THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT ANTI-CORRUPTION COURT KOLOLO

HCT-00-AC-CN-0005-2018

UGANDA::APPELLANT

VERSUS

NALUBEGA SANSA MWAJUMA &ANOR:::::::::RESPONDENT

JUDGMENT

BEFORE: GIDUDU LAWRENCE

The state appealed against the judgment of Lochomin Peter Magistrate Grade 1 of this Division wherein he acquitted the two respondents of the charges of Abuse of Office, Causing financial loss and Embezzlement.

The brief facts giving rise to this appeal are as follows;

Following the creation of Bweyale Town Council, in the new Kiryandongo District in July 2010 the 1st respondent who is an administrative officer was assigned duties of acting Town Clerk. The 2nd respondent was assigned duties of the Treasurer/Finance Officer.

Since the Town Council had no physical infrastructure on the ground, the 1st respondent as Chief Executive of the Council spearheaded the making of a physical development plan. This was done with the approval of the Ministry responsible for Lands and Urban development.

After this was done, the 1st respondent with the assistance of the 2nd respondent started looking for land to set up offices and other

institutions within the Council. They identified sellers of land, one at Agobe Central Division, and the other at Kichwabugwa cell. They did direct negotiations with the sellers and bought the two pieces of land at 32 million and 28 million respectively. Later the RDC complained to the CAO about the purchase of land by the respondents outside the Public Procurement and Disposal of Public Assets Laws.

The CAO who was not aware of the transactions asked the 1st respondent to respond to which she declined. The CAO eventually asked the IGG to investigate.

Investigations by the IGG revealed that there was no Public Procurement done by the respondents to purchase the land in question. Investigations further revealed that the prices were inflated.

It was also found that there was no valuation by Government valuer to determine the market price. The respondents were eventually charged with Abuse of office, Causing financial loss and Embezzlement.

After the trial, the Magistrate found that the prosecution had not proved the charges against the respondents and acquitted them.

The IGG filed four grounds of appeal which are summarized below;

1. That the learned Trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on court record.
2. The learned Trial Magistrate erred in law and fact when he held that there was no prejudice suffered by Bweyale Town Council.
3. The learned Trial Magistrate erred in law and fact when he acquitted the respondents on charges of causing financial loss.
4. The learned Trial Magistrate erred in law and fact when he acquitted the 2nd respondent on charges of Embezzlement.

In their written submissions, counsel for the appellant argued ground 4 separately while grounds 1, 2, and 3 were discussed jointly.

GROUND 4

It was submitted that the 2nd respondent stole 12,549,349/= on the basis that the payment voucher for this money was made in the names of one Otim Robert (PW7) who denied receiving that money.

The appellant contends that the hand writing expert Sylvia Chelengat (PW10) confirmed that the signatures on the payment voucher for this money did not belong to PW7. It was his view that it can only mean that the 2nd respondent stole this money and falsified accountability in the names of PW7.

GROUND 1, 2 , 3

These grounds relate to the offences of Abuse of Office and Causing Financial loss.

It was submitted that the respondents used proxies such as a one Asaba Christine (who did not testify) and Okumu Justine (PW3) to buy land cheaply in their names which the respondents "sold" to the Town Council at a high price. For example the evidence of Okumu Justine (PW3) is that the respondent No. 2 asked him to find land measuring about 4 acres. He did find the land and the 2nd respondent gave him the money which was 2.4 million to buy the 4 acres. An agreement was made in the names of Okumu Justine as the buyer. He handed over the agreement to the 2nd respondent.

He was surprised to find that he was said to have sold this land to the Council at 28 million. PW3 denied selling any land to Bweyale Town Council.

On the issue of land purchased at 32 million, the submission by the appellant dwells on what I consider irrelevant matters regarding the relationship the 2nd respondent had with one Christine Agaba and the baptism of their child. It is not clear to me why the Trial Magistrate allowed this to come on record. In this era of science paternity of children is confirmed by DNA and not by baptism ceremonies.

Counsel for the appellant faulted the respondents for procuring land for the council without following the law governing public procurements and disposal of public assets. He criticised the trial magistrate for accepting the respondents' explanation that they advertised for land on radios and in churches which is not provided for under the law.

There was no submission regarding the charges of Causing Financial loss which is the basis of Ground No.3.

In reply, learned counsel for the respondents supported the judgment of the trial magistrate insisting that the state did not prove charges of embezzlement against the 2nd respondent for stealing 12,549,349/=.

The reason for this is that the Auditor General in his report on Local Authorities for the year ended 30th June 2011 did not capture this money as having been stolen. He contended that this money was part of money paid to one Katushabe Sam who did road constructions in the town and that he should have been summoned to deny or confirm receipt of the money.

It was also contended that the report of the hand writing expert in regard to the forged signatures of PW7 on the vouchers where 12,549,349/= was paid was based on photocopies which could not clearly distinguish PW7's genuine signature from a forged one.

On the issue of Abuse of office, and Causing Financial loss, in Grounds 1 to 3, learned counsel for the respondents contended that land was purchased and is being used by Bweyale Town Council. No one is complaining except PW1(CAO) who had grudges with the respondents.

He submitted that even if it was irregular for the respondents to purchase land in the manner they did, there was no prejudice to the Town Council. An arbitrary act without prejudice to the employer is not criminal. He supported the view of the Trial Magistrate that the respondents' employers were not prejudiced in this transaction.

Finally, it was submitted that since the purchased land was available and being utilized by the Town Council, the charges of Causing Financial loss in Count 3 are misplaced.

My duty as a 1st appellate court is to review the evidence on record and draw my own conclusions without ignoring the judgment appealed from and also taking into account the fact that I neither saw nor heard the witnesses testify.

I have perused the evidence of the prosecution and that of the defence in the lower court. I have read the judgment and studied the exhibits.

This case arose from the actions of the respondents of purchasing land for the Town Council as if they were buying their own personal property. Under **section 2 of the Public Procurement and disposal of Assets Act 2003**, all procurements where public finances originating from the consolidated fund and related special finances expended through the capital or recurrent budgets whatever form these may take are supposed to follow the **Public Procurement and Disposal of Assets Act (PPDA)**.

Under Regulation 41 up to 66 of Statutory Instrument 2014 No.8 bids are supposed to be invited from potential vendors by publication of a bid notice, prequalification exercise, short listing or direct invitation of a sole or single provider. Bids are supposed to be published in at least one Newspaper of wide circulation. Bids cannot be solicited through radio adverts and in between church sermons as the respondents indicated.

It is clear from the evidence for both sides that the procurement was not sourced through the Contracts and Evaluation Committees to identify the sellers. There was no award.

In short there were no bids scrutinized by the Contracts Committee and evaluated by the Evaluation Committee before the final award of the contract. All the provisions of the **PPDA** were ignored from day one

It is, therefore, not difficult to find that the two respondents who are senior public officials flouted the law when they procured goods for Government above the threshold of 2 million without a Public Procurement process. This is obviously arbitrary because they did not follow the law and acted illegally. That is the meaning of Abitrary.

The question that arises is whether these acts were prejudicial to their employer? The appellant says it was prejudicial because it did not follow the law. While for the respondents it is submitted that it was not prejudicial because the Town Council benefited from land that was purchased however irregular it was.

Prejudice is damage or detriment to ones legal rights or claims. ***See Black's Laws Dictionary 8th Edition 2004.***

The process of public procurement ensures that even if the bidder was single handedly sourced, the goods to be supplied are subject to an evaluation including valuation. This ensures that the purchaser gets value for money because independent expert opinion is obtained before the purchase.

The entity also benefits from the transparency of the entire process which is good governance. This is what is provided for in ***Statutory Instrument 2006, No.39*** which are regulations governing procurements by Local Governments. Specifically ***Regulation 43*** requires transparency, accountability, fairness, competition, and value for money in the procurement of goods and services. There is no doubt on the evidence on record that these good attributes were not achieved in this procurement. The respondents argue that they hired a private valuer who assessed the land at the two sites as costing 8 million and 7 million respectively per acre.

It was their defence that they used these indicative figures to purchase the land at 32million and 28 million respectively.

However, the 1st respondent, being the authorising officer and the 2nd respondent, being the paying officer, could not ethically hire a valuer to value land they intended to purchase for the Council. That is the work of the Contracts Committee through an Evaluation Committee. The separation of roles ensures that the authorizing officer and the paying officer are not compromised or tempted to influence the valuer to give them a price that may be beneficial to them but not to the Council.

In short the Council was exposed to an unfair process which had been arrived at arbitrarily by the two respondents. To say that because the land is there and there is no conflict, and that the respondents did

nothing wrong is with respect very misleading. If the process is flawed and riddled with illegalities, then it follows that the intended beneficiary of the goods so procured has suffered a prejudice because it has obtained goods following a process outside the law. It, therefore, missed out on benefits that flow from a transparent, competitive, and value for money process.

It is on record that the sellers had problems which they wanted to solve and were selling cheaply. For example PW3 bought the land at 2.4 million instead of the 28 million that the Council paid. Similarly there is evidence on record that the land purchased at 32 million was 3 months earlier bought by Christine Agaba at 18 million. In the first scenario, the Council over paid by 25,600,000=. In the second scenario, it over paid by 14,000,000=. This is the prejudice the Council suffered.

It is, therefore, logical to conclude that the total of 60 million paid for the two pieces of land could have been much lower if a transparent competitive, and value for money process prescribed by the procurement regulations cited above had been followed.

With respect I am unable to agree with the judgment of the lower court and the submissions of respondents counsel that the respondents did not prejudice their employer by acting the way they did.

It is not valid to say that because Councilors in Bweyale Town Council are not complaining, it means the two respondents did nothing wrong. The criminality of the conduct of the respondents cannot be decided basing on whether the chairman of the Town Council and his Councilors complained or not. There is no evidence that in fact they know this law. If they knew it, they would have fired

the first shot. With respect the trial magistrate failed to appreciate the demand of the **PPDA Act** and its benefits in deciding the case.

Consequently, I respectfully disagree with the finding by the Trial Court that the two are not guilty on the charges of Abuse of Office in Counts 1 and 2.

It is my conclusion that the prosecution proved the charges of Abuse of Office against the two respondents. They are guilty of Abuse of Office by purporting to procure land for a government entity without following the **PPDA Act**. There is ample evidence to show that the purchased land was cheap land sold by desperate vendors yet the Town Council paid dearly for the same.

In short it was a bad deal. The respondents are senior officers who knew that they were breaking the law by purchasing land in a manner they did. I find them guilty and I convict them. I set aside the Order acquitting them on Counts 1 and 2. Ground 2 of the memorandum of appeal is upheld.

GROUND 3

Although the appellant did not address the court in this appeal in regard to the charges of Causing Financial loss which constitute Ground 3 of the Memorandum, the respondent on the other had found fault in preferring a count of causing financial loss yet evidence is that the land was purchased for the 28 million that was said to have been the loss.

Perhaps, I should revisit the particulars of the offence in Count 3. It is alleged that the two respondents in the performance of their duties as Town Clerk and Treasurer at Bweyale Town Council withdrew 28 million meant for purchase of land but instead put the money to their

personal use knowing or having reason to believe that such acts would cause financial loss.

The particulars of this offence are similar to what would amount to theft of the money. Frankly, acts of causing financial loss do not include outright theft. Where it is clear that a theft has been committed there is no point of preferring charges of causing financial loss because theft by public official is a complete offence of embezzlement. Besides the evidence on record adduced by the prosecution through PW2 is that this land is available and under use by the Council. Financial loss refers to actual loss. The land purchased for 28 million exists. Loss should have been directed at the difference between the real value and the inflated value.

PW3 purchased it for 2.4 million and the respondents paid out 28 million for the same. It may have been overvalued. If the prosecution wished to prefer charges of causing financial loss, it should have subjected the piece of land to valuation and fixing a price as at the time 28 million was paid for it. The difference between the actual and the inflated price would have been the financial loss suffered by the Council. In its present form Count No. 3 was misplaced to say the least and meaningless in view of the evidence adduced by the prosecution in the lower court. The complaint in ground 3 is with respect not valid. Ground 3 fails.

GROUND 4

The complaint by the appellant regarding the acquittal of the 2nd respondent on the charge of embezzlement of **12,549,349/=** is that the trial magistrate did not properly evaluate the evidence regarding exhibits **P29, P30, P31, P32, P33, and P34**. These exhibits comprise requisitions for payment by Otim Robert (PW7) made on 5th April,

12th April and 14th April 2011. In those requisitions he is asking for **23,189,345/=** for surveying roads in Bweyale Town Council.

In exhibit P34 which is a payment voucher prepared by Bweyale Town Council the payee is Otim Robert described as a field surveyor. He is paid **12,549,345/=** as a balance having received an advance payment of **10,640,000/=** making a total of **23,189,345/=** as payment for intensive road survey, road setting and pegging in Bweyale Town Council.

Sylivia Chelengat (PW10) testified that the signatures on the above exhibits vary from those of PW7. During his testimony PW7 was shown the above exhibits and not only did he deny the signatures appearing on them, but also denied receiving the **12,549,345/=.** He also denied doing the work described in the payment voucher. He never worked on any roads. He denied writing any requisitions for payment in exhibits **P29 to P34**.

In resolving this issue the Trial Magistrate held that the investigation should have produced one Katushabe who was alleged by the 2nd respondent to have taken that money since he worked on the roads and that no complaint has arisen from the Town Council about failure to do the work. The lower court also said Katushabe's name was recorded in the cash book which means he was paid.

In support of this judgment, counsel for the respondent No. 2 submitted that the Auditor General's Report did not report the theft of this money and that the possibility that Katushabe received this money cannot be ruled out. He also supported the Trial Magistrate that the hand writing expert, PW10, used photocopies and therefore could not conclude that the signatures do not belong to PW7.

With the greatest respect to the trial magistrate and learned counsel for the 2nd respondent, the Auditor General's Report which is exhibit **P26** is a Statutory Annual Report it is not a forensic report that identifies loss of money and the person responsible for it.

Secondly, even if PW10 examined the photocopies, during Robert Otims' testimony in court he denied receiving more than 10 million shillings from Bweyale Town Council. He denied signing any vouchers for the money. He only received three installments of 3 million, 3million, and 4 million respectively. He saw the signatures on the original documents comprising exhibits **P29 to P34** and stated that he did not sign any document, and never received the said **12, 549,345/=.** This means that it is irrelevant whether the hand writing expert dealt with photocopies or not because the purported author requisitioning for the money was in court and denied requisitioning for it. The payment voucher which is **exhibit P34** is very clear on who the payee is. It does not say **Katushabe** it says **Robert Otim**. The presence of Katushabe's name in the cash book does not mean that Katushabe was paid. The cash book is not a payment voucher which a payee signs to acknowledge receipt of money. The trial magistrate mis-directed himself on the use of a cash book.

Respondent No.2 described himself as an accountant by profession. Is it possible that an accountant by profession can prepare a voucher to pay Katushabe but write Otim as the payee? He even attaches requisitions on headed papers using the name of Robert Otim instead of Katushabe? I do not believe so. Respondent number 2 is an educated man. He knew what he was doing. He was falsifying accounts. It is an offence.

I have already held in this judgment that the two respondents are educated senior government officials. They are not juniors who can

say that they did not know what they were doing. If Katushabe did work for the Council he must have been paid and his voucher must be different from that of Robert Otim.

I am persuaded by the appellants submissions that the false requisitions made in the name of Robert Otim were meant to cover money that had been stolen.

The 2nd respondent was the Treasurer and author of the payment voucher. He does not deny this. He claims to have paid Robert Otim. It is clear that Robert Otim never received payment.

Like night follows day, it follows that the 2nd respondent is the one that stole 12,549,345/=. It is an irresistible inference drawn from the facts as outlined above. It is not capable of any other explanation other than that he stole that money. Being a public official it is my conclusion that he embezzled it. The prosecution proved this charge beyond reasonable doubt.

I find that the complaint in Ground 4 of the memorandum of appeal valid. The Order of acquittal of the 2nd respondent on Count 4 is set aside. It is substituted with a finding that respondent No. 2 is guilty of embezzlement of said 12, 549,345/=. I convict him on Count 4.

CONCLUSION

Upon perusing the record, reviewing the evidence and scrutinizing the exhibits on the file, I have come to the conclusion that the respondents are guilty on the charges of Abuse of office in counts one and two. The second respondent is guilty on the charge of Embezzlement.

There was no evidence to prove the charges of Causing Financial loss. The particulars of the offence in count 3 were mismatched with

the evidence on the record. Count 3 was not sustainable on technical grounds.

Consequently I find the two respondents guilty of abuse of office in counts 1 and 2 and the 2nd respondent guilty of embezzlement in Count 4. I convict each one of them accordingly.

The Orders acquitting them by the trial court are hereby set aside. The appeal succeeds in part and fails in part.

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Lawrence Gidudu

Judge

25th /January/2019.

Mr. Thomas Okoth for appellant

Mr. P.Ngabirano for the 2 respondents

Respondents in court

Rita – clerk

Judgment delivered

25/1/19