

The facts which gave rise to this appeal are brief. The appellant was employed by Government as a District Medical Officer (DMO) for Tororo District. Busolwe Hospital in Tororo District was undergoing renovation. A Management Committee was set up as an administrative arrangement to oversee the renovation. On 14/2/95 the committee held a meeting under the chairmanship of the appellant. The meeting resolved as follows:

(1) that the contractor renovating the Hospital be paid immediately Shs. 19m/= to enable him to continue with the work,

(2) that in future, payments would only be effected after an interim certificate of work had been issued duly signed by the Supervisor of Works and the Medical Superintendent.

On 20/2/95, the appellant without recourse to the committee endorsed alteration on the voucher for 19m/= to be paid to the contractor (Gay Way Services) to read 36m/=. He did this against an interim certificate which was duly endorsed. He later routed the voucher through the usual procedure for approval and eventual payment. The prosecution alleged that the alteration was arbitrary, for the purpose of personal gain to the appellant and prejudicial to his employer's interest. The appellant was subsequently arrested and charged. At the trial, he admitted that he made the alteration which he endorsed but denied that that act was arbitrary; for his personal gain or that it was prejudicial to the interest of his employer.

In his view, the act was normal, within the scope of the power of his office and for the benefit of his employer. The trial Magistrate rejected that defence and convicted him as already stated. The High Court confirmed that rejection thus prompting this appeal.

When the appeal was called for hearing, counsel for the respondent did not appear even though there was evidence of due service of Hearing Notice on them. As there was no explanation for their absence, we ordered the hearing of the appeal to proceed in the respondent's absence under rule 72 (9) of the Court of Appeal Rules Directions 1996. (Legal Notice No. 11 of 1996).

There are four grounds of appeal namely:

(1) That the learned appellate judge erred in law to hold that it was unnecessary to obtain written consent of the Director of Public Prosecution on the amended charge sheet.

(2) That the learned appellate judge erred in law in holding that the essential ingredients of the offence had been proved beyond reasonable doubt.

(3) That the learned appellate judge erred in law in basing his decision on evidence which was inadmissible.

(4) The learned appellate judge erred in law in failing to consider a ground which was argued before him.

The appellant's complaint in ground 1 was that failure of the prosecution to obtain the Director of Public Prosecution's (D.P.P's) written consent to support the amended charge sheet was a flaw which rendered the proceedings a nullity. Mr. Akamparira, learned counsel for the appellant, argued that once the original charge sheet which requires prior written consent of the D.P.P. before the prosecution commences is amended, the original charge sheet ceases to have effect and all the proceedings can only be based on the amended charge sheet. Therefore, the necessary consent has to be obtained before proceedings can validly proceed on the amended charge sheet. He cited and relied on *Uganda Vs Nondo & ors [1985] HCB 3* (High Court decision) and on *Abdulla Suleiman El Hearth and Ors Vs R. [1955] 22 EACA 404.*

In *Abdulla Suleiman's case (supra)* the defunct Court of Appeal for Eastern Africa referred to section 230 of the Indian Criminal Procedure Code which neither the Zanzibar Criminal Procedure Decree nor our own Magistrates Court Act or Criminal Procedure Code has a corresponding section and said:-

“Nevertheless, it is clear that the Court in Zanzibar could not proceed with an amended or additional charge for which previous sanction was necessary if based on new facts, until such sanction was forthcoming.”

Clearly, even the courts in this country could not proceed with an amended or additional charge for which prior sanction was necessary if based on new facts, until such sanction was forthcoming. In the instant case, the situation is different. The necessary sanction was obtained in

respect of the original charges. The amended charges were not based on new facts. They were based on the same facts. The amendment merely consisted in dropping an alternative charge leaving the main charges intact. In those circumstances we are of the view that fresh consent was not necessary. The holding of the appellate judge in the court below was therefore justified. Accordingly, this ground fails.

The appellant's complaint in ground 2 is that there was no evidence to prove beyond reasonable doubt ingredient's Nos. 2, 3 and 4 of the offence of Abuse of Office. These ingredients are:

- (2) - that the appellant's act complained of was arbitrary,
- (3) - that the act was prejudicial to his employer or other person and;
- (4)- that the act was in abuse of the authority of his office.

The appellant's act complained of was his endorsement of the alteration of a figure on voucher from 19m/= to 36m/= for payment to the Contractor (Gay Way Services) for renovation work done to the Busolwe Hospital. It was argued for the appellant that appellant's failure to seek approval of the Management Committee did not make his act arbitrary or an abuse of office and was not prejudicial to the interest of his employer. In his view, the consent of the Management Committee was not an essential part of the laid down procedure as the committee was Ad-hoc and its role was only advisory.

The respondent's contention in the court below was that the alteration of the figure by the appellant without recourse to Busolwe Hospital Management Committee for approval was arbitrary, prejudicial to the interest of the appellant's employer as it deprived it of money which should have financed other services and that the act was an abuse of the authority of the appellant's office as he acted without a reasonable cause.

The appellate judge in the court below dealt with the matter in this way:-

“In discussing the second ingredient of the offence, I found as a fact as indeed the learned Chief Magistrate found, that there was an established system under which payments from Busolwe Hospital account were authorised. It was also found that the appellant in contravention of the laid down procedure and without taking into account the other needs

of the Hospital ordered arbitrarily the payment of Shs. 36 million. A public officer is accountable for his act to the public. He is not expected to act arbitrarily, capriciously and without reasonable cause. Having acted so, he grossly abused the authority of his office. All in all the prosecution proved all the essential ingredients of the offence of abuse of office C/S 183 (1) of the Penal Code Act (sic).”

With respect to the appellate judge in the court below, we find no evidence to support the above findings. In the first place, there is no evidence that failure to seek approval of the Management Committee for the alteration rendered that alteration arbitrary. On the contrary, there is evidence which shows that the role of the Management Committee was only advisory: Masinde Esau (PW2) the vice-Chairman of the said Management Committee replied in cross-examination that “the role of the Committee was management and advisory.” Patrick Okwerede (PW5) the Chief Administrative Officer Tororo District, stated in his evidence that: -

“ . . . at the stage of commencement, the Management Committee was not part of the contract. The role of the Management Committee in the renovation of the Hospital was purely supervisory. To see the way the renovation was going.”

Secondly, there is ample evidence which tends to show that the kingpin in a building contract payment like the instant one is the interim certificate. The evidence of Dr. Mweru (PW1) Medical Officer who was attached to Busolwe Hospital, shows that at the meeting of 14/2/95 which he attended, it was resolved that in future all payments must be made only against an interim certificate duly endorsed by the Supervisor of Works and the District Medical Officer. This fact was also alluded to by Odongo Richard (PW4) the Supervisor of Works. Patrick Okwerede emphatically testified that he would not authorise payment without the interim certificate showing the value of the work already done. From the above, it is clear that failure to seek approval of the Management Committee could not render the act of the appellant arbitrary if he acted on a duly endorsed interim certificate.

In the instant case, it is not in dispute that the alteration was made in response to an interim certificate that was duly endorsed.

Thirdly, there is evidence that the appellant followed the normal procedure for requisitioning for the money to effect such payment; Patrick Okwerede explained that the requisition was to be made by the Medical Superintendent of the Hospital under renovation on a voucher. Dr. Mweru stated that in the instant case, the initial requisition for the 19m/= was made by him as the Medical Superintendent of Busolwe Hospital. According to Patrick Okwerede, the voucher would then be sent to the Chief Administrative Officer (CAO) with a requisitioning chit for approval. Once approved, the CAO would pass it to the Treasurer who in turn would instruct a cashier to prepare a cheque. Thereafter, the cheque with the voucher would be passed to the internal auditor for verification. Once satisfied that all was proper, the internal auditor would direct that the cheque be paid out.

There is no dispute that the appellant altered the figure on the voucher in his capacity as the acting Medical Superintendent of Busolwe Hospital. In that capacity he had power to requisition for the money. In other words he crossed the figure 19m/= and requisitioned for 36m/= and routed the voucher through the procedure explained above. Dr. Mweru and Patrick Okwerede both agreed that no fault was found with the procedure adopted by the appellant as the internal auditor would have detected it. Patrick Okwerede further testified that the amount altered was to correspond to the figure in the interim certificate duly endorsed. In his view, no loss was caused to the Hospital or the District by that payment as the amount paid was even less than the figure shown in the interim certificate. That evidence was supported by the evidence of Odongo Richard.

In our view, if the appellant had the power to requisition for the money for payment against an interim certificate without prior approval of the management committee as shown above, we think that he must also have the power to alter the figure he is requisitioning where necessary without recourse to the Management Committee for approval. There is no regulation shown to make approval of the Management Committee a prior condition before an amount is requisitioned or altered by the Medical Superintendent. We find on the evidence available that the appellant's act was not arbitrary as he did not only act within the scope of the power of his office but also in accordance with the accepted payment procedure and; was not prejudicial to the interest of his employer.

Ground 2 therefore succeeds. In the premises this is enough to dispose off the appeal. The appeal is allowed, conviction is quashed and the sentence is set aside. If the fine imposed was paid by the appellant, it must be refunded.

Dated at Kampala this 17th day of December 1999.

G.M. OKELLO
JUSTICE OF APPEAL

S.G. ENGWAU,
JUSTICE OF APPEAL

A. TWINOMUJUNI
JUSTICE OF APPEAL