

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

CRIMINAL APPEAL NO.035 OF 2015

(Arising from Criminal Case No. 121 of 2012)

OKELLO D. LOUIS P'ABUR:..... APPELLANT

Vs

UGANDA:..... RESPONDENT

BEFORE: HON.LADY JUSTICE MARGARET TIBULYA

J U D G M E N T

The appellant was convicted with Abuse of Office, Causing Financial loss, and Neglect of duty. The appeal is against the judgment and orders of the lower court and is premised on five grounds.

THE BRIEF FACTS.

The appellant, then Acting district engineer of Amuru District initiated the procurement process for the construction of a bridge over river Opara at Paluke Re-Miyalayab road at a cost of **70,000,000/=**. M/s Watwela Enterprises was awarded the contract (**Exh P. 6**), under which there was to be a retention fee of 10% of the contract sum. After sometime the appellant prepared and presented a certificate of completion of works together with a requisition for payment from the contractor to the Chief Administrative Officer, Mwayita Bruno (**PW30**) who approved payment of a gross amount of about **66,000,000/=**. Before payment could be effected, it was realized that the work was not completed. The approaches to the bridge were not filled and there was need to add more gravel, murrum and compact. In addition there was no sign post. The C.A.O (**Pw3**) halted the payment and tasked the accused to go back with the contractor and complete the work. In the mean-time Pw3 was transferred to another district and **Okot Samuel** (Pw.5) took over as the new C.A.O Amuru. The accused reported to Pw5 (**the new C.A.O**) that the work had been completed and Pw5 endorsed the

payment documents on the basis of the former C.A.O's (**Pw3**) signature and the certificate of completion signed by the accused person.

He however later got information that the approaches to the bridge and the embankment had been washed away by rain. He visited the bridge and found it unusable and so withheld the payment of the retention fee (5% of the contract sum instead of 10% as specified under the contract-**Exhibit P.6- page 4 clause 3.5 thereof**), was withheld.

PW4 (**Odera Jimmy Patty**), an assistant Engineering Officer was requested to inspect the project, which he did and made a technical inspection report (**P. exh. 12**). On the basis of a manual from the Ministry of Works, Housing and Communication (**Vol. 4 of 2004, pages 102-174**), and on technical specifications for roads/bridge construction- 2005 from the same Ministry, he found that the approaches to the bridge had been washed out and hard core fill material was exposed on either side of the bridge. The bridge abutment stems were set in the middle of the stream with a narrow span measuring only 3.4 m instead of 4.8 m span which would have covered the exact bank of the stream. The cement mortar mix used on the gabion wall/stone masonry wall was weak and most of the hardcore material was washed away in the first early rains. He further noted that the height of the bridge decking was low hence the noted flooding above the existing bridge deck level. There were no bridge signposts provided at 40 metres interval to the bridge. The guard rail size materials used were not in line with specifications of 75 mm diameter. The size was 25 mm and one side of the guard rail was broken. He recommended that the contractor be engaged to do the corrections on the bridge.

PW7 (Saul Mulondo), an Engineer with Uganda national Roads Authority also inspected the site and did some tests. He dug test pits and extracted soils from the test pit. He did visual description of the soils in the test pit and conducted laboratory tests. He made a report (**Exh P. 17**) quantifying the loss as hereunder;

- a. the value of work done at the time of investigation amounted to 66,845,700/=.**
- b. The value of work destroyed at the time of investigations amounted to Ug. Shs. 8,320,000/=.**
- c. The direct loss associated with use of non-standard bill items (i.e., items not included in the general specifications) amounted to 10,305,000/=.**

He reviewed the quantities and cost estimates and came up with 97 million as the indicative cost estimates for constructing the Bridge.

He found that the concrete structure was strong as probed with the geological hammer with no signs of honey combing and cracks, but that the approaches were poorly constructed. The steel re-enforcement was of twisted steel bars of 12 mm diameter instead of 16 mm. these were small in a 250 mm the beam.

The compaction was inadequate and the presence of the black silty clay layer between the gravel layer and the rock fill was not proper. The shape of the rock does not ensure proper interlock. The gravel topping the approach though of good quality was not well compacted and it was only 100mm thick, which is thin for a bridge and could be easily washed. The guard posts were not anchored, and should have been extended to firm ground or at least concreted. The stone pitching was cracked, which points to poor workmanship. It was observed that weep holes were missing in the embankment which will significantly reduce the life of the approaches.

It was apparent, he said, that the bridge was planted with inadequate knowledge of hydrological conditions of the area, and from a visual assessment, the bridge was likely to be overtopped several times in the rainy seasons. It would be better if the top of the embankment was concreted to provide a vented drift. The bridge foundation was strong as it was found on the rock of basalt.

The indicative Engineers estimate for the cost of work inspected if done to correct specifications would be approximately 97,000,000/= as of 2011, at the time of reporting.

A number of photographs were taken of the bridge and the surrounding rock fills. Pw7 further testified that the structure had no problem but the approaches were made up of poor material and under compacted.

The photographs which were attached to the report;

- Photograph No. 8 shows that the rock-fill was highly elongated and could not be compacted and packed well.
- Photograph No. 9 shows a guard post which collapsed. The stone pitching had already collapsed.

The original report dated 06thSeptember, 2011 is **P. exh. 16**, and the supplementary report dated 8thAugust, 2012 is marked **P. exh. 17**.

PW8 (Tumukurate Michael Baguma) a Senior Inspectorate officer, said that it was the responsibility of the accused person to prepare the Hydrological report as the Head of the works department but that he did not prepare one.

Consideration of the issues raised in the appeal.

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.**

Grounds 1 and 4 were jointly argued. Grounds 2 and 3 were also jointly argued but ground 5 was abandoned

Grounds 1 and 4.

1. The learned trial Magistrate erred in law and fact to convict the appellant with the offences of Abuse of Office, Causing Financial Loss and Neglect of duty in absence of evidence to prove all the essential ingredients of each of the offences beyond reasonable doubt.
- 2.
- 3.
4. The learned trial Magistrate erred in law and fact to hold the appellant responsible for loss simply because he signed on the payment certificate without reviewing the evidence as a whole.

I believe that the resolution of the first and fourth grounds which are basically that the trial court did not properly evaluate the evidence will dispose of the whole appeal.

The question is therefore whether or not there was sufficient evidence to prove all the ingredients of the offences the appellant was charged with.

For the offence abuse of office to be proved;

- 1. The appellant must be proved to have been a person employed in a public office,**
- 2. and that he did or directed to be done an arbitrary act,**
- 3. The act was prejudicial to the interests of his employer,**
- 4. The act was in abuse of the authority of his office.**

The states complaint in this regard was that the appellant certified payment of 69,802,000/= to Watwero Enterprises for the shoddy construction of a single span bridge over river Opara, an act that was prejudicial to Amuru District Local Government.

The fact that the appellant was a public officer was not contested. The trial magistrate relying on the evidence of Pw's 1, 3, 4 and 5 found that the appellant was the direct supervisor of the works in issue. He also believed the evidence of Pw1, (**Oweka**), that the appellant presented a certificate of completion of works and a request for payment to the C.A.O who approved the payment of about 66,000,000/=. He further believed the evidence of Pw4 (**Odera**), and Pw7 (**Tumukurate**) and the exhibited reports (**exhibits P 12, 16 to 18**) that the work was shoddy yet payment was effected.

The appellant's complaints are that;

- **The learned magistrate failed to apply the evidence to the elements of the offences thereby coming to the wrong conclusion.**
- **He did not resolve the last two ingredients of the offence of abuse of office;**

It was argued for the appellant that like the CAO and the contracts committee, the appellant had a role to play in the implementation of the project, and that by signing the certificate of payment he did not violate the contract but was only performing his employer's instructions. Further that it was a collective role. Counsel referred to Pw3's testimony on page 31 lines 6-27, and page 32 lines 1-3 that the letter seeking payment was addressed to him and that he directed the Chief Finance Officer to pay the contractor, for the submission that while the appellant was the core supervisor, he was only part of the core management team which comprised of contracts committee.

I note that the appellant's role of "**core works supervisor**" is not contested. My view is that that role distinguished him from the rest of the team in that the others were only managers. It is fallacious to argue that the appellant only signed the certificate as part of a team. The other members of the management team were not engineers. They were relying on his expertise, the reason he was the "**core works supervisor**". The states complaint and the basis for the charges was the fact that he certified shoddy works which was the basis for paying the contractor. Pw3 was clear that the appellant forwarded the request for payment to him and that as chief Administrative officer he approved payment based on the supporting documents. He was clear that he only relied on the expert advice of the Engineer (the appellant).

The argument that he signed the certificate on the instructions of his employer is outright false. The local government employed him for his expertise. They could not therefore instruct him to sign a certificate when he was the one to advise them on the quality of works. In any event there is nothing on the court record to support the assertion that he was instructed to sign the certificate.

Moreover the evidence relating to the appellant's conduct in the process leading to the signing of the documents and the payment galvanizes the lower court's adverse decision against the appellant. Pw3 (**Mwayita**) testified that when he got complaints about the shoddy work he withheld the payment and instructed the appellant to go and have the work put right. When the new Chief Administrative Officer (Pw5) took over from Pw3, the appellant took the relevant documents to him (**Pw5**), for approval of payment, which **Pw5** did.

The defense did not challenge or deny the above account of events which tends to show that the appellant had a special interest in the approval of the payments beyond merely ensuring that the contractor was paid. It is nowhere in evidence, for example, that the anomalies were rectified in response to the complaints that were brought to the appellants attention by Pw3. The conduct of the appellant in this regard was not that of an innocent man. I find that the lower courts finding that the act of the accused certifying poorly done work was an arbitrary act which prejudiced the interests of his employer.

The complaint about the alleged inconsistency in Pw3's (**Mwayita**) evidence is baseless. There is no contradiction in his evidence that on the basis of a certificate of completion of works and a request for payment presented by the appellant he directed the head of finance to pay the contractor. The appellant was the core person to supervise the work, but there was a core management team of which he (C.A.O) and the contracts committee were members. The key aspect of Pw3's evidence is that the appellant was the supervisor of the works, and in that capacity sent to him documents on the basis of which he approved the payment of the money. There is no contradiction in that evidence.

The complaint that the evidence that was adduced was at variance with the allegation in the charge sheet is without merit. The gist of this complaint was that in the charge sheet the complaint was that the appellant certified payment of 69,802,000/= to Watwero Enterprises yet the evidence on record shows that no money could leave the Local Governments Account

without the approval of the CAO, and that in this case there is evidence that **(Pw3)** is the one who directed the finance department to pay the contractor. There is no doubt that the C.A.O was aware of the payment and that is not the issue here. The issue here relates to how he came to release the funds, and there is evidence that he approved the payment on the basis of the certification by the appellant. The charges against the appellant relate to the certification of the poorly done works but not to who paid the contractor.

The next complaint is that while Pw3 (**the C.A.O**) and the Auditor signed the certificate of payment (**Exh P.11**) thereby confirming that work was indeed completed as per the contract and confirming the authenticity of the letter requesting payment (**Exh P.10**), the magistrate faulted only the appellants signature on exhibit P.11 yet it was part of a process. It was contended that the appellant signed the certificate of payment based on the purpose it was supposed to serve and the decisions of the others, (**i.e., the C.A.O, the Auditor and the contractor**).

The argument as raised is misleading and contrary to the evidence that Pw3 and the Auditor signed the document on the basis of the certification by the appellant. They did not sign as a confirmation of completion of the works. The appellant was the expert on whose action the others relied.

The argument that the appellant's signature was only part of a process is without merit given that the motive with which he signed the document was counter to the reason for which he was employed. This distinguishes this case from **ENG BAGONZA VS UGANDA, Crim. Appeal 102 /2010**, which the defense sought to rely on. In **BAGONZA** the appellant was found to have implemented joint decisions of persons charged with the responsibility of executing the contract, and did not act arbitrarily, while in this case the appellant feloniously misled the responsible officers into believing that all was well thereby obtaining their approvals.

It is true that the appellant was an agent of Amuru District Local Government and signed the contract [exh P.8] as such, the reason he was charged under the relevant law. Also true is the fact that the local government reserved over-all supervision over the contract, which was the only way the appellants misdeeds were unearthed. This does not remove the fact that he was the core supervisor of the works and that he failed in his duty when he misled the responsible

officers into paying for shoddy works.

There is evidence (**Pw3's**) that before payment could be effected it was realized that the work was not completed. The approaches to the bridge were not filled and there was need to add more gravels, murrum and compact. In addition there was no signpost. The argument that the work was completed is therefore not sustainable.

The contention that the defects could have occurred after the completion of the works is also answered by the evidence that the same defects (**relating to the approaches to the bridge**) that Pw3 required the appellant to put right were discovered by **Pw5 (Okot)** after he had made the payment. Moreover the joint inspection which **Pw4 (Odera)** testified about was conducted on 20th September 2010, within the defect liability period, as per his report (Exh P.12). Pw4's testimony shows that the same defects were found at the time of the inspection.

There is no evidence and no basis for the assertion that the retention fees could suffice to rectify the problem. I should point out that even if the problem were rectifiable in the way that the appellant suggests, it would not absolve him of the charges since the evidence of arbitrariness is independent of whatever remedial measures there could have been in the circumstances.

The appellant sought to rely on Pw7's (**Saul Mulondo**) evidence that the value of the work done was 66,845,700/= for which the contractor was entitled to payment and Pw3's evidence that only 62,123,780/= was paid. He however left out the key aspects of Pw7's testimony, such as the evidence that the value of the work destroyed at the time of investigations was 8,320,000/=, while the direct loss associated with use of non-standard bill items was 10,305,000/=. Since this case is about the loss occasioned to the accused's employer on account of his conduct and since there was sufficient proof of loss, issues relating to the value of the work done are only of mathematical significance.

The fact that some fifteen or twenty people were seen using the bridge does not remove the fact that the work was shoddy and that the local government suffered loss.

Pw3 and 5's evidence that even before payment to the contractor was effected problems were found with the bridge rules out the possibility of normal wear and tear due to a long period of

unmaintained use of the bridge.

On the assertion that the trial court did not resolve the issues of whether the act was prejudicial to the interests of the appellants employer, and whether the act was in abuse of the authority of his office false, the last paragraph on page six of the lower court judgment dealt with those issues in the following terms;

“The reports of inspection attributed the failures of the bridge to poor workmanship and use of non-standard bill materials/items...these point to poor supervision which fell under the docket of the accused person. So the act of the accused certifying poorly done work was an arbitrary act and prejudiced the interests of his employer in the sense that there was no value for money (i.e. 69,802,000/=) and the bridge was unusable/non-operational.”

The argument that the main interest was to have the bridge constructed and completed within the contractual period is presumptive and is against both logic and the weight of evidence that the employer was interested value for money, the reason the appellant, an expert, was employed.

Arguments relating to the alleged defect liability period of 6 months and the assertion that the work was completed substantially ahead of the contractual period and those relating to the value of the work as at 30th June 2009 and the value two years later have nothing to do with the fact that the accused by issuing the certificate of completion of works misled the responsible officer (**C.A.O**) into releasing money in payment for shoddy work. This was the basis for the charges against the appellant.

The evidence relating to how Pw5 came to release the funds showed that the accused had a felonious intent. The mere fact that the C.A.O signed the papers does not bring the accused's actions in the ambit of the **Bagonza** finding. The appellant's felonious conduct cannot be said to have been part of a process.

I do not find merit in any of the appellant's arguments relating to the charge of abuse of office. I find that all the ingredients of the offence were sufficiently proved, and the appellant was rightly convicted.

CAUSING FINANCIAL LOSS

- 1. The appellant must be shown to have been a public officer,**
- 2. And that he did an act or omission,**
- 3. And that he knew or had reason to believe that the act or omission would cause loss,**
- 4. Loss actually occurred.**

In convicting the appellant the trial court considered that he prepared the certificate of completion of works which was the basis for payment. The magistrate pointed out that the CAO's role was to approve the certificate, and that the actual loss, (10,305,000/=) was the result of shoddy works that were directly linked to the accused. He concluded that the act of the accused, a qualified engineer, preparing the certificate of completion yet he was aware of the use of non-standard bill items/materials on the bridge implied that he was aware financial loss would occur. He also found, on the basis that the bridge was not functional, that there was loss.

Similar arguments to the ones I have already commented on were raised by the appellant as here below;

- That the loss of 18,625,000/= was not proved.

I don't understand the essence of this complaint since the lower court actually made the same finding. I can only agree with both the lower court and the appellant in this regard.

- I have already commented on the fact that the Pw's 1, 3, and 5 signed the documents in issue and effected payment to the contractor, and pointed out that the evidence is that they did so on the basis of the accused, who was the core supervisor/expert having certified the works. Their signatures cannot be taken to have ratified his actions.
- That Pw7 did not bring to court the document he relied on to come to the conclusion that there was loss.

Pw7 testified in court and was cross examined. The trial magistrate, as was his prerogative, believed his evidence. The magistrate had the opportunity to see the witness testify and therefore was better placed to assess the veracity of his evidence regardless of whether he had adduced the document he relied on.

- Questions were raised whether it was illegal to pay for work as per the contract.

I will repeat here that the accused by issuing the certificate of completion of works misled the responsible officer (C.A.O) into releasing money in payment for shoddy work. This was the basis for the charges against the appellant. The contract did not provide for paying for shoddy work.

- The argument that payment was not on the basis of the certificate of completion that the appellant issued is counter to the evidence of Pw5 to whom the appellant took the documents for approval of payment, and is false.
- Whether or not the approaches were washed away by rain, and whether the problem could be rectified using the retained funds are not the issues of concern here. The concern as supported by evidence was that the work was shoddy on account of the appellant's actions.

I find that the ingredients of the offence of causing financial loss were proved, and that the appellant was rightly convicted. The appellant's complaints have no merit.

NEGLECT OF DUTY

- 1. the appellant must be shown to have been a public officer,**
- 2. and that he had a legal duty to perform,**
- 3. but that he neglected that duty.**

It was argued that the particulars of the offence were bad for uncertainty in so far as they did not precisely state what evaluation requirements the appellant was to do, which prejudiced him.

The relevant parts of the particulars of the offence are;

“...the appellant is the same period while serving as district engineer of Amuru Local Government neglected his duty to evaluate the requirements for and supervise the proper construction of Opara Bridge leading to shoddy construction work by the contractor”.

It should be remembered that the appellant is an Engineer and must have had an idea about what the **“requirements for the proper construction of Opara Bridge”** were. There was no need for spe

cifying them in the charge sheet. Moreover, he was represented throughout the trial. He cannot be heard to say that he did not understand what the requirements were. The charge sheet was sufficiently clear. The appellant understood what he was to defend himself against which is the important consideration. He did not suffer any prejudice.

The complaint that the charge was **duplex** and that the offence is **minor and cognate** to the offences charged in counts 1 and 2 is false, since the offence of Neglect of Duty is not minor and cognate to Abuse of Office and Causing Financial Loss.

It was finally argued that the ingredients of the offence were not proved since;

- It was Pw4's duty to supervise government projects.

My response is that the weight of evidence is that the appellant was the core supervisor of the works in issue. He was indeed aware of this, the reason he is the one who signed the certificate of completion of the works.

- Luwita Raymond was the Ag District Engineer,

The evidence that the appellant was the engineer in charge of supervision of this project was not contested. It is of no consequence that Luwita was or was not the Ag District Engineer.

- There is no appointment letter of the appellant with a schedule of duties.

The evidence that he was the district engineer and that he was the works supervisor was not contested. It is of no consequence that his appointment letter and schedule of duties were not exhibited in court.

The rest of the arguments that;

- He executed his duties as a senior Engineer of Amuru District Local Government.
- According to Pw3, the core management committee of the CAO, the District Engineer, the contracts committee and the Auditors had an inherent supervisory role with regard to the performance of the contract.
- The Planner and the CAO were to take note of the contract as per minutes of the

Technical Planning Committee, (Exh P3)

- Under Exhibits P. 6 and P. 7 the Project Manager is not indicated, are a mere repetition of issues I have already commented on and have no merit for reasons already given.

Grounds 2 and 3 were argued jointly and they were that the learned trial Magistrate erred in law and fact in importing and basing his decision on extraneous matters not supported by the evidence before the court. Counsel cited the statement that, “...it is not in dispute that Shs 69,802,000/= was advanced to Watwero Enterprises for that shoddy work,” on page 6 lines 11-13 of the judgment, and the reference by the magistrate to the payment of 70,000,000/= appearing on page 9 lines 14-19 of the judgment, to support his argument.

There is sufficient evidence (**Exh P.1**) that Amuru District Local Government spent a total of 68,802,000/= on account of these shoddy works. This includes the amount paid to the contractor and the deductions. The trial magistrate’s citing of slightly different amounts was a mistake which neither changed the gist of the case nor prejudiced the appellant in any way. While I uphold this ground it does not change the out-come of the appeal.

I do not find merit in the appeal. It stands dismissed.

Margaret Tibulya

Judge.

30th November 2015.