REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

ANTI CORRUPTION DIVISION

HOLDEN AT KOLOLO

CRIMINAL APPEAL NO 7 OF 2018

(Original criminal case 46 of 2016)

SSENYONJO NOAH NAKIWAFU.....APPELLANT

VRS

UGANDA (IGG).....RESPONDENT

BEFORE GIDUDU, J

JUDGMENT

The appellant, a Senior Land Management officer of Buikwe DLG was tried and convicted for soliciting and receiving a gratification C/S 2(a) and Abuse of office C/S 11(1) (2) of the ACA, 2009.

He was sentenced to a fine of 1,000,000= or to one year's imprisonment in default on count one and to the same punishment on count two. He was sentenced to a fine of 1,000,000= or nine months imprisonment on count three. He paid the fines.

He appeals against conviction and sentence. In a strange memorandum of appeal filed on 20th April 2018, the appellant through his lawyers wrote five pages of submissions calling it a memorandum of appeal.

I directed that he files a proper memorandum that is brief and not argumentative. Instead a similar memorandum was filed on 14th June 2018 on his behalf. No

amount of advice would come to bear on the lawyers to comply with good practices. Each ground was twisted with detailed repetitive arguments that led to total confusion. It was extremely difficult to know what the complaint was in each ground of appeal. I decided to hear the appeal to save time.

Nine grounds of appeal were filed which for brevity I summarise here below.

1. That the learned trial chief magistrate failed to find that prosecution witnesses were liars.
2. That the learned trial chief magistrate erred in fact and law when she convicted the appellant basing on a complaint tainted with fraud.
3. That the learned trial chief magistrate erred in fact and law when she convicted the appellant without proof.
4. That the learned trial chief magistrate erred in fact and law when she convicted the appellant of the offence of soliciting without evidence.
5. That the learned trial chief magistrate erred in fact and law when she convicted the appellant of the offence of Abuse of office without evidence.
6. That the learned trial chief magistrate erred in fact and law when she convicted the appellant of the offence of soliciting for a gratification based on evidence that was at variance with the charge sheet.
7. That the learned trial chief magistrate erred in fact and law when she convicted the appellant of the offence of receiving a gratification based on evidence that was at variance with the charge sheet.
8. That the learned trial chief magistrate erred in fact and law when she failed to properly evaluate the evidence on record thereby arriving at a wrong conclusion.
9. That the learned trial chief magistrate erred in fact and law when she refused to call for the original file on which the appellant had made written comments.

The brief facts leading to this appeal are that one Biashari Abdul of Njeru wanted to process an application to convert a sub-lease into free hold tenure. He had a bank loan which he wanted to pay back. He decided to sell his plot styled plot 6 Ruhesi Road. It was a sub lease granted by Njeru Town Council.

It would appear that this sublease was not genuine since it was sitting on Public land on which the Town Council had no jurisdiction to create sub leases.

Be that as it may, Biashari who testified as PW2 contacted one Meeme (PW1) a physical planner from Buikwe to handle the process and paid her 2 million for the purpose.

During the process, the appellant was briefed and he noticed that the sub lease was created in eror since what PW2 had was actually a Kibanja on Public land. He could just apply to covert the Kibanja into free hold.

Anyhow, on 27 November 2015, the Buikwe District Land Board in a meeting in which the appellant was in attendance approved PW2's application to convert the sub lease into free hold. It was not possible under the law to convert a sub lease into free hold. Only a lease or Kibanja can be converted into free hold because a sub lease is a form of tenancy of the lease.

PW2 failed to get progression in obtaining the free hold despite repeated calls to PW1. Finally PW1 linked PW2 to the appellant as the person responsible. Despite the legal impossibilities ahead, the appellant got in touch with PW2 and negotiated facilitation which resulted in PW2 reporting to the IGG about the appellant's demands.

A trap was set up and the appellant was arrested after receiving 2,000,000= from PW2. The money had been provided by the IGG.

The appellant denied any wrong doing contending that he upon noticing that it was not possible to convert a sub lease into free hold tenure wrote cancelling the process on PW2's file. He contends that the trap was a frame up by PW1 to embarrass him. He contends that he could not solicit for a bribe for something he could not deliver.

My duty as a first appellate court is to subject the evidence to fresh and exhaustive scrutiny and draw my own conclusions bearing in mind that I never saw nor heard witnesses testify.

M/s Sebbowa and Kabali appeared for the appellant whilst Mr. Kinobe appeared for the respondent.

Grounds 3, 4 and 6

Mr. Sebbowa argued these three grounds together. He dwelt at length to show that PW2 did not have a title that could be converted into freehold tenure. I understood him to mean that there was no title to convert to freehold so there was no basis for the solicitation.

Further, it was submitted that there was no evidence of solicitation of the gratification because the telephone print outs in exhibit P10 do not show that PW2 and the appellant were in the same place.

Grounds 1, 2, 5,and 9

It was submitted that there was no independent and verifiable evidence to prove solicitation. Instead, it was submitted that the evidence at the trial was about an application to convert a sub lease into freehold. It was the view by learned counsel for the appellant that the prosecution witnesses were liars who fabricated the charges to get the appellant out of the way so as to cut their fraudulent deals.

Further, that since it was impossible to process PW2's application, the court should not condone an illegality because the sublease PW2 held was not genuine.

Since the transaction could never be concluded, it was submitted that there was no motive to solicit and receive a bribe.

Grounds 7 and 8.

It was argued that the evidence is full of contradictions regarding what happened when money is alleged to have been received by the appellant with some witnesses saying they were inside the restaurant and others saying they were outside.

Finally, it was submitted for the appellant that failure by the trial court to order the prosecution to produce the file of PW2 was prejudicial to the appellant.

In reply, Mr. kinobe from the Inspectorate of Government asked court to dismiss the appeal contending that trial court evaluated the evidence of solicitation and receipt of the gratification as well as Abuse of office and was satisfied that they were proved.

He submitted that where two persons meet at a place where they do not ordinarily meet, it cannot be said it was by coincidence but by design. It was his view that PW2's evidence reveals that the appellant demanded money and when the matter was reported to the IGG, a phone call was made and put on loud speaker which officers from the Inspectorate such as PW10, Magoola Sarah, listened to. It was this conversation between the appellant and PW2 that discussed the rendezvous from where the police from the IGG arrested the appellant.

Mr. Kinobe also referred to the Board meeting which approved the freehold. This meeting was attended by the appellant as a technical officer. He did not guide the Board to reject the application by PW2. He kept quiet but turns around to say PW2 did not have land to convert to freehold. Only the Board could cancel the application but not the appellant he submitted further.

It was also his view that the telephone print outs in P10 confirm that the appellant and PW2 were in contact on 19th and 21st March 2016.

As regards the need for independent evidence to confirm solicitation, Mr. Kinobe submitted that it was not a requirement under the law.

Mr. Kinobe submitted further that the appellant had no business engaging PW2 except to extort money because if there was something wrong with his application, the appellant should have referred the matter to the Board to correct instead of manipulating PW2

I must confess that the manner in which the memorandum of appeal and the subsequent submissions in support were made is very unfamiliar with court proceedings. The grounds of appeal are so twisted that it takes painful effort to know what the appeal is about. It is so argumentative, narrative and oppressive.

Be that as it may, the complaint by the appellant seems to be that there was no sufficient evidence to prove charges of solicitation, acceptance of a gratification and Abuse of office.

It was the view of learned counsel for the appellant that to prove charges of solicitation the prosecution required what he called independent evidence which was lacking. It was also his view that the charges of acceptance of a gratification were not proved because the evidence was contradictory. As regards Abuse of

office, it was contended that the appellant could not abuse office because he could not deliver on the impossible since the sub lease could not be converted into a freehold.

The offences of corruptly soliciting and corruptly receiving a gratification in section 2(a) of the ACA, 2009 are committed if a public official solicits or accepts something of monetary value in exchange for any act or omission in the performance of his or her public functions. In other words a public officer who solicits for money in order to perform or omit to perform a duty commits the offence.

The evidence adduced on record is that PW2 desired to have a freehold title for his plot of land. He approached PW1, Meeme, a physical planner of Buikwe District who processed the application. The Land Board approved the application. The appellant was present in a meeting that approved the application by PW2 to convert the plot into freehold. He did not advise the Board that it was not possible. The application would have failed at that stage.

When it came to his part to actualize the Land Board Minute 128/11/15, he raised red flags which he never raised during the Board meeting that he attended. Instead of raising technical issues regarding PW2's papers with the District land Board that had approved the application, the appellant got into contact with him creating a casual relationship. He wrote to him to produce the original leasehold title, and identity card. He then tells him how hard the process will be instead of being frank that the application was approved in error and he was to advise the Board to rescind it.

This casual dragging about a matter the appellant knew was not possible created the fertile ground to demand money to solve the problem. Once the appellant held out to the complainant that he was going to deliver the service if given money, it became immaterial whether he could actually do it or not. To hold otherwise would be absurd because it would mean that fraudsters could get money from unsuspecting victims and get away with the money and the fraud. It is my considered view that the intention of the Legislature was to punish the crime of soliciting and or receiving gratification by public officers in the performance of public duties. It was not intended to protect public officials from liability because

the schedule of duties is not in the knowledge of the victims that seek public services.

Supposing a nurse receives money in a hospital holding out as a doctor going to perform surgery on a patient, can the nurse raise a defence that because surgeries are performed by doctors, the nurse should be acquitted?

Feeling frustrated for lack of progress yet the bank from which he had obtained a loan was foreclosing, PW2 decide to seek help from the IGG. A trap was arranged after the IGG officials listened to the audio conversation between PW2 and the appellant at the other end. Indeed following the conversation, the appellant chose to meet PW2 by the roadside and finally at a restaurant. PW2 handed over an envelope containing marked bank notes. The appellant was arrested.

The appellant denies soliciting for the money or meeting PW2 to negotiate the deal but the telephone print outs show that they talked on three different days including the day of the trap. Further, their meeting was on appointment as a result of a telephone conversation. It was not coincidental; it was a planned meeting outside the office for the purpose of receiving an illegal payment. The events leading to the meeting of the appellant and PW2 were planned. They followed a conversation which focused on money which the IGG officials provided. The denial by the appellant can only be false.

It is not clear to me why the appellant did not advise the Board to revisit PW2's application instead of tossing him around. In his defence the appellant says he never read the file of PW2 before the Board discussed it. That may be granted but having read it after why didn't he advise the Board of the impossibility of converting a sub lease to freehold instead of asking PW2 to produce the lease, Identity Card and photographs? By engaging PW2 into negotiations and meetings his arrest was a natural result of the crime report made to the IGG.

The appellant's denials of not soliciting for money are betrayed by the telephone conversation he had with PW2 which was heard by IGG officials such as PW10. This led to the trap. It is further betrayed by the appointment to meet at a road side and eventually in a road side restaurant. Is that how the appellant transacts official business? Except for criminal intent, the appellant had no business meeting PW2. He should have just written to the Board asking them to cancel the approval on

grounds that a sub lease cannot be converted into a freehold. That would leave him home and dry.

It is futile to argue that because it was impossible to process a freehold title from a sub lease so one cannot solicit or receive a gratification. The person giving does not know of the impossibility. The victim is made to believe that he is paying a bribe to get the service. The payment is not voluntary. It followed a demand and threats of rejection of the application if money was not paid. It was the appellant's mandate to process approved applications such as that of the accused. If there were challenges in processing the application, the appellant should have advised the Board instead of engaging the applicant.

At page 7 of her judgment, the learned chief magistrate asked similar questions regarding the manner in which the appellant chose to treat PW2 in a casual way instead of giving the Board technical advice to reject the application. He created the condition to justify his demand for money. The testimony of PW1 and PW2 when taken together with the phone interactions and physical meeting leaves no doubt that the appellant solicited for money which he was ready to receive from any place outside his office. Forms which the appellant claimed were to be filled by PW2 could not be filled from a restaurant. Besides, the Board had not rescinded its approval of PW2's application to warrant a fresh application.

The events at the rendezvous were brief and dramatic. It was a bit amateurish on the part of the IGG officers but as the learned chief magistrate observed at pages 8 to 11 of her judgment, it is a fact that the money was given to the appellant who placed it in a newspaper. He did not reject it. He was receiving what he had asked for. If the police had not arrested him at the table he would have left with it. The apparent confusion was caused by the amateurish manner by which the arresting officers went about their job.

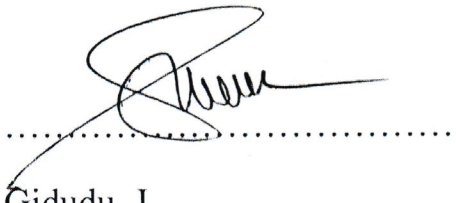
They did not allow the appellant time to leave the place with his bribe but pounced like kites as soon as PW2 stood to leave the table. This does not, however, diminish the evidence of receipt of the gratification. Once PW2 handed the envelope to the appellant and he did not protest or throw it back, the offence was complete. In any case, it is the reason the appellant chose to meet PW2 in a restaurant and not his office. The reason was to receive the bribe.

There was ample evidence to justify the conviction of the appellant on those two counts and the appeal challenging that finding must fail.

The evidence of the appellant's own witnesses such as DW6 Banuba Francis is that the appellant was the technical officer supposed to advise the Land Board on the suitability of the applications. It is for this reason that he attends Board meetings to guide the deliberations.

The appellant chose not to advise the Board that PW2's application fell short of the requirements. Instead he chose to exploit the situation for personal gain. He acted arbitrarily and a finding that he was guilty of abuse of office by the learned chief magistrate is justified.

The result is that the appeal fails on all the grounds however improperly raised. It is dismissed. The conviction is upheld. The light sentences imposed by the trial court stand.



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Gidudu, J

27th July 2018