THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO 0079 OF 2011

(Arising from Judgment of His Lordship JB Katutsi at the High Court of Uganda at Kampala in Criminal Session No. 0031 of 2010, dated 3.03.2011)

BIREETE SARAH ::APPELLANT

VS

UGANDA:::RESPONDENT

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

HON. MR. JUSTICE CHEBORION BARISHAKI, JA

JUDGMENT

The accused was indicted for Abuse of Office (Count 1) contrary to S. 11(1) and Embezzlement (Count 2) contrary to S.14 (a) (iii) of the Anti-Corruption Act, 2009 respectively. She was convicted on both counts and sentenced to 5 years imprisonment on Count 1 and 10 years imprisonment on Count 2. Both sentences were to run concurrently. She was further disqualified from holding any public office for a period of 10 years upon release and ordered to refund US Dollars 70,160.00. Being dissatisfied with the conviction and sentences, the Appellant appealed to this Court.

The facts giving rise to the Appeal are as follows; On Count 1, it was alleged that the accused(now the appellant) between February and May 2009 in the Kampala District being a person employed by the Ministry of Foreign Affairs/National Co-ordination Mechanism of the International Conference at the Great Lakes Region as conference coordinator, did an arbitrary act prejudicial to the interests of her employer by diverting

For the accused, it was contended that she had never been an employee of the Uganda Government or at all. She further contended that the charges against her were misconceived and untenable in law. In the alternative, she denied any allegation of theft on her part or at all. She was tried, convicted and sentenced as stated above. She appealed to this court.

At the hearing of the Appeal, the Appellant was represented by Geoffrey Nangumya on private brief while Alice Komuhangi Kawuka, Senior Principal State Attorney, represented the Respondent.

Counsel for the Appellant made two applications; one seeking for leave of court to file a supplementary memorandum amending the grounds stated in the memorandum of appeal and the second was to re-organize the record. Counsel for the Respondent objected to the applications on the grounds that Counsel for the Appellant had had sufficient time to amend the memorandum and re-organize the record. However, Counsel for the Appellant had not yet filed in court the supplementary memorandum and had not served a copy of the same on Counsel for the Respondent. In the interest of justice, court allowed the appellant's counsel to amend the grounds orally. Counsel for the Appellant withdrew ground 1 and substituted it with a new ground and amended ground 2.

The grounds of appeal as amended are as follows;

1. ***That the learned trial Judge exhibited a lot of bias throughout the trial and this led to the appellant being unjustifiably convicted and sentenced.***
2. ***The learned trial Judge misdirected himself on the law and fact relating to the employment status of the Appellant.***
3. ***That the learned trial Judge erred in law when he convicted the appellant of the offences of abuse of office and embezzlement without proof of the essential ingredients and the participation of the Appellant in commission of the offences.***

accused and that it took unnecessarily too long keeping the accused in jail

vi) Counsel for Appellant submitted that the trial Judge introduced evidence, which was not part of the record, in his judgment.

Regarding ground 2, Counsel for Appellant submitted that the evidence led showed that the accused person was neither an employee of the International Conference of Great Lakes Region nor of the Government of Uganda/Ministry of Foreign Affairs during the period the offences were committed. He relied on the Pact **[Exhibit 6]** and the Appellant's contracts of employment referred to as R65, R66, R70 in support of his submission.

Regarding ground 3, it was Counsel for Appellant's submission that the appellant was never found to have participated in any of the acts that led to the loss of the alleged monies. She was only found to have sent the letter authored by Ambassador Mugume (PW7), the Permanent Secretary Ministry Of Foreign Affairs to the secretariat in Bujumbura requesting for refund of the monies and that letter was exhibited. He relied on the case of ***Uganda VS Kisembo Moses and 3 Ors High Court Criminal case No. 22 of 2014*** to support his submission. He further submitted that PW7 did not deny his signature on the letter but denied its contents. He found it awkward that the Ambassador proceeded to use 40,000 US dollars (80million shillings) that was received by the Ministry of Foreign Affairs as a result of the purported letter without knowledge of the source.

Regarding ground 4, Counsel for Appellant submitted that the trial Judge failed to evaluate the evidence in the following ways;

i) By continuing to refer to the letter of 22nd April 2009 and finding that it was a forgery and yet it was not on record

ii) By finding that the money alleged to have been stolen by the accused/appellant was remitted for salaries, yet the money had been remitted as Uganda's contribution to the Great Lakes offices

iii) By finding that the money had earlier been sent back, yet the money was sent back after the letter requesting for it was received by the Secretariat in Bujumbura

giving support to the Government of Uganda for it to be able to continue with the undertaking. She further contended that the reason why the appellant couldn't in her individual capacity ask for payment from the Friends to the Great Lakes Region when there was a delay was because support was intended for the Government of Uganda and not to her individually. It was her further submission that it is wrong for the appellant to be an employee of the National Coordination Mechanism when it is convenient for her and totally dissociate herself when it is not convenient for her

Regarding ground 3, Counsel for Respondent submitted that the arbitrary act for the offence of abuse of office was the email that the Appellant generated and upon which Uganda's surplus contribution to the International Conference of the Great Lakes Region (ICGLR) was sent. It was her submission that Ambassador Mugume totally disassociated himself from the content of the letter that was attached in the said email. It was her further submission that the act of asking for the money to be put on the appellant's private account was prejudicial to the interests of the National Coordination Mechanism.

As regards the offence of embezzlement, Counsel for Respondent submitted that the Appellant withdrew the money from the account (Great Lakes Youth League). She contended that by virtue of the office that the appellant held to wit; Conference Coordinator of the ICGLR, she accessed this money and she knew where the money was or where it went because the money was on an account which she had control over though she was not a signatory.

Regarding ground 1, Counsel for Respondent submitted that there was no bias on the part of the learned trial Judge and if there was any bias, it did not occasion any miscarriage of justice to the appellant.

The sentences handed to the Appellant are legal sentences and not harsh in the circumstances. The Appellant held an office that was very instrumental in ensuring proper coordination within the Great Lakes Region including holding the image of the Government. What was done in this case was very bad for the Government. As such, the sentence was therefore, appropriate and the compensation order was justified.

The test to be applied in determining whether a judicial officer is biased was set out in the case of ***GM Combined Ltd v AK Detergents (U) Ltd Supreme Court Civil Appeal No.19 of 1998*** where Justice Oder cited with approval the case of ***Exparte Barusley and District Licensed Valuers Association (1960) 2 QBJ 169*** where it was held thus:

> ***"In considering whether there was a real likelihood of bias; the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal or whoever it may be who sits in a judicial capacity, it does not look to see if there was a real likelihood that he would or did, in fact favor one side at the expense of the other. The court looks at the impression which he would give to other people. Even if he was impartial as could be, on his part, then he should not sit. And if he does sit, his decision cannot stand. Never the less there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice or chairman as the case may be would think it likely or probable that the court will not inquire whether he did in fact favor one side unfairly. Suffice is that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: The Judge was biased."***

Also in ***Localball (UK) Ltd v Bay Field Properties Ltd and Another 2000 QB,*** it was held that;

> ***"Any Judge who allows any judicial decision to be influenced by partiality or prejudice deprived the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice wherein any particular case the existence of such partiality or prejudice its actually shown the litigant has irrestible grounds for objecting to trial of the case by that Judge or for applying to set aside the judgment."***

Regarding the events of 23rd November 2010, when bail was cancelled, we have looked at the record of proceedings of the previous hearing date of 5th of November, 2010. Counsel for the accused informed court that she did not know how to proceed without the file although she had made

On the issue of a submission of no case to answer, it is trite law that prior to placing an accused person to his/her defence, the Prosecution is required to have established a *prima facie* case against such accused person. In the present appeal, counsel for the accused sought for the court's guidance on submission on no case to answer and the trial Judge advised him in these terms;

> ***"Counsel I want to assure you that you know sometimes it is better to make a conclusion that it was better to go on to the logical conclusion then you can reserve oral submissions in the final submissions so that we don't waste time because from what I have seen you might be having your reasons to submit I will not deny you that duty can't you incorporate that in your final submissions?. Counsel answered; "My Lord I can".***
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> ***So my finding at this stage is there is a prima facie case so it is supposed to be for the accused to say something in her defence if she so elects."***

From the foregoing, we find that the trial Judge did not deny the accused an opportunity to submit on a no case to answer. Rather, he asked counsel if he could incorporate it in his final submissions which counsel answered in the affirmative. The law makes it mandatory to submit on a no case to answer when court considers that there is no sufficient evidence against the accused. **S.73 of the Trial on Indictments Act provides:**

(1) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is no sufficient evidence that the accused or any one of several accused committed the offence, shall, after hearing the advocates for the prosecution and for the defence, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is sufficient evidence that the accused person or any

Counsel for the appellant abandoned the issue of introduction of new evidence by the trial Judge in his judgment after court advised him that he had raised it as a separate ground of appeal.

On the issue of bias, we find that the trial Judge was not biased and therefore, ground 1 of the appeal fails.

Ground 2, relates to the appellant's status of employment. The appellant maintains that she has never been an employee of Government and was never paid out of the consolidated fund and was therefore, wrongly charged under the Anti-corruption Act. Counsel for the respondent described the appellant as a person employed in a public body. She contended that the appellant was employed in a government undertaking at the time the offences were committed by virtue of the Pact [Exhibit 6]. Counsel for the appellant strongly disagreed with the said contention because the appellant was charged as a person employed by Ministry of Foreign Affairs/National coordination mechanism of the Great Lakes Region. Indeed, a look at the indictment confirms this position.

It is also important to note that the Anti Corruption Act, 2009 is not only applicable to Government employees. The long title provides thus:

> ***"An Act to provide for the effectual prevention of corruption in both the public and the private sector..."***

It is therefore, a misconception to think that one cannot be charged under the Act simply because such a ~~one~~ person is not a Government employee.

The trial Judge held that the accused/appellant was a person employed in a public body to wit: Ministry of Foreign Affairs/National coordination mechanism of the Great Lakes Region. His decision was based on the evidence of witnesses who testified that the appellant was the Conference Coordinator of the International Conference Mechanism. The appellant does not agree with this position.

S.1 of the Anti-Corruption Act defines a **"public body"** to include the Government, any department, services or undertaking of the Government. Thesaurus Dictionary defines an **"undertaking"** to mean *"to contract to or commit oneself to (something) or (to do something)"*. Merriam Webster Dictionary defines an **"undertaking"** as *"a promise or agreement to do or not do something"*

of Friends to the Great Lakes Region but none of the contracts on record are between her and the said group. From the record, the appellant entered into a contract **(RST 247/454/25)** with the National Preparatory Committee in August 2004 under guidelines sent out by Secretary to the Group of Friends of the Great Lakes Region and its Board of Trustees. The contract was for a period of 5 months and was later renewed for 10 months (December 2005- September 2006). The next contract **(RST/247/454/65)** was between the appellant and the National Coordinator for 9 months (October 2006-June 2007). Its budget was also approved by the Secretary to the Group of Friends and its Board of Trustees. It is important to note that the payments were made by UNDP. From the above, it is clear that the contracts were signed before the Pact came into force but the second contract was still running when the Pact was in force.

There is no other contract after June 2007, however, the appellant continued to work as a Conference Coordinator up to the time she was arrested. She also testified in the trial Court that she was the Conference Coordinator. Her contract of service was implied in the circumstances. For instance, in a Loose Minute dated 31/03/2009, prepared by the appellant, she was part of the Ministry of Affairs delegation for Zone 3 Mission to Sudan, Kenya and Ethiopia, she received the money for the above mission and her per diem on 14/4/2009 through a cheque which bears her signature and name. It is also worth noting that in her communication to the Secretariat, the appellant signed off as the Conference Coordinator, International Conference on the Great Lakes Region, Ministry of Foreign Affairs. We accept counsel for the respondent's submission that the appellant cannot choose to be an employee at her own convenience.

Counsel for the appellant referred to the appellant as a volunteer, we do not accept that contention because the appellant was being paid for her services. The Cambridge Dictionary defines a volunteer as ***"a person who does something, especially helping other people, willingly and without being forced or paid to do it"***
We are further fortified in our decision by a letter dated 22nd January 2007 where Ambassador Mugume requested the Secretary to the Board of Trustees, Group of Friends of the Great Lakes Region to avail funds for the ***"salary payments of Ms Sarah Bireete"*** to enable her carry out her work effectively. We also accept counsel for the respondent's submission that the Group of Friends of the Great Lakes Region were paying the

Counsel for the respondent argued that the arbitrary act in count 1 was the email that the appellant generated and upon which Uganda's surplus contribution to the ICGLR was sent. Ambassador Mugume denied the contents of the email attachment but testified that the signature on the letter looked like his. In other words, the appellant forged the letter (Ref RST 247/454/32) dated 13/02/2009, recalling the funds. We find it relevant to refer to the report and testimony of the Handwriting Expert, Samuel Ezati (PW8). In his report, the said letter was Exhibited as R-3. His finding on the report was thus:

> ***"The questioned signature on R3 is produced by Fax. They are strong pictorial similarities between the questioned signatures of R-71, R-6 and R-3 and Specimen signature Exhibit b. I cannot make a definite opinion in this case unless the original questioned document before it was faxed is produced"***

During cross examination, he testified;

> ***"Actually I did not give any opinion on that one. Number four I did not give any opinion...Okay take it that way as you want you see some legal terms I don't know them but I did not pronounce myself on that one"***

From the foregoing, it is clear that the prosecution did not prove the ingredient of arbitrary act beyond reasonable doubt. There was no evidence to show that the appellant forged the said letter. We therefore find that the offence of Abuse of Office was not proved to the required standard of proof of beyond reasonable doubt.

Regarding the ingredient of an act prejudicial to the interests of the National Coordination Mechanism for the offence of Abuse of office, Counsel for the respondent submitted that the prejudicial act was that the appellant asked for the money to be put on her private account. We do not accept her submission because Charles Kapekele Chileya (PW1) who is the Deputy Executive secretary of the ICGLR in Bujumbura testified ***"I advised the Uganda government to find private accounts if they want to recall some money from us".*** This advice came after he met with Ambassador Mugume in Nairobi and Kinshasa and discussed about the status of funding. During that meeting, Ambassador Mugume

We are of the considered view that the prosecution proved beyond reasonable doubt that the 114,000 USD being Uganda's surplus contribution to the ICGLR was deposited on the Great Lakes Youth League Account following an email with a letter as an attachment recalling the funds. The appellant was the President of the Youth League and her sister PW8 was a signatory to the account, PW8 withdrew the said money less by 4.500,000 (Four million five hundred thousand shillings only), which police recovered and exhibited. The appellant was aware and participated in the said transactions and admitted to knowing the same. The prosecution proved beyond reasonable doubt that after the money had been withdrawn from the bank it simply disappeared into thin air and was never passed on to Government. We accordingly uphold the finding of the trial Judge that the appellant was rightly convicted of the offence of embezzlement.

On ground 4, we shall resolve the components of the alleged failure by the trial Judge to evaluate evidence as Counsel for Appellant submitted albeit combining the first three as we find them interrelated

i) by continuing to refer to the letter of 22nd April 2009 and finding that it was a forgery and yet it was not on record

ii) by finding that the money alleged to have been stolen by the accused/appellant was remitted for salaries yet the money had been remitted as Uganda's contribution to the Great Lakes offices

iii) by finding that the money had earlier been sent back yet the money was sent back after the letter requesting for it was received by the Secretariat in Bujumbura

The trial Judge did not make a specific finding to the effect that the letter dated 22nd of April, 2016 was a forgery. He noted it as part of the prosecution case.

iv) by finding that the letter requesting for the money was a forgery and then holding that Uganda Government lost money in Bujumbura. His contention was that the money was not property of the Government of Uganda

The Judge did not make a specific finding that the letter requesting for the funds to be remitted was a forgery though it could be implied from

In conclusion, we find that the appeal succeeds only in part. The conviction of the appellant of the offence of Abuse of Office is quashed and the sentence is set aside. The conviction and the sentence of the appellant for embezzlement by the learned trial judge are upheld. The appellant should start serving her sentence, her bail pending appeal is cancelled. The orders as to the appellant's disqualification from holding any public office for a period of 10 years upon release and order to refund US Dollars 70,160.00 are upheld.

Before taking leave of this matter, we recommend that the Government of Uganda should streamline matters regarding the management of ICGLR/NCM to avoid such mishaps in future.

Dated this.....21st.....day of.....April.....2016

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HON. MR. JUSTICE REMMY KASULE, JA

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HON. LADY JUSTICE SOLOMY BALUNGI BOSSA, JA

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HON.MR.JUSTICE CHEBORION BARISHAKI, JA