REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT THE ANTI CORRUPTION DIVISION

CRIMINAL SESSION CASE NO. 0003 OF 2014

UGANDA:: PROSECUTOR

VRS

PATRICIA OJANGOLE:::::::::::::::::::::::::::::::: ACCUSED

BEFORE THE HON. JUSTICE LAWRENCE GIDUDU

JUDGMENT

Patricia Ojangole, the accused, is the CEO of Uganda Development Bank Ltd, herein after referred to as UDBL.

She is charged with the offence of conflict of interest c/s 9(1) and (2)(a) of the Anti corruption Act. She denied the charges.

It is the prosecution case that the accused while being employed as Chief Internal Auditor of UDBL and later Ag. CEO of the same used her position to get appointed as CEO by knowingly failing to disclose her interest to the board of UDBL.

It was the accused's defence that she was being persecuted by persons she had faulted in her audit reports. She defended her appointment as being free from conflict or influence because it was clear to all staff from the very beginning that whoever was holding a post in acting capacity was free to apply for substantive

appointment. She argued that only the board had power to appoint and she had no influence upon it.

This being a criminal case, the prosecution has a duty to prove all the essential ingredients beyond reasonable doubt. The accused has no duty to prove her innocence.

The section of the law under which the accused has been charged is reproduced below:

9. Conflict of interest.

(1) An employee, or a member of a public body, public company or public undertaking who, in the course of his or her official duties, deals with a matter in which he or she or his or her immediate family has a direct or indirect interest or is in a position to influence the matter directly or indirectly and he or she knowingly, fails to disclose the nature of that interest and votes or participates in the proceedings of that body, company or undertaking, commits an offence and is liable on conviction to a term of imprisonment not exceeding twelve years or a fine not exceeding five thousand currency points or both.

(2) Conflict of interest shall arise where the person referred to in subsection (1)
(a) deals with a matter in which he or she has personal interest and where he or she is in a position to influence the matter directly or indirectly, in the course of his or her official duties;

From the above provisions the following ingredients must be proved to sustain the charges:

I. **The accused must be an employee of a public body or public company**
II. **The accused must deal with the matter in the course of her official duties**
III. **The accused or her immediate family must have a direct or indirect interest in the matter**

IV. Or must be in a position to influence the matter directly or indirectly
V. The accused must fail to disclose the nature of that interest
VI. Or participates in the proceedings of that company

While the above ingredients constitute the offence, to commit the crime, subsection 2 provides that the accused must:-
Deal in the matter in which she has personal interest and be in a position to influence the matter directly or indirectly in the course of her employment.

At the conclusion of the trial, it was not in dispute that the accused was an employee of UDBL which is a public company owned by government. She also acted in her official capacity as acting CEO during the recruitment of the substantive CEO and had an interest in the substantive job which she eventually applied for, sat interviews and passed leading to her appointment.

The ingredients in contest are whether the accused failed to disclose her interest and whether she influenced her recruitment into UDBL.

The prosecution adduced the evidence of a former employee of UDBL, two board members, a recruitment consultant and a police officer to support its case.

The evidence of Ms Florence Nabuuma Kabenge, PW1, was that she, as acting board secretary, was tasked to initiate the process of recruiting persons to fill vacant positions in the bank. She advised that the bank advertises for a recruitment consultant or it writes to PPDA for a waiver. Her advice was not accepted by the board.
Eventually she was relieved of her duties as acting board secretary. M/s Ligomarc advocates took over the job of board secretary. It was her evidence that the accused negotiated with Vincent Kaheru, the consultant, to arrive at a figure of 12 million. Kaheru was co-opted by the board to help in the recruitment.

Dr. Samuel Sejjaaka, the board chairman who gave evidence as PW2 gave a background to the scenario that resulted in these charges.
It was his evidence that he and others were appointed to the board of UDBL in May 2012. The new board tasked management to lay before it the bank portfolio. Management became uncooperative. The board suspended management and ordered for a forensic audit. The audits by external auditors and internal audit by the accused who was then chief internal auditor revealed fraud. They decided to lay off the entire management team and decided to replace it with a new management team.
They advertised the posts including that of CEO. PW2 faulted PW1 for being an incompetent officer who failed the board in getting the recruitment process started. It was his evidence that she was a poor worker who would report late and failed to execute tasks assigned to her. It was also his evidence that the board took over the management of the recruitment process and advised all staff in acting capacity to apply for posts advertised if they met the criteria.
He stated that they were aware staff members had applied for the jobs advertised and took steps to avoid being influenced. It was his evidence that he was aware the accused had applied for the job of CEO and that whatever tasks she performed regarding the process of recruitment; it was on instructions of the board.
Mr. Vincent Kaheru, the consultant in issue also testified as PW4. His evidence was that he was first contacted by Ms Harriet Omoding, a board member (PW5), interesting him to participate in the recruitment exercise by the board. He was eventually contacted by the accused as a follow up to what PW5 had told him. He was eventually contracted by the board through PW2 and provided the short listing tool. He also participated in the interviews and made a report to the board after the exercise. He was engaged in person because the fees quoted by his firm were considered high by the board.

He denied negotiating with the accused saying he was just asked to lower his price and quote as an individual and not a firm. He stated that the interview tool is copyrighted and is not adjustable while the oral questions to the candidates were developed from the interview room on the day of interviews.

He denied being influenced by the accused. He also denied influencing the board in a particular way saying his role did not give him control over the process.
Ms Harriet Amoding, PW5, who was the board member in charge of short listing. Stated that she was the one who knew PW4 and contacted him to come on board and provide expertise to the recruitment process. She was the one who instructed the accused to contact PW4. She found no fault in the accused applying for the post of CEO and addressing her application to "the recruitment team" because it was the board that interviewed the applicants. It was her evidence that it would look clumsy for the applicant to address the application to herself as acting CEO as the advert indicated.

Finally the evidence of the investing officer, Daniel Acato, PW6, is that he was detailed with others to investigate a range of issues such as improper loan to savannah, victimization, improper transfers etc. He could not recall the date of the complaint of the whistle blower. He concluded that the accused influenced her appointment and refused to believe PW2, also a prosecution witness that whatever the accused did in the process was on instructions of the board. However he admitted that the accused did not choose her interviewers.

The accused in her defence denied influencing her appointment. She believed the charges were framed against her to kick her out of the job. She testified that people she faulted in her audit reports and lost jobs in the bank want her out in turn. It was her evidence that the bank was run unprofessionally and the level of risk to loans was shockingly high. 60% of the loans were non performing thus causing losses to shareholders.
She attributed her problems to staff in the bank who owed allegiance to those that had been dismissed because of the audit reports she had issued to the board.

She faulted PW1 for failing to perform. She failed to produce board minutes, failed to generate working papers for the board and even refused to publish names of debtors.

It was her evidence that it was PW5 who introduced her to PW4 and other consultants. She admitted writing the emails but on instructions of PW5. She denied having the power to influence the board. She denied concealing her interest on grounds that it was common knowledge that everybody in acting capacity was asked to apply for substantive appointment. It was her evidence that she would be excluded from some board meetings because she was expected to apply. This instruction from the board was verbal. It was her evidence that even PW1 would excuse herself from some board meetings because she was expected to apply.
During cross examination, the accused named the people behind her prosecution as PW1, former CEO Etou Gabriel, and Shallot Mucunguzi who had been dismissed for leaking official mails.

She stated that she made her application on 15th October, stopped sending any mails concerning the recruitment on 16th October and submitted her application on 19th October, 2014. She testified that the board expected her to apply and it was not necessary to inform the board because it was already aware. She testified that most people in acting capacity did not meet the qualifications for the advertised jobs that is why they did not apply.

It was the submission of Mr. Sydney Asubo for the state that the fact that the accused did not disclose her interest in applying for the job and participated in the various correspondences and tasks, she gained un due advantage. It was his view that she committed the offence of conflict of interest. He canvassed the proposition that if she had disclosed her interest then even if she participated she would not commit a crime

In reply, Mr Nsubuga Mubiru, learned counsel for the accused laced his submission with humour. He asked me to find the accused not guilty and acquit her on grounds that if I believe the prosecution case, I would acquit and if I believed the defence case, I would still acquit.

He criticised the prosecution for adducing two versions of evidence. The first version is by PW1 and PW6, who testified that the accused participated in proceedings that recruited a consultant who prepared the interviews in which she was an applicant without disclosing her interest.

The second version is by PW2, PW3, PW4 and PW5 who testified that they were aware of the accused's interest in the job and were not surprised that she applied. These two versions are adduced by the same side and are clearly contradictory. They were not reconciled. I will return to the two submissions later.

Section 9(2) of the ACA, no. 6 of 2009 provides that conflict of interest arises where a person

(a) Deals with a matter in which he or she has personal interest and where he or she is in a position to influence the matter directly or indirectly, in the course of his or her official duties.

The Act does not define conflict of interest. It only identifies it.
The issue for resolution is whether, the accused dealt in the matter in which she had a personal interest whether she was in a position to influence the matter directly or indirectly. Further, whether, she failed to disclose that interest to her employer.

Black's Law dictionary, eighth edition, defines conflict of interest as *a real or seeming incompatibility between one's private interests and one's public or fiduciary duties.*
Did the accused have private interests which she exploited in some way for her personal gain?
The law under which the accused has been charged requires that there should exist both a personal interest and the accused should be in a position to influence the matter. See sec 9(2) of the ACA.

Apparently, the existence of a conflict of interest does not by itself mean wrong doing. For many professionals, it is impossible to avoid having conflicts of interest from time to time.

A conflict of interest would only become a legal matter if a person tries or indeed succeeds in influencing the outcome of a decision for personal benefit. In this case the prosecution must prove beyond reasonable doubt that the accused used her official position to influence the decision to appoint her CEO. It must be proved that she skewed the process to favour her without disclosing her interest.
How then one would deal with conflict of interest since it occurs in people's daily or professional lives?
Recusal. One way of dealing with conflict of interest is to avoid it by stepping down or declining to participate in a proceeding. The prosecution has not accused her of applying for the job. She had every right to apply and attend interviews once shortlisted. Recusal is, therefore, not one of the options available to the accused.

The second option of dealing with conflict of interest is disclosure. By disclosure, the interested party reveals to others the nature of the interest so that it is known. Again the ACA does not define disclosure but Black's Law dictionary, eighth edition defines disclosure as the *act or processes of making known something that was previously unknown; a revelation of facts.*

Mr. Asubo asked me to find the accused guilty on the basis that she did not write to the board disclosing her interest in applying for the job. The defence as given by the accused herself is that there was nothing to disclose because the encouragement of staff holding acting positions to apply came from the board itself. It was the accused's evidence that the board communicated to all staff verbally and this fact was common knowledge.
Prosecution witnesses such as PW1, PW2 and PW5 confirm that this was a fact known to all staff. It was the evidence of PW2 and PW5, both members of the

board, that they were not surprised when the accused applied because they were aware of her interest in the job.
The ACA does not indicate whether disclosure should be made even when the one to whom the information is to be given is already in the know. Would that be disclosure any way? Is disclosure a mere formality or it should carry information heather to unknown to the other party. Mr. Asubo suggested that disclosure is mandatory whether the other party knows it or not. What then would be the value of the law in requiring a meaningless disclosure?
A similar law in Kenya is instructive. Section 42(1)(a) of the Kenyan Anti-Corruption and Economic crimes Act,2003 provides thus on conflict of interest:

42(1) If an agent has a direct or indirect private interest in a decision that his principal is to make the agent is guilty of an offence if-

(a) The agent knows or has reason to believe that the principal is unaware of the interest and the agent fails to disclose the interest.

The above provision makes disclosure meaningful and not a mere formality as the prosecution seems to suggest. To disclose is to reveal what was previously not known to the other party. The duty should arise where the other party has no knowledge of what is concealed. The crime is committed when the other party acts innocently only to discover later that an interest has been concealed and a party has gained from that concealment. Even in ordinary English, to disclose is to *make known publically or to show something that was hidden***. See Cambridge International Dictionary of English, 1995. The law in Kenya on the same crime is clearer and conveys the intention of the law appropriately.**

The prosecution adduced evidence of PW1, PW2 and PW5 to the effect that the board had already made known to all staff that they should apply for substantive appointments if they qualify. Now the prosecution has asked me to fault the accused for failing to disclose to people like PW2 and PW5 who were the authors of the information. With respect, if this was the intention of the law, it is ridiculous. Disclosure is an English word which does not mean mere formality but conveying information unknown to the recipient.

From the prosecution evidence, it is clear to me that there was nothing to disclose. The law in section 9(1) was not meant for the situation such as the one the accused and others in her organization were in. It was meant for the situation where the other party was not privy to knowledge of an undisclosed interest. Disclosure is not a mere formality but an act of conveying information unknown to the recipient. It is my finding that there was nothing for the accused to disclose. Both the accused and the board were aware that positions in UDBL were due for filling through open competition and that staff of UDBL including the accused were going to apply. It would be a circus to pretend that the accused was disclosing that she was going to apply. I am unable, with respect, to accept the prosecution submission that the accused should have as a formality written to the board and from there her further dealings with the board would be immune to conflict. That would make disclosure appear a mere ritual. Disclosure is supposed to put the recipient on guard so as to take steps to shield the process from influence peddling. That is the mischief the law was enacted to deal with. PW2 said the board after informing staff to apply took steps to avoid compromising the process. With this evidence in the prosecution file, it is a wonder why we are here.

Besides, it is a requirement under subsection 2 of section 9 for the prosecution to prove that the accused was in a position to influence her appointment directly or indirectly. There was no evidence adduced to prove that the acting CEO was in a position to influence her appointment as full CEO. On the contrary, the prosecution adduced evidence from PW2 which was to the effect that the board did not and would not be influenced by the acting CEO. The prosecution also adduced evidence of PW4 who said he supplied a tool to the board for managing the interview process but that the tool could not be altered or tampered with to favour anybody. Questions for the oral interview were framed that morning of the interview and the accused, like any other candidate did not have advance knowledge of what to expect.

Further, the prosecution adduced evidence of PW3 who testified that she was the one who received applications including that of the accused. PW3 had the applications deposit box under her lock and key. The accused did not manage the process of processing the applications. She was not in a position to influence the matter.

I believe these prosecution witnesses that there was no room for the accused to peddle any influence. Being acting CEO did not put her in a position of influence. Even the consultant (PW4) called by the prosecution scoffed at any suggestion that he would be influenced by the accused in the recruitment process. If these prosecution witnesses say the accused was not in a position to influence them, where else is evidence that she was in such a position except from the bar?

The accused denied the allegations and explained her role as being that of conveying instructions of the board to the recipients such as PW4 and giving feedback. The board would exclude her whenever it discussed a matter regarding the appointment of the CEO. She denied being in a position to influence the board. According to the prosecution witnesses, the accused emerged the best candidate in an open competition. The prosecution witnesses supported the accused's version. It is no wonder that if I believe the prosecution evidence, I find no conflict of interest and if I believe the accused in her defence, I find no conflict of interest.

The lady and gentleman assessors advised me to acquit the accused. They observed that the prosecution assembled two versions of the case. These two versions were contradictory. They also observed that the accused acted honestly in her dealings with the board. They found no influence.

I entirely agree with the assessor's opinion. It would be clumsy for the law to merely criminalise a person for holding a position of influence. The person can only be guilty if evidence is adduced to prove that the person used that position to influence the outcome of a decision. As I observed earlier on, the existence of

conflict of interest does not by itself amount to a crime. That would be absurd because not every situation of conflict is created by the person charged. It only becomes an offence if a person tries or indeed succeeds in influencing the outcome of a decision for personal benefit.

The prosecution did not adduce evidence of wrong doing on her part. PW6 who is the police officer did not give reasons for believing that the accused influenced her appointment. He and others were sent to the bank to investigate different allegations and apparently failing to find proof imagined that the accused who had been an acting CEO could have become full CEO by influencing the board to appoint her. The board denied being influenced but PW6 chose to ignore these denials and brought these charges for which, as I have found, there is no proof.

I believe the accused's version that the charges are malicious because while internal auditor she unearthed a lot of rot which led to the dismissal of the entire management and appointment of a new board. UDBL according to the accused had 60% of the loans as non-performing meaning management was not doing due diligence or was colluding with borrowers to fleece the bank.

PW6 chose to prefer charges against a person who had pointed out the wrongs in UDBL in her audit reports. The accused should have been commended by a serious investigator instead of charging her thereby leaving the crooks at large.

Where an accused person enters a plea of not guilty and the state adduces evidence which supports the accused's denial, the court should make a verdict in favour of the accused. This is the scenario in this case.

In conclusion, I find that on the full consideration of evidence adduced by the prosecution against the defence case, the prosecution has not proved the charges of conflict of interest against the accused beyond reasonable doubt. I find her not guilty and I acquit her accordingly. Her bail deposit, if any, be refunded.

Lawrence Gidudu

JUDGE
30th June, 2014.