a meeting of people (one of whom (PW3) he barely knew according to him) where he just chanced to be for the very first time. I did not find Pw4 worthy of credence in the least"

I have already talked about the fact that the trial magistrate based her arguments on what she observed of the witness in terms demeanor. Since the learned trial magistrate is the best judge of demeanor having had the chance to see the witness testify, there is no basis for faulting her finding.

I however note that the relevance of Pw4's evidence was to corroborate that of Pw3 that she met the accused persons on the day in issue. Since Pw3's evidence was credible, whether or not Pw4's evidence was discredited did not have to and does not affect the out-come of the prosecution case.

In further expounding on the arguments touching on the fifth and sixth ground, it was submitted that;

- A1's face appears in the exhibited video (exhibit P8), which is about the events in A2's chambers when she solicited for a minimum of 20m/= and rejected 3m/= as being too little.
- There is evidence that A3 grabbed Pw3's bag at the Lubowa Quality supermarket meeting at which UGX 300,000,000/= was demanded for (in reference to the CD labeled '**Bag taken away**').
- A3 did not only instigate the solicitation for gratification but personally solicited, negotiated and arranged for Pw3 to meet A1 and A2. He did not do it once, but appeared and participated in all the meetings at **Lubowa Quality Supermarket, Soho Restaurant and at the Chambers of A2**. He made numerous calls to Pw3 while arranging for the various meetings.

- A2 conspired with A1 and A3 when he offered to appear and negotiate the gratification at the **Quality Super market Lubowa compound** and at **Soho Restaurant**. He also assured Pw3 that he is the one who writes reports for A1 (**his wife**).
- He offered his chambers at Colline House as a meeting place for A1 and A3 and even introduced the parties to each other before he left.

In order for me to effectively resolve the issues raised by the parties, I will here below proceed to evaluate the evidence relevant to each count.

It is the law (**Kifamute Vs Uganda SCCA No 10/1997**) that the duty of a first appellate court is to subject all evidence to fresh scrutiny and come to its own conclusion bearing in mind that it did not see and listen to the witnesses testify. The burden of proof lies with prosecution, which has to prove all ingredients beyond reasonable doubt.

In Count 1, A1 (**Jane Mpeirwe**) was charged with corruptly soliciting for gratification. The complaint was that A1 (**Jane Mpeirwe**) between July 2013 and January 2014 at different places including her husband Arthur Mpeirwe's chambers at Colline House Pilkington Road, solicited for gratification of 300m/= from Geraldine Ssali Busulwa (**Pw3**) as an inducement for her and others at the inspectorate of government to write a favorable report on file number HQT/6/5/2013 that A1 was investigating relating to alleged corruption and mismanagement at the National Social Security Fund.

The state had to prove that;

- A1 was a public official,
- She solicited for gratification of 300m/= from the complainant
- The gratification was in exchange for an act or omission in the performance of her public duties.

The fact that A1 (**Jane Mpeirwe**) was a public servant was rightly found by the lower court, not to have been contested and therefore sufficiently proved.

The bone of contention is about the issue of solicitation, and the main evidence in this regard was that of **Pw3 (Geraldine Ssali Busulwa)** who testified that she directly interacted with A1 on two occasions, (*at Quality Supermarket and at A2's Chambers on Colline House*).

On 22nd July 2013 while in a car at Lubowa, Quality Supermarket, A1 asked her for 300m/= in order for her to issue a favorable report. Pw3 again interacted with A1 in October 2013 at A2's Chambers at Colline House Pilkington Road, when she asked for at least 20m/= from her for the same purpose. It was in evidence that Pw3 captured the interactions with the respondents on audio and video CD's (**exhibits P.5, P6, P7 and P.8**).

Perusing the lower court judgment I note that in evaluating the evidence on record, the learned magistrate mainly focused on the quality of the CD recordings and on the chain of movement of the exhibited CD's, paying very little attention to the direct evidence of Pw3 about the events leading to the charges.

This is surprising given that the few comments that were made about Pw3's evidence indicate that the learned magistrate found it credible in material particulars. I here below highlight relevant excerpts of the judgment to demonstrate the above position.

- At page 9 of the judgment, paragraph 3 from the top the magistrate had this to say;

“Pw3, ably in my view, testified as far as she could recall given the lapse of time, the details of the meetings between her and all accused to the extent that when the court listened to the CD’s and read the transcription and translation of the CD’s admitted as P.11, P.12, P.13 and P.14, it was fairly convinced that she was truthful.”

- **On page 10, the first paragraph from the top the magistrate said;**

*“Pw3 testified that she met A1 at the Law firm of her husband A2 in October 2013. Save for the testimony of Pw3, the only prosecution evidence in support of her position was the CD admitted as P.8, and its transcription and translation **P14 (a) and (b)** respectively. This court watched the video showing the face of A1 clearly. No one else was shown but there existed a conversation in which she spoke of a report being written”.*

- **On page 10, the second paragraph from the top,**

“From it, it is clear to me in addition to the testimony of Pw3 that indeed she met A1. In that recording it is not mentioned that shs 300m/= is needed for writing a report, but it is mentioned that she worked with a team that needed to be satisfied. An offer of shs3m/= when made by Pw3 to her is turned down by A1. A1 is heard as saying “I will do for you freely”. The closest possibility to the allegation is in A1 saying, “at least if the 20 was brought to day...”

What the magistratesaid **in the last paragraph at Page 10**, that

“This court is much aware a matter can be proved even by a single witness...” indicate that she was alive to the legal position that Pw3’s evidence did not have to be corroborated in order for it to ground a conviction, and yet **on page 11, the first paragraph from the top, third line, when she says;** “Aside the testimony of Pw3, no other prosecution witness testified as to having heard these conversations between A1, A2, A3 on the one hand and Pw3 on the other on any of the dates they purportedly met...”

It is clear that the learned magistrate became engrossed with looking for evidence corroborative of Pw3's evidence, yet having believed Pw3's evidence, there was no need for its corroboration. I find that the learned magistrate misdirected herself in this regard.

Turning to Pw3's testimony, she was positive that she talked to A1 who demanded for the 300m/= in order to issue a favorable report. A1 denied this and raised the defence of a grudge as having been the factor that led to her being framed. The learned magistrate seems to have without basis believed the narrative about the grudge, being that the existence of the grudge was never put to Pw3 to give her a chance to admit or deny it. It should have been rejected as an afterthought.

Other than the issue of the grudge which I find baseless, there is no other reason the court discounted Pw3's evidence. I have already faulted the prominence the lower court gave the CD recording's, treating them as the key evidence in the case yet they could only corroborate Pw3's evidence.

Pw3's evidence was moreover corroborated as follows;

- As the magistrate said at page 9 of the judgment, paragraph 3 from the top, *"that when the court listened to the CD's and read the transcription and translation of the CD's admitted as P.11, P.12, P.13 and P.14, it was fairly convinced that she (meaning Pw3) was truthful."*

- Again on page 10, the first paragraph from the top the magistrate said; *"Pw3 testified that she met A1 at the Law firm of her husband A2 in October 2013. Save for the testimony of Pw3, the only prosecution evidence in support of her position was the CD admitted as P.8, and its transcription and translation P14 (a) and (b) respectively. This court watched the video showing the face of A1*

clearly. No one else was shown but there existed a conversation in which she spoke of a report being written”.

- On page 10, the second paragraph from the top,
“From it, it is clear to me in addition to the testimony of Pw3 that indeed she met A1. In that recording it is not mentioned that shs 300m/= is needed for writing a report, but it is mentioned that she worked with a team that needed to be satisfied. An offer of shs3m/= when made by Pw3 to her is turned down by A1. A1 is heard as saying “I will do for you freely”. The closest possibility to the allegation is in A1 saying, “at least if the 20 was brought to day...”

Going by the learned magistrates own analysis of the evidence, Pw3’s evidence was sufficiently corroborated as demonstrated above. Upon thorough evaluation of the evidence I find that there is sufficient evidence that A1 solicited 300m/= from Pw3. The ingredient of solicitation by A1 was proved beyond reasonable doubt.

On whether the gratification was in exchange for an act or omission in the performance of her public duties, again Pw3’s evidence as corroborated by the recordings (above) prove that A1 solicited for the money in order for her to issue a favorable report to Pw3.

There was sufficient evidence to support the charges in count one. The ground of appeal succeeds.

In Count 2, A2 (Jane Mpeirwe) was charged with Abuse of Office. The complaint was that between July 2013 and January 2014 while performing her duties as an investigator at the Inspectorate of Government did in abuse of authority of her office, an arbitrary act when she solicited for gratification of 300m/= from Geraldine Ssali Busulwa (**Pw3**) as an inducement for her and others at the inspectorate of government to write a favorable report on file number

HQT/6/5/2013 that A1 was investigating relating to alleged corruption and mismanagement at the National Social Security Fund.

The state had to prove that;

- a) That she was employed in a public body or a company in which the government has shares.
- b) That she acted or directed to be done an arbitrary act.
- c) That the act was done in abuse of the authority of her office.
- d) That the arbitrary act was prejudicial to the interest of her employer or any other person.

It was submitted that;

- the facts show that she was employed to combat and investigate corruption but instead used her position to enrich herself to the prejudice of her employer.
- She arbitrarily shared secret information on the file she was handling with unauthorized persons (A2 and A3), pursuant to her quest to demand for a bribe from PW3.
- According to the exhibited video she even refused to receive UGX 3,000,000/= because it was small and wanted at least UGX 20,000,000/= as a starting point.
- She delayed to write the NSSF report because negotiation according to the evidence was moving at a low pace.

For the respondents it was argued that;

- There was no evidence that Pw3 met A1 at A2's chambers.
- A1 does not deny ever meeting Pw3 at various places, so the meeting in the video could be one of those.
- There was no evidence that Pw3 met A1 in the car at Quality supermarket, or that the A1 solicited for the 300m/= or anything as alleged.

- A1 was framed due a grudge in the office.
- There is no proof that A1 ever called Pw3 or A3, or that Pw3 communicated on phone, and so, the recorded conversation may not even be genuine.
- There was no evidence that the meeting at SOHO and at Quality supermarket was arranged between A3 and Pw3 or that A2 was invited to the meeting by A3. The magistrate was right not to believe the uncorroborated evidence of the single identifying witness who Pw3 was.
- The trial magistrate found that solicitation of 300m/= was not proved.
- The investigation of Pw3 by A1 had long ended and a report in favor of Pw3 issued (**exhibit D12**) when the alleged solicitation took place. The trial magistrate was right to find that it does not make sense that the solicitation could have taken place under those circumstances.
- A2 denied ever meeting Pw3 and 4 at his Chambers at Colline House.
- It is surprising that Pw3 could not capture any particular feature, sign post or person associated with A2's chambers. Not even the door plates, or any staff member, or any word to prove that indeed this was at the office of A2.
- A2 was not placed on the alleged scenes of the crime,

The fact that A1 was an employee of a public body was not contested and was therefore proved.

The Arbitrary act

The arbitrary act complained of is the solicitation for gratification of 300m/= from Geraldine Ssali Busulwa (**Pw3**). I have already found that A1 indeed solicited for the 300m/=. The only question is whether that solicitation amounted to what is termed as an arbitrary act. In **Uganda Vs Atugonza ACD Criminal case No 37/2010**, an arbitrary act is defined 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. Soliciting for money in exchange for issuing a favorable report to the one being

investigated breaks the law and is therefore an arbitrary act. The arbitrary act must be done wilfully. In this case there is no suggestion that A1 was forced to solicit for the money. She deliberately/wilfully solicited for it.

Whether the act was done in abuse of the authority of her office


The evidence is that A1 solicited for the money in her capacity as an IGG Investigator. It is clear she misused or abused her office.

The act was prejudicial to the interests of A1's employer.

A1 was supposed to investigate corruption but she instead solicited for money from a suspect so that she could issue a favorable report to her. This is clearly counter to the interest of the employer whose mandate is to fight corruption and not to cover it up for a fee.

About the trial magistrate's comment that it does not make sense that the solicitation could have taken place when the investigation of Pw3 by A1 had long ended and a report (**exhibit D12**) in favor of Pw3 already issued I can only say that the two activities are not mutually exclusive. The fact that the report had already been issued cannot rule out the fact of solicitation. It is therefore not a question of the situation making or not making sense, but rather of what actually happened. In this case there is credible evidence that the solicitation was made.

On the whole I find merit in the appellant's complaint. I uphold the appeal as relates to count 2.



In Count 3 A2 (Arthur Mpeirwe) is charged with corruptly participating in solicitation of gratification.

The complaint was that he, between July 2013 and January 2014, participated as an accomplice in the solicitation for gratification of 300m/= from Geraldine Ssali Busulwa (**Pw3**) as an inducement to **Jane Mpeirwe (A1)** and others at the Inspectorate of Government to write a favorable report on file number HQT/6/5/2013 that **Jane Mpeirwe (A1)** was investigating relating to alleged corruption and mismanagement at the National Social Security Fund.

The state had to prove that;

- A2 participated in the solicitation for gratification,
- He acted as an accomplice in the commission of the offence.

In acquitting A2 the learned trial magistrate noted Pw3's evidence that she met him at a Corner Restaurant at Quality Supermarket Lubowa, when he was introduced to her by A3 as A1's husband. The discussions of that meeting were recorded on exhibit P6. She again met him at a meeting at SOHO Restaurant, The learned magistrate did not however mention the fact that Pw3 met A2 a third time at his office where he introduced A1 to her before leaving them.

Just like for the previous counts the learned Magistrate sought for corroboration of Pw3's evidence, and said that the CD's (**exhibits P6 and P8**) with their translations were the closest in content to corroborating Pw3's testimony against A2.

I have already pronounced myself on the legal position that Pw3's evidence did not need to be corroborated. The learned trial magistrate, going by her comments which I have already highlighted herein seemed to appreciate the fact that Pw3's evidence passed the credibility test.

Commenting on the events that took place at Quality Super market, the magistrate noted the fact that Pw3 did not refer to what A2 said that would lead the court to conclude that he participated in solicitation.

In order to put things in proper perspective, it is important that I highlight Pw3's evidence in this regard. It is in evidence that A3 introduced A2 as the husband to A1, telling her to talk to him since he and A1 were the same.

From the above, as far as spoken words are concerned, the learned magistrate was right. A2 did not say anything, but even that is strange and I dare say, not consistent with innocence given what A3 told Pw3, let alone that fact that A2 was at that place which was not a mere coincidence in my view. That he was introduced to Pw3 in those terms and he kept quite is of no little significance.

Against that back ground, Pw3 gave further evidence that in a September meeting at SOHO Restaurant A2 was again introduced as the one who writes reports. She was told that she did not need to see A1.

At that meeting A2 said that he used to work with IGG, and that he is the one who helps A1 to write reports and so Pw3 did not need to see A1. When she challenged him about his role in the matter, he is reported to have said he "**had everything**".

In October when she went to meet them at A2's chambers A2 is the one who picked her from the reception area and took her to his office. He sat her at a table and told her that A1 was coming to meet her. A1 indeed came and asked her what she had taken for them.

A2 denied that he met Pw3 on any of these occasions and suggested that he was a victim of a grudge against A1. I have already discounted the narrative about the grudge since it was not put to Pw3 to give her a chance to admit or deny it. It was an afterthought.

Taking Pw3's evidence (**above**) as a whole, there is no way any one can say that A2 did not say anything that would lead court to conclude that he participated in solicitation!

If the issue was lack of evidence that he was at any of those places at the relevant times, the learned magistrate pointed to the fact that the name **Arthur** is mentioned in Exhibit P.8 (the recording).

She however noted that that **Arthur** could have been any other person. The comment was baseless given that Pw3's evidence pointed to a particular Arthur, in this case A2. There was no basis for the courts speculation that there could have been any other Arthur.

On the fact that A2 did not appear in the recordings, the court rightly noted Pw3's evidence that he left the room after sitting Pw3 in his office and telling her to wait for A1. There is plausible explanation for his not appearing in the recordings therefore.

On the issue of A2's participation in the solicitation, his denial cannot stand given Pw3's credible evidence. She interacted with him on three occasions there is no possibility of mistaken identity. The alleged grudge that was alluded to was a clear afterthought.

I find that there was sufficient evidence that A2 participated in the solicitation for gratification.

Whether he acted as an accomplice in the commission of the offence.

A person is an accomplice of another in committing a crime if, with intent to promote or facilitate the commission of a crime, he solicits, requests, or commands the other person to commit it or aids the other person in planning or committing it, (**Black's Law Dictionary 8th Edition, Page 17**).

An accomplice is a person who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory.

I have already found that A2 participated in the solicitation. The only issue is whether he had the intent to promote or facilitate the commission of a crime. In this regard, Pw3's evidence is that A2 told her that he is the one who helps A1 to write reports. Remembering that the solicited for money was meant to be in exchange for a favorable report, there was an obvious intent to promote the crime of abuse of office.

I find that there was sufficient evidence to support the charges in count three. The appeal therefore succeeds in this regard.

In Count 4 A3 (Daniel Kaguta) is charged with corruptly participating in solicitation of gratification. The complaint was that he, between July 2013 and January 2014, instigated the solicitation for gratification of 300m/= from Geraldine Ssali Busulwa (Pw3) by **Jane Mpeirwe (A1)** as an inducement for **Jane Mpeirwe (A1)** and others at the Inspectorate of government to write a favorable report on file number HQT/6/5/2013 that **Jane Mpeirwe (A1)** was investigating relating to alleged corruption and mismanagement at the National Social Security Fund.

The state had to prove;

- That A3 participated in solicitation for gratification,
- He acted as an instigator in the commission of the crime.

A3's participation in the solicitation

Pw3's evidence is that A3 was the one who made all the contacts with her and arranged all the meetings between her and A1 and A2. The learned magistrate rightly discounted the narrative of an alleged grudge between A3 and Pw3 (*surprisingly so, given that she believed that narrative with regard to A1 and A2*), dismissing it as an afterthought. In acquitting A3 however, the learned magistrate again focused on the exhibited CD's, questioning the authenticity of their contents due to what she termed as an untidy chain of their movement. She also pointed to the fact that there is neither mention of Jane Mpeirwe nor of 300m/= in the recordings, no call data was retrieved to support Pw3's evidence that A3 called her many times.

I may only repeat for emphasis that there was no reason for the court to have disbelieved Pw3's account of events. The shortcomings in the CD recordings did not affect her evidence. The fact that the 300m/= was not mentioned in the recordings was explained by the fact that A3 had removed the bag in which the recorder was from Pw3 when the 300m/= was mentioned. It is instructive that the magistrate discounted A3's allegation of the existence of a grudge. There is therefore no reason she did believe Pw3's account of events.

I believed Pw3's evidence that A3 rung her on all the occasions in issue and arranged meetings between her and A1 and A2. He even initiated the discussions and encouraged her to give the accused persons money so that she gets a favorable report. The absence of phone call data records to support Pw3's evidence was satisfactorily explained as being a result of lapse of time. **I find that he participated in the solicitation.**

Whether he acted as an instigator in the commission of the crime.

The **Longman dictionary** meaning of the word "instigate" is, "to start something happening by ones actions, to cause to act usually wrongly."

Going by Pw3's evidence A3 who rung her at all times, was the first to introduced the idea of Pw3 giving money to the accused persons, and even arranged all the meetings in issue clearly instigated the commission of the crime of abuse of office.

On the whole I find that there was sufficient evidence placing the accused persons to the scenes of the crimes. All the ingredients of the offences were proved. The appeal therefore succeeds in its entirety. The judgment and orders of the lower court are set aside, and I enter convictions against each accused on each count. It is so ordered.


Margaret Tibulya

Judge

30th November 2018.