

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO**

**Crim. Appeal 23 of 2015**

**(Arising from criminal case No. 2 of 2013)**

**Bonyo Godfrey :::APPELLANT**

**VERSUS**

**UGANDA::: RESPONDENT**

**BEFORE: HON.LADY JUSTICE MARGARET TIBULYA**

**J U D G M E N T**

This is a Judgment on an appeal from the Judgment and orders of the Chief Magistrate Anti-corruption court sitting at Kololo. The appellant was convicted of one count of Corruptly soliciting for gratification contrary to sections 2 (a) and 26 of the Anti-Corruption Act and one Count of Corruptly receiving gratification contrary to Section to sections 2 (a) and 26 of the Anti-Corruption Act. The appeal is against conviction and sentence.

This being the first appellate Court in this matter, it has a duty of re-evaluating the entire evidence on record 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.**

**The grounds of the appeal are;**

- 1. That the learned trial magistrate erred in law and in fact when she failed to properly evaluate the evidence on record and as a result she came to a wrong and erroneous decision.**

It was argued for the appellant that the learned magistrate rejected the defense evidence and held that the prosecution evidence was truthful. Further that save that the trap money was got

within files in unknown location, there was no evidence linking the accused to the allegations.

The Prosecution responded that the learned magistrate gave reasons for her decision. The appellant called Hakim Ssebyanzi (pw4) and asked him why he had not reported. The money was found in an envelope with photographs of the scene of the crime. Finally, that the exact place where the money was found is a minor issue.

The state evidence relevant to the issues raised in ground 1 is that of;

- Pw3 (**Katongole Sula**) that the appellant asked him for 500,000/=, and that on 4.8.2012 when the appellant asked him whether he had got the 500,000/=, he told him he had only 200,000/= which the appellant rejected. Pw3 added on 50,000/= but the accused insisted that he be given 400,000/= and that the balance, now of 150,000/= should be taken to him by **Hakim Ssebyanzi**(Pw4) on the 6.8.12.
- Pw1 (**D/Sgt Tumuramy Enoch**), Pw2 (**Kajura Nicholus**), Pw4 (**Hakim Ssebyanzi**), and Pw5 (**Osenyi Moses**), that while travelling to Kiruhura, the appellant rung Sebyanzi asking him where he was and Sebyanzi told him that he was on the way going to Kiruhura.
- Pw4's (**Hakim Ssebyanzi**) that he gave the trap money to the appellant, after he (appellant) asked him whether he had taken the balance of 150,000/= and confirming that he had received 250,000/=.
- Pw1 (**D/Sgt Tumuramy Enoch**), Pw2 (**Kajura Nicholus**), Pw4 (**Hakim Ssebyanzi**) Pw5 (**Osenyi Moses**), and Pw6 (**Mwesigye John**), that Pw1 conducted a search and recovered 150,000/= from a greenish-bluish envelope which was under the files on the appellants table, and that the envelope contained photographs of the scene of crime in the rape case against Pw4.
- DW1's (**Bonyo Godfrey**) that Pw1 picked an envelope on the table and there was money in it.
- Dw2's (**Tumwine David**) that money was found in the accused's office in an envelope. The money in the envelope had the same serial numbers as those on a list that was brought out.

The defense evidence (Dw3's, **Turyabitunga Amon**) was that the money (envelope) which was got in the appellants office had been planted there by Pw4.

In evaluating Dw3's evidence the learned magistrate considered that Pw's2 and 3 had testified that the appellant had been with one suspect and that the time was about 4:30/5:00pm, yet Dw3 said it was coming to midday. Dw3 further said that the envelope in issue was Khaki, yet all other witnesses said it was greenish/bluish. The magistrate concluded that Dw3's evidence was an afterthought. Given that the trial court saw the witnesses testify, it was based placed to gauge the demeanor of the witnesses and determine who to believe and who not to believe.

The allegation that Pw4 planted the trap money in the appellants office is very serious and if proved could have turned the appellants fortunes. It is strange however that it was not put to Pw4 when he testified. The obvious reason is that it was the afterthought that the learned Magistrate called it. Moreover in his evidence Dw3 said that he and pw4 had waited for the appellant in his office for quite some time, yet the evidence of the prosecution witnesses who went to execute the arrest was that the whole exercise of handing over of the money to the appellant and his arrest took under 20 minutes. Dw3's account of events was suspicious and went against the weight of the state evidence as outlined above. The learned magistrate rightly rejected it.

### **The alleged inconsistencies.**

The complaint was that the exact place in which the money was found is not clear.

It was pointed out that Pw1on page 10 of the proceedings said that the money was got in the center of the table, while Pw2onpage 15 (paragraph 3) said that the envelope was found on the left hand corner of the table. At the same time Pw4 on page 21 (paragraph 11) said that the money was found in a green envelope down in the box not on the table, yet Pw5 on page 28 said that the envelope was found on the right hand corner of the table. It was argued that there were deliberate falsehoods.

The Prosecution retorted that the inconsistencies in the prosecution evidence relating to where the money was found were minor. The envelope which had photographs of scene of crime could not have been accessed by Pw4 and was found in the accused's office.

The learned magistrate reasoned that since it was not in dispute that the envelope was found in the appellant's office, the exact place within the office it was found is of little relevance, and I think she was right. The appellant himself did not dispute the fact that the envelope was found in his office. The assertion that the envelope was planted there by Pw4 cannot be true in view of the fact that it contained photographs of the scene of crime in a case the appellant was investigating. That fact goes to galvanize the state assertion that the appellant was the one who placed it wherever it was found since it is not logical to assume that Pw4 could have put those photographs in the envelope.

I agree with the lower court finding that the inconsistencies in this regard were minor.

There was the complaint that the search certificate bore the L.c1's signature yet he was not around at the time of the search. It also bore erasures which were confirmed to have been forgeries.

This complaint has no merit. The evidence (PW1's and 5) was that the L.c 1 actually signed the search certificate. He is said to have come and taken over the confirmation of whether the monies got with the appellant were those that had been arranged for the trap. Pw1 made a search certificate and it was signed by "all present". Since the Lc1 was among those present he must have signed the document.

The erasures in the document were satisfactorily explained by Pw5 (Osenyi) on page 28, the third last paragraph of the proceedings.

The second and third grounds were said to have been argued jointly but the second ground was actually not argued at all.

**2. That the learned trial magistrate erred in fact when she failed to address the issue of the source of the 250,000/= allegedly solicited by the accused.**

Since it was not argued suffice it to say that where the 250,000/= came from was not an issue to have been addressed by the court.

**3. That the learned trial magistrate erred in law and in fact when she failed to properly evaluate the evidence of the solicitation of the said bribe.**

For the appellant it was argued that there was no clear evidence of soliciting and that the statement on page 4 paragraph 5 of the judgment that, **"the issue in contention under this ingredient is whether the accused asked for the money? Pw3 maintained that the accused**

asked for 500,000/= and upon his plea, the same was reduced to 400,000/=. Without any firm evidence to the contrary, solicitation was complete at that point”, had the effect of restating the ingredients of the offence or solicitation with an implication that **mens-rea** was not necessary and only the **actus-reas** of asking for the money was the only ingredient sufficient to establish the offence of solicitation. This prima facie prejudiced the trial magistrate which subsequently led to an erroneous conviction.

The prosecution responded that there is overwhelming evidence of the solicitation. (Pw3, **Sula Katongole**) interfaced with the accused many times, as demonstrated here below;

- On the 1<sup>st</sup> of August 2012, the appellant asked him for 500,000/= (see Page 16 paragraph 2 of the court record)
- On the 4<sup>th</sup> of August 2012, he again asked for the 500,000/=, pw3 gave him 250,000/= and he insisted that the balance is 150,000/= to be taken on the 6<sup>th</sup> August 2012 by Hakim Sebyanzi (see Page 16 para 7)
- On the 4<sup>th</sup> of August, the appellant told Pw4 (**Hakim Ssebyanzi**) on page 18 paragraph 7, that he should return with a balance of 150,000/= and on page 19 paragraph 1 he explained to him that he delayed because he was looking for the money.
- Shortly before arrest accused asked appellant whether he had brought the money which he confirmed as 150,000/=, and confirmed receipt of 250,000/= earlier.

**Mens rea** refers to the mental element of the offence that accompanies the **Actus reus**. The statement in the lower court judgment that counsel cited does not allude to that legal concept. The learned magistrate was only evaluating the evidence relating to the solicitation. She made the point that pw3’s evidence sufficiently proved the solicitation. I don’t see how the issue of **mens rea** comes in. The argument is misconceived.

There was the argument that the testimony of the single identifying witness (Pw3) **Sula Katongole** had to be tested with the greatest care which was not done in this case. Counsel cited the cases of *Nabulere Vs Uganda Crim Appeal No. 9 of 1978*, and *John Katuramu Vs Uganda criminal appeal 2/98* and argued that corroboration was important.

This argument is misconceived as well. The authorities relied on are irrelevant since identification was not an issue in this case. The appellant does not deny having interacted

with the complainants. There is no indication that the circumstances did not favor positive identification or that there was any possibility that the appellant was wrongly identified.

The complaint that the Magistrate did not consider the purpose for the solicitation has no basis because the court was under no duty to do so. The purpose of the solicitation is not an ingredient of the offence.

That the evidence bore inconsistencies on how much was solicited is again not of relevance, given that the act of solicitation was proved to sufficient levels.

**4. That the learned trial magistrate erred in law when she held that the inconsistencies in the prosecution evidence were minor.**

The complaint about the exact place in which the envelope containing money was found has already been dealt with. It has been ruled that since the appellant himself did not dispute the fact that the envelope was found in his office, the inconsistencies as to where in the office it was found were minor.

**5. That the learned trial magistrate erred in law when she relied on the evidence of Pw4 who had confessed to having bad blood with the accused and held it as truthful.**

It was argued that pw4 wanted the accused in prison at all costs, and this could have been the basis for the fabrication of evidence against the appellant. His evidence needed to be corroborated. It was an error to reject the evidence of Dw3 and accept that of Pw4 who had bad blood with the accused.

The respondent argued that pw4's is not the only evidence that the court relied on. All evidence was corroborated. Moreover, Pw4 said that he told the court the truth notwithstanding the torture visited on him by the appellant.

I have already outlined the evidence that was relevant to the issues of solicitation and receipt of the money by the appellant. The suggestion that only Pw4's evidence was relied on by the court is far from the truth. The whole argument is again misconceived and not borne out on the record. Pw4's was just part of the evidence that the lower court considered and relied on to convict the appellant. This complaint has no merit as well. In the result, all grounds of

appeal fail. The appeal has no merit and is dismissed. The judgment and orders of the lower court are upheld.

**Margaret Tibulya**

**Judge.**

**25<sup>th</sup> September 2015.**