

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
SESSION CASE NO. HCT-00-AC-SC-0012/2014

UGANDA :::::::::::::::::::::::::::::::::::PROSECUTOR

VERSUS

B.D WANDERA ::::::::::::::::::::::::::::::::::: ACCUSED

RULING
BEFORE HON. JUSTICE JOHN EUDES KEITIRIMA

8TH AUGUST 2014

The accused B.D Wandera hereinafter referred to as the accused is indicted with the offence of illicit enrichment Contrary to Section 31(1) (b) and 31(2) of the Anti-Corruption Act,2009.

The particulars of the offence are that the accused, the former acting Director of Soroti Flying School Academy is in control and possession of property/assets worth shs140,925,543/= disproportionate to his current and past known source of income.

The accused pleaded not guilty to the indictment.

The prosecution called 4 witnesses to prove their case.

At the close of the prosecution's case counsel for the accused made a submission on a no case to answer.

Counsel for the accused submitted that the burden of proof lies with the prosecution throughout the trial and never shifts. He cited the cases of **Woolmington Vs DPP-1935 AC 462, Bigirwa Edward Vs Uganda Criminal Appeal No.27 of 1992.**

On proof of a prima facie case Counsel for the accused cited the case of **Ronald Bhatt Vs Republic 1957 EA 332** where it was held that a prima facie case is where a reasonable tribunal properly directing its mind to the law and evidence would convict the accused if no explanation is offered by the defence. A mere

scintilla of evidence can never be enough not any amount of worthless discredited evidence.

Counsel for the accused further cited the Practice Note of Lord Parker which was published and reported in Practice Note [1962] ALL E.R 448 as follows:

- (a) where there has been no evidence to establish an essential ingredient of the alleged offence;
- (b) when the prosecution's evidence has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal can safely convict on it.

Counsel for the accused submitted that there were two ingredients of this offence:

- (i) That the assets or the value of the assets by the accused exceeds the amount of the past income and present of the accused person.
- (ii) The state must prove that the other value of the assets which exceeded the past income was acquired illegally.

Counsel for the accused submitted that the 1st ingredient had two variables: one was the past and present income of the accused, the 2nd was the value of the assets he had. Counsel for the accused contended that each of them must be proved scientifically as the prosecution was dealing with figures. That if the past and present income are not properly computed then the equation would not balance.

Counsel for the accused further submitted that the evidence of the prosecution specifically that of PW1 revealed that the accused started working in the 1980's which was now close to 30 years and that all this income should have been considered which was not in this case. That instead the prosecution conveniently chose to begin from 2006-2012 which was a period of 6 years out of the 30 years and that this was 1/5 or 20% of the accused's personal income. He further submitted that even within that range, the accused's income for 2 years i.e 2006-2007 were completely wiped out of his income and hence this left 4 years for consideration which were 2008-2012 and that even still the whole year of 2012 was never calculated as the prosecution only stopped at the month of August 2012. That therefore on this variable alone, the accused's income was not accurately computed as it stretches from the 1980-2012. That the accused had 2 simple houses which were savings of his life.

Counsel further submitted that the 2nd variable was the asset variable. That the accused's assets were singled out to be a guest house of Mbale and a village house in Sironko. That the IGG in order to ascertain the value of these two assets purportedly appointed a Quantity Surveyor to give them value. That the Guesthouse was given a value of 238,149,900/= and the village house was given a value of 116,942,890/= as contained in the report of March 2013.

Counsel for the accused further contended that S.31 of the Anti-Corruption Act mandates the IGG or DPP to appoint a valuation expert to ascertain the value of the accused's assets and that the figure was prima facie evidence of the value of the assets and that the person appointed must be a valuation expert. That PW3 was not a valuer and hence could not be a valuation expert. Counsel submitted that it came out in evidence that the roles of the valuation surveyor and quantity surveyor were not inter changeable. Counsel further contended that the words of the statute must be given their ordinary and natural meaning. That Section 31 of the Anti Corruption Act further provided that a certificate of a valuation surveyor shall be prima facie evidence of the value of the assets of the accused and that in this case no certificate was issued by the expert. That what was on record was a report which did not amount to a certificate. Counsel cited the case of **Davie Vs Magistrates of Edinburgh; 1953** which held that experts were to furnish the Judge with the necessary scientific criteria for testing the accuracy of their conclusions to enable the Judge form their own independent Judgment. According to Counsel for the accused, PW3's report did not pass the test required as he just lamped many items together and assigned them arbitrary figures and did not provide court with scientific criteria for testing the accuracy of his conclusions and hence his opinion was merely an oracular pronouncement.

Counsel also cited the case of **Kimani Vs Republic [2002] 2 EA 417** which held that:

“Though the courts must give respect to the opinions of experts, such opinions are not binding on courts and that such evidence must be considered along with all other available evidence, and the court would be entitled to reject it if the expert opinion is not soundly based.”

Counsel stated that PW3's report was devoid of quantities for each item, no column for unit costs and items were lamped together and assigned a figure and there was no guidance to court as to how these figures were arrived at. That even

PW3 admitted that he could not justify the figures and hence his report should be rejected as it was heavily discredited.

Counsel for the accused also submitted that the prosecution had to prove that the sources of the income were illegal as it was held in the case of **Akankwasa Damian Vs Uganda-Constitution Petition 5 of 2011**.

That the state had to prove that the excess income was illegally obtained.

It was Counsel for the accused submission that the state had failed to prove all the ingredients of the offence and therefore this court in accordance with S.73 (1) of the Trial on Indictment Act should acquit the accused at this stage as the accused had no case to answer.

In reply Counsel for the state submitted that they associated themselves with the authorities cited by counsel for the accused with regard to a prima facie case but varied on the issue raised by adding past, present or unknown income to the issues raised.

Counsel for the state submitted that it was a pre-requisite under S.31 of the Anti-Corruption Act that there is no need for the state to prove that the acquired wealth resources were illegal but all the state needed to prove was that the accused was a public official and that he had disclosed all his past, present income, assets owned and liabilities as revealed in exhibit PE1. That it was the said declaration form which shows when the accused assumed the position in issue from 2006-2011 and the properties acquired during that period were the ones compared to his income. The valuation found that his total income was 275 million and total expenses were 416,000,000/= million and therefore the difference unexplained was 141,000,000/= and this excluded medical expenses, school fees, maintenance costs, upkeep and feeding of family. That the declaration form was the very evidence on the accused's evidence and court should not speculate on what the accused earned in the 1980's as that was never included in the declaration form. That the value of the accused's property was properly computed and under S.31(4) of the Anti-Corruption Act the state had hired a quantitative valuer whose report was stamped and signed. That the quantitative surveyor arrives at the cost and that a Valuation Surveyor estimates the current value. That this being evidence from the expert this court was obliged to take the figures therein as correct and the true value. Counsel for the state stated that there was so far no contrary evidence and the onus was on the accused to prove the contrary and that this could only be done if the accused is asked to defend himself. Counsel for the state emphasized that since the accused's

assets exceeded his income and loans without justification it meant that he illicitly obtained the same and that while it was the burden of the prosecution to prove their case beyond reasonable doubt, the said Act imposes on the accused the evidential burden which could only be resolved in his defence.

That PW3 had explained how his report was scientifically arrived at and that the authorities cited by Counsel for the accused were not relevant as PW3 did not have to go to a laboratory to prove his results. That PW3 mentioned items and gave a cost to them and there was nothing more to expect from the report and that the report could be verified by any other quantitative surveyor. Counsel agreed with the ratio decidendi in the case of **Akankwasa Damian Vs Uganda Constitutional Petition 05/2011(Reference)** on how cases of this nature should be proved.

Counsel for the state concluded by praying that court finds the evidence so far adduced by the prosecution sufficient to establish a prima facie case against the accused and put him to his defence pursuant to Section 73 of the Trial on Indictment Act.

In reply counsel for the accused submitted that the indictment was clear on what the accused was charged with as the particulars of the offence included the accused current and past known sources of income and hence his past sources of income should be known by the IGG.

That the IGG knew the accused was employed in the 1980's but chose to begin where the accused would be caught and that was in 2006. Counsel for the accused emphasized that the starting point was very important. That it was the duty of PW1 to interrogate the accused when he started work. That the declaration form that was filed by the accused had no space to indicate former income. That the declaration form of 2011 did not comprehensively cover all the accused's income and that it was the duty of the prosecution to do that and not the accused. That no amount of words would change the meaning of valuation expert in the context of S.31 of the Anti Corruption Act and that Parliament was alive to the Registration of Surveyor's Act. Counsel for the accused reiterated his earlier submissions with emphasis that the valuation did not show how figures were arrived at and that the roles of the Quantitative Surveyor and the valuer could not be interchanged and that PW3 had stated that he could not justify the figures.

The issue to determine now is whether a prima facie case has been made out against the accused person sufficiently to require him be put to his defence.

Indeed in the case of **Ramanlal Tranmbaklal Bhatt Vs R [1957] EA 332** as cited by Counsel for the accused and another case of **Uganda Vs Manuel Quethi [1992-1993] HCB 63** it was held that a prima facie case must mean where a reasonable tribunal, properly directing its mind to the law and evidence could convict if no explanation is offered by the defence.

The case of **Uganda Vs Alfred Ateu 1974 HCB 179** also stated the principle upon which a no case to answer may properly be made and upheld and cited the Practice Note of Lord Parker C.J [1962] ALL ER 448 again cited by Counsel for the accused as follows;

- (a) When there has been no evidence to establish an essential ingredient of the alleged offence*
- (b) When the prosecution's evidence has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal can safely convict on it.*

The offence the accused is indicted with is provided for under S.31(1)(b) and 31(2) of the Anti Corruption Act, 2009. It provides that:

“The Inspector General of the Government or the Director of Public Prosecutions or an authorized officer, may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person- is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or assets.”

The ingredients of this offence therefore are that:

- (i) The accused must be in control or possession of pecuniary resources or property;
- (ii) The pecuniary resources or property must be disproportionate to his or her current or past known sources of income or assets.

This is an offence of mathematical calculation and hence the mathematics of the prosecution must be with precision.

The prosecution should be able to establish the proper value of the pecuniary or proper resources of the accused, the prosecution should also be able to establish the current or past unknown sources of the accused's income or assets;

The prosecution should also be able to establish that the accused's property or pecuniary resources are disproportionate to the accused's current or past known sources of income or assets, the prosecution must also be able to infer that the disproportion originates from the unlawful acts of the accused.

Building a solid prima facie case requires the prosecution to construct a financial profile of the accused from a starting point in time up to the time where the illicit enrichment is identified. The financial profile should be able to demonstrate what the accused owns, owes, earns from legitimate sources of income and spends over a period of time. Selection of the appropriate starting point or baseline for the financial profile is critical.

A proper valuation should then be made and assets valued at the cost at the time they were acquired.

The burden of proof therefore, still lies with the prosecution to at least establish a prima facie case at this stage.

Article 28(3) (a) of the Constitution provides that;

“ Every person who is charged with a criminal offence- shall be presumed to be innocent until proved guilty or until that person has pleaded guilty”

So the prosecution still has the burden to prove their case beyond reasonable doubt. The basis of the prosecution's case is based on the declaration of income, assets and liabilities form of the accused which was tendered in court and marked as exhibit PE1.

According to the prosecution, the accused disclosed all his past and present income, assets owned and liabilities in the said form Exhibit PE1.

The evidence that the prosecution was able to adduce as the accused's salary was from 12th December 2008 to 8th June 2012 see Exhibit P.4. The salaries of the accused from 2006-2007 was according to PW1 based on his appointment letter. Unfortunately this evidence was never tendered in court. According to the declaration form of the accused which was Exhibit PE.1 specifically page 8 the accused explains that he was able to build the family house from personal savings over a period of 10 years. It was therefore imperative for the prosecution to establish whether the accused indeed had those savings as he had declared in the said declaration form.

That evidence could have easily been established either from his bank statements during that period or from interviewing the accused in what form he had his savings. It would appear that the prosecution merely concentrated on the current known sources of income from 2008 when the accused was appointed an Acting Director and ignored computing his past known sources of income which the prosecution could also easily establish as it was within their knowledge that the accused had employment before 2008. His declaration form indicates he had employment before 2008 and one of the assets had been constructed using his past savings.

Apparently this was never done. I agree with Counsel for the accused's submission that the prosecution omitted to compute the past known income of the accused which could have been easily established. The prosecution therefore failed in proving this important ingredient of the offence and hence failed in their mathematical calculation.

On the aspect of having a proper valuation of the accused's assets, the prosecution engaged PW3 a quantity surveyor to compute the value of the structures the accused possessed.

According to PW3 his job description was to value work in progress. A quantity Surveyor is a professional concerned with construction costs relating to buildings. To that extent therefore a quantity surveyor falls within the ambit of a valuation expert as envisaged in Section 31 (4) of the Anti Corruption Act in as far as he or she could value construction costs relating to buildings. As it came out in the evidence, some of the structures were not completed. If the Act wanted to restrict valuation experts to Valuation Surveyors, it would have said so in clear terms. There are no professionals called valuation experts, there are categories of valuers in various fields and they are therefore valuation experts in their related fields. For example experts in valuing cars cannot value land or cows or other assets. There is no single profession that would have the expertise to value all assets. So in the context of a Quantity Surveyor PW3 is a valuation expert in as far as valuing the costs of construction is. However having said that, valuation experts reports are not conclusive evidence, contrary evidence can always be adduced to disregard their reports. I therefore agree with the holding in **Kimani Vs Republic [2002] 2 EA 417** as cited by Counsel for the accused which held that;

“ though courts must give proper respect to the opinion of experts, such opinions are not binding on the courts. Such evidence must be considered

along with other available evidence and the court would be entitled to reject it if the expert opinion is not soundly based.”

I also agree with the holding in the case of **Davie Vs Magistrates of Edinburgh; 1953** as cited by Counsel for the accused which held that:

“Expert witnesses however skilled or eminent can give no more than evidence. They cannot usurp the functions of the Judge, any more than a technical assessor can substitute his advice for the Judgment of the court.....their duty is to furnish the Judge with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge to form their own independent Judgment by the application of that criteria to the facts proved in evidence.

The scientific opinion evidence if intelligible, convincing and tested becomes a factor for consideration along with the whole other evidence in the case, but the decision is for the Judge. In particular the bare ipse dixit (something asserted but not proved) of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross- examination nor independently appraised, and the parties have invoked the decision of a Judicial tribunal and not an oracular pronouncement by an expert.”

In this instant case, PW3’s report was faulted by Counsel for the accused for not giving a criteria on how the figures were arrived at.

Ideally, I would have expected such a report to have a narrative especially of the valuation rationale. The report should have been intelligible so as to make this court appreciate how the given values were arrived at, the criteria of arriving at such figures. The report as it is, just gives figures to stages of construction without explaining how those figures are arrived at. As a lay person in as far as these figures are concerned, the report just wants me to take the gospel truth of the expert’s opinion without explaining the criteria these figures were arrived at. This would enable court to test their veracity .This was made worse when during cross examination PW3 stated he could not justify some of the figures in the columns. One wonders for example the criteria for computing the building material costs

then. Where would one verify those figures in case he or she wished to challenge them?

The report therefore failed the standard of convincing court on what criteria the figures were arrived at. It was imperative to give a proper though not necessarily accurate value to the properties in question as I had said earlier this was a case of mathematics. Knowing that such report would be used in court, it was imperative for PW3 to have a narrative explaining in simple terms the criteria on arriving at figures that were in the report. PW3's report fell short of that standard. Therefore one cannot say that there was proper valuation of the properties in issue as no intelligible criteria was given.

As I had stated earlier, if the prosecution was able to prove the known current and past known sources of income of the accused, and was able to give a proper valuation of the assets of the accused, and if it were found that the property /assets were disproportionate to the accused's current and past known income, then inference would have been drawn that the accused had illicitly enriched himself if there was no plausible defence.

As the prosecution evidence stands now, I do not think I would convict the accused if no explanation was offered in defence. I find that the prosecution has not made a prima facie case sufficient to require the accused person to be put to his defence.

I will therefore acquit him of the offence indicted against him in accordance with Section 73(1) of the Trial on Indictment Act.

.....
Hon. Justice John Eudes Keitirima

Judge

8th August 2014

Accused in court

Sarah Birungi for the state

Bwiire Aggrey for the accused

Interpreter Mwesigwa

Ruling read in open court.

.....
Hon. Justice John Eudes Keitirima
Judge
8th August 2014