

UGANDA / JUDGMENT

Kiwanuka v Uganda (Criminal Appeal No. 302 of 2021) [2023] UGCA 399 (29 March 2023)

[2023] UGCA 399

COURT

Court of Appeal of Uganda

BEFORE

Buteera, DCJ, Egonda-Ntende, JA, Monica K. Mugenyi, JA

CASE / FILE NUMBER

Criminal Appeal No. 302 of 2021

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There must be the acts of the accused
were prejudicial to the
employer.

THE REPUBLIC OF UGANDA**IN THE COURT OF UGANDA AT KAMPALA**

[*Coram: Buteera, DCJ, Egonda-Ntende & Mugenyi, JJA*]

Criminal Appeal No. 302 of 2021

(*Arising from High Court Criminal Appeal No.17 of 2020*)

BETWEEN

Kiwanuka Francis= Appellant

AND

Respondent Uganda=

> (Appeal from a Judgment of the High Court [Kajuga, J] delivered on 7th December, 2021)

JUDGMENT OF THE COURT

Introduction

- This is a second appeal. The appellant was charged and acquitted before the \$[1]\$ Chief Magistrate of Anti-corruption at Kololo of the offence of abuse of office contrary to section \$11(1)\$ of the Anti-Corruption Act, 2009. The respondent appealed to the High Court of Uganda and on 7th December, 2021, the acquittal was set aside and the appellant was convicted for the offence of abuse of office Contrary to Section \$11(2)\$ of the Anti-Corruption Act, 2009. The appellant was sentenced to a fine of 168 currency points or 1 year imprisonment and disqualified from holding a public office for ten (10) years from the day of conviction.
- Dissatisfied with the conviction and sentence of the first appellate court the \$[2]\$ appellant has appealed to this court relying on 2 grounds which I set out below.

'(1) The first appellate court erred when it overturned the well-reasoned judgment of the trial court wrongly holding that the appellant had abused the authority of his office.

(2) The first appellate court erred when it convicted the appellant without subjecting the evidence on record to thorough and exhaustive scrutiny as the first appellate court.'

- t3] The respondent opposed the appeal
- 14) At the hearing Ms. Kyasimire Jackline, Senior State Attorney, in the Office of Director of Public Prosecutions represented the respondent and the appellant was represented by Mr. Ngaruye Ruhindi. Counsel filed written submissions.

Submissions by Counsel

- t5] Counsel for the appellant drew our attention to the duties of the second appellate court as laid out in the case of Ernest Enzama v Uganda Supreme Court Criminal No. Appeal20 of 2005 (unreported) and Tito Buhangiro Vs Uganda Supreme Court Appeal No.8 of 2014 (unreported).
- 16] Counsel argued that the first appellate court did not scrutinise PEX9 which it relied on to convict the appellant. Counsel for the appellant submitted that the appellant acted on instructions of PW4 the Chief Administrative Officer of Lyandonte District Local Government when he released the Motor Vehicle UG 1245 R Ford Ranger to Jose Motor Garage Ltd purposely to help the district ascertain the costs of repairs.
- 17] Counsel for the appellant further submitted that according to PEX9, Jose Motor Garage Ltd as a prequalified service provider was required to make an assessment of the motor vehicle and submit an invoice to Lyantonde District Local Government since the appellant lacked the competence to do so.

- t8] Counsel further argued that the first appellate court did not take into account the exhibits DEXH2 and DEXH4 the self-recorded statements of PW4, where he stated that the financial year was coming to an end and the Motor Vehicle UG 1245 R Ford Ranger was grounded and needed urgent repair and it was for the said reason he instructed the appellant to fast-track the repairs.

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t9] Counsel for the appellant submitted that the first appellate court did not take into account the evidence of PW4 where he stated that he was not certain whether the engineer (appellant) had competence because Lyantonde District Local Government did not have an assistant engineer in charge of mechanical engineering at the time.

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- [0] Counsel for the appellant contended that the much as PW4 alleged that he never signed a letter releasing the motor vehicle to Jose Motor Garage Ltd, to the contrary he indicated in his plain statement (DEXH9) that he instructed the appellant to fast track the repair of the motor vehicles and paid the service provider which is a clear indicator that PW4 authorised the appellant to release the vehicle.
- [1 l] Counsel further contended that the first appellate Court wrongly attributed the mistakes of Jose Motor Garage Ltd for issuing proforma invoices PEXh5 and PEXhS on the same day a letter from the appellant was received and the faults of Medad Asimwe the person who made the procurement requisition to the appellant.
- U2l Counsel for the appellant submitted that the appellant never played any role in the requisition of funds, the procurement process and the signing of documents. Counsel averred that the appellant was punished for the mistakes of Medad Asimwe who wrote the requisition for procurement, the Chief Financial Officer who approved the repair and the Deputy Chief Administrative Officer who confirmed the availability of funds and the Chief Administrative Officer who authorized the payment.
- [3] Counsel for the appellant submitted that the I't appellate Court unjustly convicted the appellant for the act of releasing the motor vehicle for assessment which act wasn't prejudicial to the interests of Lyantonde District Local Government. He contended that the act was beneficial to the district since repairs were effected and the vehicle was put in good working conditions.
- [4] Counsel for the appellant concluded by submitting that the first appellate Court failed to scrutinize and re-evaluate evidence on record and wrongly overturned the decision of the trial Court.

- [15] In reply, the learned senior state attorney submitted that the first appellate Court re-evaluated the evidence on record and convicted the appellant on the role he played. Counsel submitted that the learned Judge of the first appellate Court scrutinized the contents of PEX9 and observed that the letter specifically forwarded motor vehicle UG 1245 R for repair which was ^a breach of procurement laws.
- [6] Counsel further submitted that the learned Judge took note of the fact that the motor vehicle was released on the same day the proforma invoice was prepared and signed by Jose Motor Garage Ltd (PEX5 and PEX8) and concluded that the procurement process was flouted.
- U7l Counsel for the respondent further submitted that the first appellate court was able to establish the critical evidence overlooked by the trial court in regards to PEX9 the letter written by the appellant releasing the motor vehicle to Jose Motor Garage and concluded that it was PW4 who was vested with the authority to release the motor vehicle to Jose Motor Garage Ltd for repair and the appellant was to only make an assessment.

Analysis

- [8] On a second appeal, this court is obliged only to consider matters of law and will not question the findings of the fact of the trial court provided that there was evidence to support those findings even though this court could have come to a different conclusion. This court, as a second appellate court, can only interfere where it finds that there was no evidence to support the finding of fact as this is a question of law. See Kifamunte Henry [998] UGSC 22 and Akbar Godi v [Jsanda 20 15 TJGSC 17
- [19] The facts according to the prosecution evidence is that on 2nd Muy, 2017, Mugabi Moses Ndawula (DW3) Chief Finance Officer and Asiimwe Medard

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the Accountant approached Mr. Brian Karamuzi(Pwg) the Community Development Officer who had been assigned duties of the procurement officer and asked for procurement requisition form 65. The form was issued to them and signed by Ndyahabwa Ezra Kyomukama the Deputy CAO of Lyantonde District Local Government who confirmed the availability of funds. The procurement process was initiated by Assimwe Medard and the appellant acting as district engineer issued PEXh9 released motor vehicles UG 1245 R and LG 0001-77 to Jose Motor Garage Ltd to effect repairs without a contract award. Jose Motor Garage Ltd issued proforma invoices PEXh5 and PEXh6 and asked for payment before effecting the repairs. The payment was effected on the same day and Jose Motor Garage Ltd acknowledged receipt of payment (PEXh7 and PEXh8).

- [20] In 2019 a whistle-blower made a report to the State House Anti-Corruption Unit which led to the arrest of the appellant, Mugabi Moses Ndawula, Ndyahabwa Kyomukama Ezra and Nsimbi Joseph on charges of abuse of office and theft.

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- 121l The trial was held before a Magistrate Grade I and on 30th September,2021 judgment was delivered whereby the appellant and 2 others were acquitted and Mugabi Moses Ndawula was convicted. The prosecution was dissatisfied with the decision and appealed to the High Court Anti-Corruption Division. The appeal was determined and judgement delivered on 7th December,2021 whereupon the appellant was convicted of abuse of office contrary to section 11 (2) of the Anti-Corruption Act and his acquittal was set aside.
- [22] The appellant challenged his conviction on the ground that the first appellate court failed to scrutinize all the evidence before it. Mr. Ngaruye Ruhindi for the appellant submitted that the first appellate unjustly convicted the appellant in absence of evidence of how the act of releasing the motor vehicle to conduct an assessment was prejudicial to the interest of Lyantonde District Local Government.
- 123l Ms. Kyasimire Jackline, Senior State Attorney, for the respondent submitted that the appellate Court re-evaluated the evidence on record and found that the

appellant was guilty of exercising the authority which was not vested in him. She contended that there was no justification for the appellant to release the motor vehicle UG 1245R to a non-contracted party and on that basis the first Appellate Court rightly found him guilty and convicted him.

124) The appellant was charged with the offence of abuse of office contrary to Section 11 (1) of the Anti-Corruption Act. It provides,

> '(1) A person who, being employed in a public body or ^a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both.

> (2) Where a person is convicted of an offence under subsection (1) and the act constituting the offence was done for the purposes of gain, the court shall, in addition to any other penalty it may impose, order that anything received as a consequence of the act,, be forfeited to the Government.'

- 125) The elements of this offence are that firstly the person charged must be employed in a public body or company in which the Government has shares. Secondly that he or she does or directs to be done an arbitrary act. Thirdly that such arbitrary act is prejudicial to the interest of his or her employer. Fourthly that such arbitrary and prejudicial act must be in abuse of the authority of his office.

- 1261 It is the obligation of the prosecution to prove all these elements beyond reasonable doubt. Where any of the said elements are not proved beyond reasonable doubt the prosecution will have failed to discharge its burden and the accused would have to be acquitted.
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- 127) The appellant was acquitted of the said offence in the trial court which was reversed on appeal to the High Court. The High Court convicted him of the offence of abuse of office contrary to section 11 (2) of the Anti-Corruption Act after finding that the appellant abused his office within the meaning of section 11(a) of the Anti-Corruption Act. He was then sentenced for the offence under section 11 (1) of the Act.
- [28] We must note at the outset that the offence the appellant was convicted of, on appeal, was not the offence that the appellant was charged with or tried upon. Secondly its ingredients are different from the ingredients of the offence under sub section (1) in the sense that there is an additional ingredient of the arbitrary act being for personal gain. The learned appellate judge did not find that the appellant had acted for personal gain. There was therefore no basis for the conviction of the appellant under section 11 (2) of the Anti-Corruption Act.
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- 1291 As the appellant was sentenced for the offence with which he was charged we shall conclude that it was the intention of the learned judge on appeal to convict the appellant for that offence and not under section 11 (2) as it was stated in the learned judge's judgment. That must have been an error.
- [30] This is how the learned judge determined whether the act committed by the appellant was prejudicial.

'As to whether the arbitrary act prejudiced or caused harm or injury to the rights of the employer, we shall first consider the reason for the establishment of the procurement laws as the need to foster, transparency and accountability in the process, fairness and equality. An abuse of the process certainly jeopardizes the right of Lyantonde Local Government to secure value for money in its procurement, and not to engage in transactions that draw obligations on the District when the right procedures have been abrogated.

I find that the appeal has merit in respect of count 2. I am satisfied that the 2nd respondent Kiwanuka Francis abused the authority of his office within the meaning of the s. 11 (a) of the Anti-Corruption Act.'

- [3 ^I] Much as the learned judge found that the appellant had committed an arbitrary act and had abused his office there is no specific finding of fact as to the prejudice, harm or injury that was suffered by Lyantonde District Local Government on account of the arbitrary act. The learned judge made ^a presumption that since the procurement laws were not followed there must have been prejudice, harm or injury caused to the Lyantonde District Local Government.
- 132) In our view proof of 'an arbitrary act prejudicial to the interests of his or her employer or of any other person' was essential. For an act to be prejudicial it must cause or occasion actual 'harm or injury' to the interests of the employer or any other person. For instance, did the release of the vehicles in question lead to harm or injury to the interests of the employer of the appellant? No specific finding was made on this matter other than to presume that since the procurement laws were flouted harm or injury must have resulted. It was incumbent upon the prosecution to prove that the appellant's arbitrary act led to his employer not receiving value for money or suffering some other actual harm or injury.
- [33] It is not enough that the arbitrary act may have been prejudicial or is likely to be prejudicial to the interests of the employer of the appellant or any other person. There must be proof, beyond reasonable doubt, that such act is prejudicial to the interests of the employer or any other person. The interests affected must be stated or specified. There must be proof of the interests affected by the arbitrary act and how such interests have been diminished or adversely affected.
- 134) From the evidence on record the vehicles that were released for repair were repaired and delivered back to Lyantonde District Local Government in working condition. There is no complaint with regard to the quality or cost of the works that were carried out. No particular harm or injury flowing from the act of the appellant releasing the vehicles in question was alleged or proved.

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- [35] We agree with the appellant that the learned judge on appeal failed to reevaluate the evidence on record and wrongly concluded that the appellant had committed the offence under section 11 (1) of the Anti-Corruption Act. As this ground disposes of the appeal it is unnecessary to consider whether the act of the appellant was in fact arbitrary as was complained of in ground I of the appeal.

Decision

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[36] This appeal is allowed. The conviction of the appellant is quashed. The sentence imposed on the appellant is set aside. If the appellant had paid the fine imposed upon him, we order a refund of the same.

Dated, signed and delivered at Kampala thisYtr' of n"4 ²⁰²³

Richard Buteera Deputy Chief Justice

^F ^E v

Justice of Appeal

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Monica Mugenyi / Justice of Appeal

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