

UGANDA / JUDGMENT

Uganda v Agaba (Session Case 1 of 2021) [2022] UGHACD 7 (2 December 2022)

[2022] UGHACD 7

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Tibulya, J

CASE / FILE NUMBER

Session Case 1 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO
HCT-00-ACD-SC-NO.001/2021

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Uganda:::::::::::::::::::::::::::: Versus

Edgar Gerald Agaba::::::::::::::::::::::::::::

JUDGMENT

BEFORE: HON. LADY JUSTICE MARGARET TIBULYA

The accused stands charged with 8 counts as follows;

two counts of abuse of office, three counts of causing financial loss, and three counts of embezzlement.

The state case is premised on the evidence of 18 witnesses the gist of which is that the accused who was the Chief Executive Officer/accounting officer of the National Lotteries and Gaming Regulatory Board committed the offences in that capacity. The accused denied all charges and maintained that the prosecution failed to prove the ingredients of the offences beyond reasonable doubt.

Burden and standard of proof.

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The burden of proof in criminal cases lies with the prosecution and does not shift except in a few statutory cases. The prosecution must prove all the ingredients of each offence beyond reasonable doubt (*Woolmington v DPP* (1935) AC 462).

Abuse of office (counts 1 and 2)'

In count 1, it is alleged that being an employee of the Ministry of Finance Planning and economic development as the Chief Executive officer of the National Lotteries and Gaming Regulatory Board, in abuse of the authority of his office, the accused did an arbitrary act prejudicial to the interests of his employer, in that he irregularly forwarded a request for payment of UGX 410'695'4001= for banqueting services purportedly provided by Imperiat Royale Hotel during ^a Kampala Central Division Gaming Regulation Educational clinic and workshop for four days from the 10th to the 13th December 2018'

In count 2, it is alleged that in FY 2018/19 being an employee of the Ministry of Finance Planning and economic development as the Chief Executive officer of the National Lotteries and Gaming Regulatory Board in abuse of the authority of his office, the accused did an arbitrary act prejudicial to the interests of his employer, in that he irregularly forwarded a request for payment of UGX 480,040,480/= for banqueting services purportedly provided by Imperial Royale Hotel during a Kawempe Division Boda Boda Gaming Regulation Educational clinic and workshop for four days from the 5th to the 7th and 11th March 2019'

The state had to Prove that; i) 'r

- o the accused was a government employee'
- o that he did or directed to be done the alleged arbitrary acts'
- r that the acts were prejudicial to the interests of his employer'
- o that he abused the authority of his office'

The Gaming Board Human Resource officer Ms. Sarah Birakwate (Pw1), and Pw's 4 (Godfrey Arinaitwe), 6 (Namuli Juliet) and 12 (Betty Kasimbazi) confirmed that the accused was an employee of the Government, a fact he admits. Since the defence does not dispute the fact that the accused was an employee of the Government, I find that the first ingredient for each of counts 1 and 2 has been sufficiently Proved.

Whether the accused did or directed to be done the alleged arbitrary acts.

The arbitrary acts which the accused allegedly committed are that he irregularly forwarded a request for payment of UGX 410,695,400/= for banqueting services purportedly provided by Imperial Royale Hotel during a Kampala Central Division Gaming Regulation Educational clinic and workshop for four days from the 10th to the 13th December 2018', (r) dd,

Also that he irregularly forwarded a request for payment of UGX 480'040'480/= for banqueting services purportedly provided by Imperial Royale Hotel during ^a Kawempe Division Boda Boda Gaming Regulation Educational clinic and workshop for four days from the 5th to the 7th and 11th March 2019'

An exhaustive resolution of this issue requires that the court addresses three sub issues

- o Whether the accused in fact forwarded the alleged requests,
- o Whether he irregularly did so, and
- o Whether (if he irregularly forwarded the requests), his actions were arbitrary.

Whether he forwarded the requests in issue'

The statesought to rely on Pw12 (Betty Kasimbazi's evidence) that the accused as the CEO of the Board, and whose signature she was well versed with sent to her (as the then Undersecretary Ministry of finance) an internal Memo (Exhibit P 10 (a)) dated 17/12/2018, in which he requested that payment of 470,666,000/- be made to Imperial Royale Hotel for their services in relation to a workshop which had been held at the Hotel by the Gaming Board from the 10th to 13th of December 2018'

for their services of the 5th, 6th 7th and 11th of March 2019 in respect to a workshop a. by the Gaming Board. He similarly sent to her another internal Memo (exhibit P 10(b)) of ^{8/12/2019} requesting that payment of 480'040,520/- be effected to Imperial Royale Hotel

Upon analyzing the signatures which forwarded the memos to Pw12 and comparing them with the accused's undisputed signatures' the document examiner (Pw17 (Erisa Sebuwufu), opined that they might have been appended by the accused (see the examination report (exhibit P' 17))' Pw17's evidence therefore corroborates that of Pw12 that it was the accused who sent the requests in issue to her. The accused does not even deny that he forwarded the memos to Pw12. There is sufficient basis for a finding as I do' that the accused forwarded the memos alluded to in counts 1 and 2' requesting that payments of the aforementioned monies be made to Imperial Royale Hotel'

Whether he irregularly did so.

The back ground to the complaint is that ordinarily, in order for the Gaming Board to request for funds, the responsible officer (the accused) would send to Pw12 an internal memo bearing the subject matter and the details of what the funds were for. Such memo would be originated by the manager compliance (the head of department), through the Finance manager to the CEO (the accused) who would approve and forward it to Pw12 (the Undersecretary then).

The basis for the state's assertion that the accused irregularly made the requests was that while each of the two workshops in respect for which payments were sought by the accused took only one day, (see the evidence of Pw4 (Arinaitwe Godfrey), Pw14, (the Auditor) and Pw18 (the investigating officer), it was indicated in the forwarding memos that each of the workshops had taken 4 days. On the basis of the accused's signature, believing that each of the workshops had indeed taken 4 days instead of the genuine 1 day, Pw12 approved the payments Berner to Imperial Royale Hotel.

The state contends that Pw12 was misled into approving the payment of 470,696,100/= and 480,040,520/= to Imperial Royale Hotel. Ronald Ssenfuma (Pw9) of Bank of Africa Equatorial branch confirms that Imperial Royale Hotel received the payments from the Ministry of Finance as follows; a payment of 470,696,100/= on the \$14/12/2019\$ and that of 542,925,087/= of which the 480,040,520/- was a part, on 29/5/2019, as borne out in the Imperial Royale bank statement (**exhibit P.7(b)**).

The accused maintains that he was not aware that each of the two workshops had in fact taken only one day, and that he only relied on his officers.

The court however notes the evidence that by the time the accused forwarded the requests for payment, the workshops had already taken place' This renders it improbable that the accused did not know that each workshop had been conducted for only one day but not the 4 days he cited' This position is galvanized by the fact that with regard to count I, there was a contract which stipulated that the workshop would take two days from I 0'r' to I 1th of Dec embet 2022'

Had the accused not been complicit in the scam, he would not have sought for the equivalent of 4 day's payment for the work shop alluded to in count I' since there no basis for the belief that it had taken 4 days' That the accused sought payment for 4 days instead of the contractual 2 days for that workshop' only supports an adverse inference that he had an ill motive when he sought payment for 4 days. Coupled with the above considerations is the fact that the accused was the Chief Executive, the final person in the Gaming Board for purposes of approval of payments and so could not have ignorantly approved the release and payment of such a colossal amount of money' This leaves no doubt' as is my finding that he irregularly forwarded the requests rnl sue to Pw12.

Whether his actions were arbitrary'

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LJganda Vs Atugonza ACD CR CS 37 of 2010 and LJganda Vs Kazindo ACD

CRCSt3S/20t0are authority for the position that an...arbitrary act', is an 'Action, decision or rule not seeming to be based on reason' system or plan and at times seems unfair or breaks the law' "

The arbitrary act or omission must be done wilfully, i.e., deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not. "This includes doing things based on individual discretion rather than going by fixed rules' procedure or law'

uncontroverted evidence (Pl{4, Arinaitwe Godfrey who was present at both workshops, Pw t4 (the Auditor and Pw1S the investigating officer who interviewed several staff members of Gaming Board who attended the workshops) is that each of the workshops took one day and not 4 days as the request for payment indicated. I believed that evidence and with the evidence that by the accused irregularly forwarding the two requests for payment of UGX 480,040,480/= and UGX 410,695,4001= for banqueting services' he acted in total disregard of the facts thereby committing arbitrary acts' I find that the accused did arbitrary acts when he irregularly forwarded each of the two requests for payment for 4 days instead of 1 day each' T?/'

It is in evidence that had it not been for the investigations which culminated into these proceedings, the Government which had paid for extra 6 days (3 for each workshop) had lost colossal sums of money. The fact that the commission of the offences had been completed and the loss had occurred' coupled with the fact that resources had to be invested in investigating the scam before there could be made negates the assertion that there was no loss to the government since the money was recovered.

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The accused, as employer was therefore prejudiced as articulated above. I find that the accused's actions were prejudicial to the interests of his employer'

Whether the accused abused the authority of his office.

The term "abuse of office" refers to a departure from what is legally acceptable or reasonable. It is about acting in a way that breaches one's duties and obligations.

It is the wrong or unfair use of power to the prejudice of another (see Ignatius Barungi Vs Uganda (1988-1990) HCB 68'

In this case the evidence is that the accused (then C. E. of the Board) deliberately and irregularly requested for monies from the Ministry of Finance' He misused/abused his office as the CEO since it is only because of that office that he was able to irregularly engage in that activity. I find that the act was an abuse of the authority of his office'

The allegations of abuse of office in each of counts 1 and 2 have been sufficiently proved. I convict the accused on each of those counts as charged'

Counts 3, 4 and 5 - Causins financial loss'

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The state has to Prove that;

- o the accused did or omitted to do an act,
- o he knew it would cause financial loss to Government'
- e loss occurred as a result'

In count 3 it is alleged that in financial year 2018/2019, being employed by the Ministry of Finance as CEO of the Gaming Board, irregularly forwarded a request with names of unauthorized persons for E-Cash payment of UGX 52,468,000/=, purporting it to be payment to facilitate the sensitization exercise for Kampala Metropolitan area Local leaders about gaming between 20th August 2018 to 2nd October 2018 whereas not, knowing or having reason to believe that this act would cause financial loss of UGX 52,468,000/= to the government.

Whether the accused irregularly forwarded a request with names of unauthorized persons for E-Cash payment of UGX 52,468,000/=.

The state maintains that the accused forwarded to Pw12 (Betty Kasimbazi) the internal Memo (exhibit P. 10(f) of 20/7/2018 requesting for facilitation for Kampala Metropolitan area sensitization workshops which were to be conducted between August and October 2018. Attached to the memo was a budget for the sensitization activities and lists of names of persons who were to be given E-cash amounting to 52,497,120/- to facilitate the sensitization activities.

On the 19/9/2018, believing that the document was authentic since it bore the accused's signature, Pw12 approved the payment of E-Cash of 52,497,120/- through Stanbic Bank.

Pw12's evidence that the accused forwarded the documents to her is not contested. Since the accused does not deny that he forwarded the request to Pw12, the only issue is whether he irregularly did so. The irregularity which the state is complaining about is that the request bore names of unauthorized persons. The state inter-alia sought to rely on Pw16's (Mr. Samuel Kamuli; an IT forensics and systems Auditor)'s evidence that he extracted WhatsApp messages from mobile phone numbers 0772506445 (the accused's number) and 0717440512 (Jonathan Kyeyune's number). WhatsApp correspondences he extracted show

that the accused is the one who provided the names of Mega Kaahwa (0782114681), Ayesiga Godfrey (0782988391), Allan Papaok (0773556800) and Kyomugisha Rogers (0781171878), with those corresponding phone numbers to Kyeyune for inclusion in the list which the accused later forwarded to Pw12 for payment of E-Cash. Uncontroverted evidence is that Mega Kaahwa, Ayesiga Godfrey, Allan Papaok and Kyomugisha Rogers, were known to and had personal dealings with the accused person. Information in Know-Your -Customer (KYC) documents (exhibit P. 11(7); (exhibit P. 11(9); exhibit P. 11(10), (exhibit P. 11 (11) of Mega Kaahwa, Ayesiga

Godfrey, Allan Papaok and Kyomugisha Rogers respectively, supports the assertion that those persons were the accused's close acquaintances. This is galvanized by information in Synta Pw16's IT report.

The four did not have anything to do with the Lotteries and Gaming Regulatory Board Activities, and were therefore not entitled to receive E-Cash, yet each of them was paid \$4,000,000/= \$.

Other than the above irregularity, it is in evidence that the list which the accused forwarded included John Patrick Kazoora, Thomas Eletu and Patrice Pacoto) who were staff members of the Gaming Board at the time. Pw14's uncontroverted evidence is that the Treasury Instructions 2018 prohibited Government employees who were already on the IFMS to receive Government payments through E-Cash.

It is not disputed that other than the accused, each of Jonathan Kyeyune and John Patrick Kazoora provided names of their personal contacts who irregularly received E-Cash payments.

Based on the above evidence, I find that the request which the accused forwarded indeed bore unauthorized persons. Since the accused provided particulars of some of the unauthorized recipients of E-cash, he was aware of the irregularity. I find that he irregularly forwarded the request.

Whether he knew or had reason to believe that this act would cause financial loss to Government.

While the accused denies that he knew that his action would cause financial loss, all evidence is that he was indeed complicit in the scam. He for example knew that his acquaintances did not have anything to do with the Lotteries and Gaming Regulatory Board Activities, yet he forwarded their particulars for payment to them of government funds. Since he knew that they had nothing to do with the Board activities, he must have been aware that they were not going to conduct any activities, and that any payment to them would constitute a loss to the Government. Indeed, the activity was not conducted by those beneficiaries. I find that the accused knew that the act would cause financial loss.

Whether loss occurred.

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Pw 14 testified that the internal memo (exhibit P10 (f) which the accused irregularly forwarded to Pw12 for payment of E-Cash caused a loss of 52,497,120/- to Government since the activity was not conducted. This money was intended to facilitate team leaders during Gaming sensitizations in the Kampala Metropolitan areas. The money was paid to persons who had no nothing to do with the Gaming Board activities. uncontroverted evidence is that Pw18 only recovered monies which had been paid to Mega Kaahwa' Ayesiga Godfrey and Kyomugisha Rogers amounting to 2,000,000/= (Exhibit's P'20 and P'20 (b), leaving the money which was paid to Allan Papaok unrecovered'

The accused maintains that since the monies which had been irregularly paid was recovered, the Government did not suffer any loss'

While it is in evidence that some recoveries were made that recovery was a result of investigations which culminated in these charges. clearly, the fact that recoveries were made after investing resources into investigation and prosecution does not rule out the fact that the Government suffered loss. It is moreover in evidence that only part of the money was recovered' Clearly' the government suffered loss. The fact that some recoveries were made can only mitigate the punishment but does not rule out the culpability of the accused. I find that the G government suffered financial loss' c){7/

In count 4 it is alleged that in financial year 2018/2019, being employed by the Ministry of Finance as CEO of the Gaming Board" irregularly forwarded ^a request with names of unauthorized persons for E-Cash payment of UGX 24,000,000/=, purporting to be for Hall hire for the sensitization exercise for Kampala Metropolitan area Local leaders about gaming between 20th August 2018 to 2nd October 2018 whereas not, knowing or having reason to believe that this act would cause financial loss of UGX 24,000,000/= to the government'

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Whether the accused irregularly forwarded request to unauthorized persons for E-Cash payment of UGX 24,000,000/= to the government'

Pw12 testified that based on the same memo (the subject of count 3), the accounts of Bwambale Andrew and Arinaifwe Godfrey (Pw4) were credited with 24,000,000/=.

The findings in count 3 that the request which the accused forwarded bore unauthorized persons' and that the accused irregularly forwarded the request therefore apply in equal measure to count 4'

Whether the accused knew or had reason to believe that this act would cause financial loss to Government.

According to Pw14, by the time the request for the 24m/= was made the accused who approved and forwarded the request (Exhibit P10) knew that there was no need for funds for Hall hire. The activities had been planned to be conducted at (r. Division and Municipality headquarter Halls' d7/

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Uncontroverted evidence is that the recipients of the money were asked to withdraw it and give it to Kyeyune. Pw14 testified that the accused told him to comply with Kyeyune's instructions to withdraw the money and take it to him'

The accused therefore knew that the money had not been used for the stated purpose. I find that the accused knew or had reason to believe that this act would cause financial loss to Government'

Whether loss occurred

Pwl4 testified that there was no evidence to show that the activity for hall hire had been implemented. His evidence that no accountability was provided to him was not contested. Considering that the UGX. 24,000,000/= was released for a specific activity which was not implemented, there is basis for a finding as I do that the government suffered loss.

In **count 5** it is alleged that between March and April 2019, being employed by the Ministry of Finance as CEO of the Gaming Board, irregularly forwarded a request for payment of UGX 7,357,000/=, for a 4-day sensitization engagement with community leaders in Mpigi purportedly conducted from 12th March 2019 to 15th March 2019 whereas not, knowing or having reason to believe that this act would cause financial loss of \$UGX\$ 7,357,000/= to the government.

Whether the accused irregularly forwarded a request for payment of UGX $\frac{1}{2}$ \$ 7,357,000/=.

The irregularities which are the subject of count 5 relates to dates and the number of days the workshop took. According to Pwl4 while the internal memo under which funds were requested is dated 4/3/19, it refers to a 3-day activity which took place on the 12th, 13th, 14th and 15th of March 2019. This is problematic.

Secondly, the memo indicated that the activity took 4 days when it in fact took half a day.

Thirdly, while the Auditor found that the accused was paid 800,000/= as per diem, 675,000/= for fuel and 320,000/- for the driver, he did not attend the workshop. He moreover did not give the drivers allowance to him. Based on the foregoing evidence I find that the accused irregularly forwarded a request for payment of UGX 7,357,000/=.

Whether he knew or had reason to believe that this act it would cause financial loss to Government.

By the time the accused approved the memo, he knew that he was a beneficiary of the funds that had been requested for and yet he had not attended the workshop. He also knew that the workshop had taken only half a day, yet the request referred to 4 day's facilitation amounting to 7,375,000/= which was false. I find that the accused knew that this act would cause financial loss to Government. I also find that his actions caused financial loss of \$7,375,000/\$ = to the Government.

On the whole, the prosecution has proved the charges of Causing Financial Loss against the accused person beyond reasonable doubt. I accordingly convict him

on each of counts 3, 4, and 5 as charged.

Counts 6, 7 and 8 – Embezzlement.

For each of these counts that state has to prove;

that the accused was an employee of the Ministry of Finance as CEO of the Gaming Board,

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- that he stole the money which is the subject of each of counts 6,7 and 8,
- that the money was the property of his employer,
- that the accused had access to it by virtue of his employment.

Whether the accused was an employee of the Ministry of Finance as CEO of the Gaming Board,

Since the defense admits that the accused was the CEO of the Gaming Board, this ingredient has been sufficiently proved for each of counts 6' 7 and 8'

Whether he stole the money which is the subject of each of counts 6' 7 and 8'

Under section 25a(1) of the Penal Code Act a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing

Count 6:- the 1,750,000/=

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The 1,750,000/= is the total amount in per diem fuel refund and driver's allowance the accused has been found to have been irregularly paid in relation to the Mpigi workshop. While the accused does not dispute the fact that the money was paid to him as affirmed by Pw7 (Godfrey Okirwoth of DFCU Bank) Pw14 (the auditor) and Pw15 (Twesigomwe Pedison- of Accountant Generals office), he maintains that he was not aware that it had been deposited into his account.

The accused does not dispute Pw's 2,3,4 and 14, evidence that he did not attend the workshop. It is common cause moreover that by the time he approved the internal memo forwarding it to the Accounting Officer he knew that he had not attended the workshop.

He was aware that he would be a beneficiary of the funds requested for given that he was privy to the budget which had been attached to the memo he approved'

The accused's assertion that he was not aware that the money was paid into his account is therefore not true since he was the one who approved the request for the money.

The fact that he received it well knowing that he had not attended the workshop supports the finding as I do that he had a fraudulent intent. That he did not even pass on his driver's allowance to him galvanizes this finding. I find that he stole

the 1,750,000/ \$=\$.

Count 7: - the \$3,600,000/=

The accused maintains that the 3,600,000/= wasn't paid to him, and that it is not reflected on his bank statement. The fact that the money is not reflected on the accused's account was however explained by Pw's 14 and 15 that it was paid as part of a batch, and so only the total of that batch was reflected. The court accepted that explanation, and finds that the 3,600,000/= was indeed paid to the accused.

The accused does not deny that he did not pay the money to the Africa Forum where it was supposed to have been paid. He only suggests that he refunded the money. As pointed out earlier on, the fact that the accused refunded the money only goes to mitigate the punishment. It does not remove culpability. Since he received the money for payment to the Africa Forum but instead diverted it to his

own use, I find that he stole it.

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Count 8: the 12, \$044,800/=

The accused doesn't deny that he requested for and was paid the \$12,044,800/\$ = to facilitate his travel to Gaborone. The state seeks to rely on Pw5 (Brigadier Johnson Namanya, the Commissioner Citizenship and Passport Control)'s evidence and the Travel History Report (exhibit P4) relating to the accused Passport number **BO948226** to prove that he never travelled to Gaborone.

While the accused suggests that he travelled but that he was not given time to render accountability, Pw 12 (Betty Kasimbazi) testified that when the investigations commenced she asked him to submit the accountability and he failed.

There is sufficient evidence that the accused did not travel to Gaborone' Since he had got the money for that purpose but he neither travelled nor refunded that money before the investigations commenced, he had a fraudulent intent to put it to his own use. I find that he stole the 12,044,800/=

Whether the money was the property of his employer'

Based on Pw12's evidence that all the money in issue was paid to the accused upon his requisitioning for it from the Ministry, I find that it was the property of the accused's employer.

Ll/hether the Accused had access to it by virtue of his emPloyment.

It is not disputed that as the CEO of the Gaming Board' the accused was responsible for forwarding requisitions for funds to the Under Secretary/Accounting officer in the Ministry of Finance for release of funds to him. Pwl2's testimony that the accused indeed forwarded all the requisitions in issuetoherwasnotdisputed. Allthemonetheaccusedhasbeenfoundtohave stolenwaspaidtohimonthebasisofrequisitionsheapprovedastheCEO'

Clearly,,heaccessedthemonbyvirtueofhisoffice. Isofind. Ifindthatthe state has sufficiently proved all three counts of embezzlement against the accused. He is accordingly convicted on each ofcounts 6'7 and 8 as charged'

Hon Lady Margaret T ibulya

l't December 2022.

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