

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO.494 OF 2014

AIP ODONGO MOSES

5 **NO.23710 D/C OPIRA JULIUS.....**
.....APPELLENTS

VERSUS

UGANDA.....RESPONDEN

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CORAM: HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA
HON. MR. JUSTICE KENNETH KAKURU, JA
HON.MR. JUSTICE PAUL KAHAIBALE MUGAMBA, JA

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(Criminal Appeal from a Judgment of Hon. Lady Justice Margaret Tibulya delivered at the High Court of Uganda at Kampala (Anti Corruption Division) on the 5th day of June, 2014 in criminal case No. HCT-OO-ACD SDC No.02 /2014).

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JUDGMENT OF THE COURT

This appeal arises from the Judgment of *Hon Lady Justice Margaret Tibulya, J* in Criminal Case No. 2 of 2004 in the Anti-corruption Division of the High Court at Kampala dated 5th June 2014.

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Brief Background

Both appellants were serving Police officers attached to Lira Central Police Station, when on 17th October 2013, they were

arrested and later charged on three counts. On count one, they were charged with corruptly soliciting for a gratification contrary to *Section 2(a) and 26(1)* of the Anti-corruption Act 2009 (herein after referred to as ACA).

- 5 On the second count they were charged with corruptly accepting a gratification contrary to *Section 2(a) and 26(1)* of the same Act and on the third count with abuse of office contrary to *Section 11(1)* of the same Act.

The 1st appellant had been contracted to train para-legals in Kole District on consensual gender based violence and children's rights at a training worksop that was held between 29th July 2013 and 2nd August 2013.

He had been contracted by a Non-governmental organization, called *Society for Human Rights Activists*. The contract which he signed indicated he would be paid shs. 300,000/= for the work.

He later learnt through a whistle-blower that in fact he was entitled to shs. 1,000,000/= for his work and not shs. 300,000/= as indicated in his contract. He also learnt that documents relating to his payment had been falsified to indicate that he had in fact been paid shs 1,000,000/=. The Director of the said NGO one Jimmy Odoch (Pw₁) when confronted by the appellants with the above facts paid the appellants shs. 700,000/= but contended that he had done so under duress.

In the meantime the appellants filed a complaint against Pw₁ over the forgeries he had allegedly made in respect of the payments and accountability. The appellants then are said to have demanded from Odoch shs. 1,000,000/= so that they could drop the complaint against him. Mr. Odoch reported the matter to the Police Special Investigations Unit (S.I.U) at Kampala, whereupon a trap was laid. The appellants were arrested as they received part of the said shs. 1,000,000/= from the wife of Mr. Odoch,

Pw₂. The prosecution called 6 witnesses to prove its case. Both appellants testified on oath and called 3 witnesses in their defence. The trial Judge rejected the opinion of the assessors and convicted the appellants on all counts. On count one each of the appellants was sentenced to a fine of shs. 200,000/= or 3 (three) years imprisonment. On count 2 each was sentenced to a fine of shs. 200,000/= or 3 years imprisonment and on count 3 each was sentenced to pay a fine of shs. 100,000/= or 2 (two) years imprisonment.

Both appellants being dissatisfied with the decision of the trial court, filed this appeal jointly on the following grounds;-

1. The learned trial Judge erred in law and fact in convicting the appellants basing on evidence that was full of contradictions, inconsistencies and gaps that were so grave.

2. The learned trial Judge erred in law and fact when she wrongly held that prosecution had proved all the ingredients of the charges of soliciting for gratification, accepting a gratification and abuse of office in all counts thereby wrongly convicting the appellants.

3. The learned trial Judge erred in law and fact when she heavily relied on the prosecution's exhibits in which the 1st appellant's signature was severally forged as proved by DW5 [a handwriting expert] whose vital evidence was totally disregarded.

4. The learned trial Judge erred in law and fact when she failed to fairly, justly and properly evaluate all

evidence on record thereby reaching wrong conclusion that occasioned a miscarriage of justice.

When this appeal came up for hearing learned counsel **Mr. Patrick Kasumba** appeared for the appellants while **Ms. Carol Nabasa** learned Assistant Director of Public Prosecutions appeared for the respondent.

The Appellant's case.

Mr. Kasumba submitted that the appellants had been wrongly convicted of soliciting for a bribe of shs. 700,000/= where the evidence pointed to the fact that, 1st appellant had paid that amount in accordance with his contract with the complainant.

Counsel argued further that, the 1st appellant had been paid shs. 300,000/= for the consultancy work with the NGO Society for Human Rights Activists, whereas he was entitled to receive shs.1,000,000/=. Upon learning from a whistle-blower what he was entitled to, he went to Pw₁ and demanded shs. 700,000/= which he had not been paid.

Counsel contended that had the learned trial Judge properly evaluated the evidence she would have found that the appellant is innocent.

Mr. Kasumba submitted further that there was no evidence to sustain the charges against the appellants in respect of shs. 400,000/= that the Judge found had been solicited for and received by the appellants from Pw₁ but delivered to them by Pw₂. Counsel contended that there were contradictions in the prosecution evidence and as such the trial Judge erred when she relied on that same evidence to convict the appellants.

He asked Court to allow the appeal and quash the conviction.

The Respondent's case

Ms. Nabasa opposed the appeal and supported the learned trial Judge's findings and conclusions. She submitted that the evidence had been properly evaluated. She contended that there were no contradictions in the prosecution case, and that if there were any
5 there were minor and immaterial to proving the charges against the appellants.

She asked Court to dismiss the appeal.

Resolution of the issues

This is a first appeal, as such this Court is required under *Rule*
10 *30(1)* of the Rules of this Court to re-evaluate the evidence adduced at the trial and to make its own inferences on all issues of fact and law. See: ***Kifamunte Henry Vs Uganda: Supreme Court Criminal Appeal No. 10 of 1997.*** (Unreported)

We shall proceed to do so.

15 From the outset we must express our displeasure with the manner in which the memorandum of appeal which we have reproduced above was drafted. Obviously the 1st paragraph contains unnecessary details some which are not in tandem with what is set out in the indictment and the High Court Judgment.

20 All the grounds of appeal appear to offend *Rule 86(1)* of the Rules of this Court which provides as follows;-

“86. Contents of memorandum of appeal.

25 ***(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongfully decided, and the nature of the order which it is***
30 ***proposed to ask the court to make.”***

The grounds of appeal herein are too general. None of them except for ground 3 of appeal concisely sets out the complaint against the decision of the trial Judge. In ground one for example the alleged contradictions are not set out. Ground 2 does not state what was wrongly held by the trial Judge. Counsel for the appellant argued all the grounds generally. We would have been inclined to strike out the offending grounds had the respondent raised objection.

Both appellants were charged at the Anti-corruption Division of the High Court before The Hon. Lady Justice Tibulya J, with three counts as follows;-

1) *Corruptly soliciting for gratification contrary to Section 2(a) and 26(1) of the Anti-corruption Act (ACA).*

2) *Corruptly accepting gratification contrary to Section 2(a) and 26(1) of the same Act.*

3) *Abuse of office contrary to Section 11(1) of the same Act.*

It was alleged in count one that, both appellants between 10th and 17th October 2013, at Lira Municipality corruptly solicited for a gratification of shs. 700,000/= from Odoch Jimmy as an indictment to drop the case of forgery against him in CRB 3096/2013.

In respect of this Count, the learned trial Judge at pages 10-11 of her Judgment noted:-

***“The purpose for which the 700,000/= was solicited, according to the evidence differs from the one indicated in the charge sheet. I will first of all decide whether the accused made the threats to Odoch before I decide on whether if the threats were made, they are still relevant to the charges against to the accused persons.*”**

The defence denied that they solicited for the 700,000/= and therefore they are taken to have denied having made those threats. The reasons I give for accepting Odoch's evidence that the accused solicited for the 700,000/= are relevant to the issue at hand. His taking up the matter to the authorities which is a pointer to his distress also lends credence to his account of events.

As I said, he impressed me as a witness of truth. I therefore believed his evidence that the accused made the threats.

The threats they made are not the subject of the charge, but to me, the main issue is that these threats still relate to the performance of the public functions of the accused, which the Law (Section 2(a) of the Anti-corruption Act seeks to curb.

Though the threats cited in the charge sheets differ from those borne out in the evidence, then I find that this is not good reason for an adverse finding against the prosecution. The accused were not prejudiced by the anomaly since they had an idea of what the charge was about. They were given an opportunity to cross examine the witness. I am solicited for the 700,000/= as a gratification for not coming up fake forgery charges against the accused which they could do as police officers.

I find count I sufficiently proved."

With all due respect we do not agree with the findings of the learned trial Judge on this count. The fact the learned trial Judge

found that the evidence adduced by the witnesses differed from what was set out in the particulars of the offence as set out in the charge sheet would have led her to only one conclusion, that, the charge had not been proved.

- 5 We find that she erred when she held that the appellants “*were not prejudiced by the anomaly since they had an idea of what the charge was about*”

10 It is trite law that the burden of proving a charge lies entirely on the prosecution. The offence upon which an accused is charged must be proved as it appears on the charge sheet by evidence. The prosecution has a duty to prove beyond reasonable doubt that an accused person is guilty as charged. Therefore, the particulars of the charge must be proved as they appear on the charge sheet, to which an accused person pleaded. If an accused
15 person admitted to facts different from those that are set out in the charge sheet, a plea of not guilty cannot be entered. It is erroneous for Court to presume that the accused had an idea of what the charge was about.

20 Be that as it may, the evidence in respect of this matter was adduced only by Pw₁ Odoch. In his examination in chief he stated as follows:-

25 ***“When we discussed, A1 told me that the information he had got was that he was entitled to 1 million shillings and not 300,000/= and so he wanted the balance of the 700,000/=.***

30 ***So he came with D/C Opira to investigate the matter. A1 said he had come as a complainant but also as an investigating officer. I asked them what they were investigating. They said that they had information***

that I had submitted accountability of 1 million to our development partner in respect of the contract payment. So they had come to investigate that.

5 **I asked them who had sent them, they said they had been sent by IDF (Independent Development Fund) our development partner. But that they had come to investigate, which may also help IDF, even if they had not requested for the investigation. _**

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I asked them questions and they became aggressive and harsh to me A1 told me that as a police officer, they are mandated to prosecute and do whatever they feel is best to them.”

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The testimony goes on, and Pw₁ tells Court that he paid shs. 700,000/= to the appellants in order to avoid arrest. Replying to questions put to him by the trial Judge, Pw₁ stated that, his programme officer had requisition for shs. 1,000,000/= presumably to be paid to the 1st appellant for the consultancy work. Further that the accountant had only paid to the appellant shs. 300,000/= as a result of which he had been suspended from duty.

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From the above evidence it appears to us clearly that appellants acting on information from a whistle-blower had come to Pw₁'s office to demand shs.700,000/= which was the amount he was entitled to. From the facts as narrated by PW₁, we find nothing to suggest that the appellants corruptly solicited shs. 700,000/= from Pw₁ Odoch as an inducement to drop a forgery case against him. Pw₁ was demanding money that was legally due to him. He may have done so forcefully but evidence does not point to

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corruptly soliciting a bribe. We find that the learned trial Judge erred when she convicted the appellants in respect of count one as there was no evidence to sustain the charge.

5 In respect of count 2, both appellants concede that they received shs. 400,000/= from Pw₂ Evelyn Odoch the wife of Pw₁. However, they contend that, the money was received as an exhibit in the forgery case against Pw₁ referred to above, in which investigations were on going.

10 We are satisfied that prosecution evidence in particular the evidence of Pw₁ and Pw₂, clearly indicates that the purpose for which the money shs. 400,000/= was sought was to induce the appellants to drop the forgery charges against Pw₁. The evidence is corroborated in all material facts with evidence of Pw₃ Olugu Francis a Police Officer attached to special investigations unit,
15 who helped to set up the trap. It appears to us clearly that the appellants had irregularly opened up a police file, as basis of threatening or causing Pw₁ to pay them shs. 700,000/= he had earlier refused to pay. Having succeeded in obtaining that payment, which as earlier found Pw₁ was legally entitled to, the
20 appellants became greedy and wanted more money. They thereafter threatened Pw₁ with prosecution on account of false accounting and forgery that had resulted from the first payment of shs. 300,000/= and later shs. 700,000/=. At this point PW1 felt threatened and black mailed and reported the matter to Special
25 Investigations Unit of the police. The police then set a trap. In the result the appellants were arrested with the money.

We are satisfied that the prosecution proved beyond reasonable doubt count 3 in respect of abuse of office against each of the appellants.

The appellants being police officers indeed abused their office and authority when they threatened Pw₁ with prosecution in order to cause him into paying them a bribe.

5 They both formed a common intention when they irregularly opened a police file solely for the purpose of obtaining money from Pw₁. They clearly had no intention of investigating the alleged forgeries and false accounting that had been made against Pw₁ by the whistle-blower.

10 We are therefore satisfied that both counts two and three were proved beyond reasonable doubt and as such the appellants were both properly convicted in respect of the two counts.

This appeal therefore succeeds only in part.

We make the following orders;-

15 **1) The conviction of the 1st appellant in respect of count one is hereby quashed and the sentence set aside. The respondent is hereby ordered to refund the fine of shs 200,000/= that had been paid by the 1st appellant.**

20 **2) The conviction of the 2nd appellant in respect of count one is hereby quashed and the sentence set aside. The respondent is hereby ordered to refund to 2nd appellant shs. 200,000/= paid in respect of the conviction on this count.**

25 **3) The convictions of the 1st appellant in respect of counts 2 and 3 are hereby upheld and the sentences confirmed.**

4) The convictions of the 2nd appellant in respect of counts 2 and 3 are hereby upheld and the sentences confirmed.

Dated at Kampala this.....day of2016.

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HON. JUSTICE SOLOMY BALUNGI BOSSA
JUSTICE OF APPEAL

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HON. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. JUSTICE PAUL KAHAIBALE MUGAMBA
JUSTICE OF APPEAL