**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA.**

**(ANTI CORRUPTION DIVISION)**

**CRIMINAL CASE NO. 004 OF 2009**

**UGANDA ---------- PROSECUTOR**

**VERSUS**

**NDIFUNA MOSES ----------ACCUSED**

**BEFORE HON. JUSTICE J.B.A KATUTSI**

**JUDGMENT**

The accused at the bar is indicted for corruptly soliciting for a gratification c/s 2(a) and punishable under section 6(1) of the prevention of corruption Act, and for corruptly receiving a gratification c/s 2(a) and punishable under section 6(1) of the prevention of corruption Act.

On count 1 it is alleged that the accused a magistrate GII attached to Mbarara magistrate court on 11.06.09 at the court Chambers/premises solicited for a gratification of shs 200,000/= (two hundred thousand) from SENKAYI MURISHID an accused person who was appearing before him for trial as an inducement for the accused to give, make, or pass an order allowing SENKAYI MURISHID to open his business premises that had been closed by the Health inspector Kakoba Division in Mbarara municipality.

On count 2 it is alleged that at the same time and place the accused received a gratification of shs 200,000/= ( two hundred thousand )as an inducement for the said accused to give , make, or pass an order allowing Senkayi Muridish to open his business premises that had been closed by the Health Inspector Kakoba Division Mbarara municipality.

I am constrained to first comment on the manner that the indictment is framed. The offence s of soliciting and receiving are created under one section. Namely Section 2(a). The penalty is under one section, namely section 6(1). The section creating the offences uses the conjunction ***"or"*** A conjunction is used to introduce another possibility. This is clear from the Oxford Advanced Learners Dictionary 6th Edition.

In my humble opinion therefore receiving is an alternative to soliciting and should be charged as such.

Section 50(2) of the Trial on indictments Act empowers the court to make an order for alteration of the indictment as the court thinks necessary to meet the circumstances of the case. In other words the court is empowered to amend the indictment. I am satisfied that the amendment I am about to make does not cause any injustice to the accused. The indictment is therefore amended by making count 2 an alternative to count 1. It is amended accordingly.

I have very carefully studied the evidence on record. The thinness of prosecution case on count 1 is obvious.

The paucity of the evidence led on this count does not measure to the degree of proof required in criminal cases. I would therefore have the accused acquitted on this count.

Now was there any receiving of money on 16.06.09? There is no doubt that there was. This much is admitted by the accused in no uncertain words.

The only question remaining is, was that receipt corrupt under the meaning of section 2(a) of the Act? The state says it was. The defence says it was not. Accused gave his evidence on oath. So it is an oath against an oath. The duty of the court now is to try to penetrate the patina of the oath to see which side is really truthful and which side is trying to hide under the patina of the oath.

It is the case for the accused that he received the money under section 160 of the M.C.A. that section legislates as here under:

***"In criminal cases, a magistrates court may promote reconciliation, and encourage and facilitate the settlement in an amicable way, of proceedings for assault, or for any other offence of a personal or private nature, not amounting to felony and not aggravated in***

***degree , in terms of payment of compensation or other terms approved by the court, and may, there upon, order the proceedings to be stayed"***

The evidence on record makes it abundantly clear that there were no proceedings involving Senkayi and his brothers before the court presided over by the accused.

What is clear from the evidence is that Murushid Senkayi and his wife Senkayi Nalongo were being charged with abetting a nuisance c/s 60(1) of public Health Act." See exhibit D 4. It is true that the charges arose out of a complaint lodged by Senkayi brothers. The premises of Senkayi had been closed by the order of the health inspector Kakoba division. see exh.D1. The claim by Senkayi that he approached the accused with the view of having the closure order lifted is not farfetched. It is plausible and logical. The matter was before the accused. In his own admission he had cautioned Senkayi to stop the nuisance.

There is clear evidence that by 16.06.09, the problem between Senkayi and his brothers had become history. This is evident from the evidence of MAGIDU SENTAMU who was examined by the accused. He said inter alia:

> ***"We are all brothers. The town clerk sent his health officer who demolished the temporary kitchen. After two days Senkayi built another kitchen in the same place. We wrote again……. The town clerk took time to respond. We waited for action in court and wrote to the magistrate at the municipal council where Senkayi was an accused. Nothing was done. We wrote to the magistrate again seeking help to have the temporary kitchen removed….. After few days, Senkayi removed the temporary kitchen. OUR PROBLEM ENDED THERE."***

He Sentamu repeated this under cross examination. He said: ***"……. the temporary kitchen was removed. I don't know whether after that Senkayi still had a case in court. AFTER THE KITCHEN WAS REMOVED WE HAD NO OTHER PROBLEM WITH SEKANYI."***

The question is? Can you reconcile people that no longer have a problem?

The accused examined two witnesses to promote his reconciliation claim. It became abundantly clear that the entry in the court file made on 16.06.09 was a mere fabrication. The chief magistrate Mr. Rwatoro was before me. When he started talking about this entry I could not help noticing a complete change in his demeanour and composure. He became shifty prevaricating and totally uneasy. He must have had a hand in this dirty entry.

I do believe the evidence of STANELY NSUBUGA PW5 from the IGG'S office. He said: ***"I asked why he received the money; he said he was to pass over the money to Senkayi's relatives. WE ASKED FOR THE FILE, he said he did not have the file".*** This is the file the accused alleged he had put the money. I accept prosecution witnesses evidence that accused pulled the money from his jacket pocket.

I find no earthly reason why these officials from the IGG's office would conspire to tell lies against the accused and none was suggested to me. I found the two witnesses called by the accused to be pathetic witnesses who were doing their best to save their friendDW2 Mande had been employed at Mbarara magistrates Court with active assistance of the accused. He was paying back for the favors extended to him by the accused. I accept prosecution evidence that only a man and a woman entered the chambers of the accused after Senkayi had left it, and that other than Senkayi, none was seen coming out. Mandes claim that he had left the chambers to go and see the cashier is hollow.

Were it to be true, he would have gone with the file and the money. In any case the cashier had nothing to do with the money since it was not Government revenue. The total sum of my judgment is that the accused did receive Shs.200,000/= (Two hundred thousand) corruptly and in agreement with the Assessors find him guilty and convict him as charged in the alternative.

**J.B.A KATUTSI**

**JUDGE**

**16th November, 2009**

16/11/2009

Accused before court

Kafuko for him on private brief

Birungi and Mawanda for state

Liz Clerk

Judgment read

**J.B.A KATUTSI**

**JUDGE**

**16th November, 2009**

**Birungi:**

We don't have the past record of the accused but call for a deterrent sentence.

**J.B.A KATUTSI**

**JUDGE**

**16th November, 2009**

**Kafuko:**

Require for a lenient sentence. The convict is aged 57 years. He has a big family of 17 children and two wives. Most of the children are still at school. He has been looking after his aging children, 9 orphans. He has been in service for 23 years. He is very repentant by the unfortunate incident and prays for leniency. Pray therefore, that court may consider a sentence that will enable to make him a useful citizen again.

**SENTENCE AND REASONS FOR IT:**

The accused was a serving Magistrate. His actions and behavour have brought disrespect to the noble profession one of the oldest in history. Greed must be punished. I am told he has two wives and 17 children. Why did he do such a thing that would tempt him to supplement his

salary by corrupt ways, is him to answer? He would have been wiser. However, I note that the conviction will cost him his job and therefore livelihood. This type of corruption though to be condemned was as impact on National economy. Such that said it cannot be condemned. All in all I deem a sentence of 2 years in prison to be sufficient and a warning to those with greed that in future this will not be tolerated. I would have ordered him to pay shs. 200,000/= which he corruptly received. However, this sum is already with the court as an exhibit. It must be kept safely till all the appeals have been exhausted. In case the conviction is maintained by the upper courts, this money must be handed back to the IGG's Office.

I so order.

**J.B.A KATUTSI**

**JUDGE**

**16th November, 2009**