

UGANDA / JUDGMENT

Uganda v Etuusa Lubega (HCT-00-ACD-SC 3 of 2017) [2021] UGHCACD 6 (25 August 2021) [2021] UGHACD 6

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Tibulya, J

CASE / FILE NUMBER

HCT-00-ACD-SC 3 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

HCT-00-ACD-SC-NO.003/2017

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Uganda ::::::::::::::::::::::::::::::

Versus

Etuusa Margaret Loy Lubega ::::::::::::::::::::::::::::::

JUDGMENT

Before: Hon Lady Justice Margaret Tibulya

The accused, a Deputy Academic Registrar in charge of Ceremonies at Makerere University stands charged with four counts of Abuse of office.

In the first count she is alleged to have Abused the authority of her office when she contravened the procurement laws, regulations and procedures by irregularly procuring M/s Exxon Contractors Ltd to provide phone keeping services during the 67th graduation ceremony at Makerere University.

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In the second count she is alleged to have Abused the authority of her office when she contravened the procurement laws, regulations and procedures by irregularly procuring one JAALC (U) Ltd to provide drinks/food vending services during the 67th graduation ceremony at Makerere University.

In the third count she is alleged to have Abused the authority of her office when she contravened the procurement laws, regulations and procedures by irregularly procuring one Mirembe Juliet (EPRC Restaurant) to provide drinks/food vending services during the 67th graduation ceremony at Makerere University.

In the fourth count she is alleged to have Abused the authority of her office when she contravened the procurement laws, regulations and procedures by irregularly procuring one Milton Egayu to provide flower vending services during the 67th graduation ceremony.

It was common cause that the office of the Academic Registrar works with the University's Ceremonies Committee to organize, prepare and coordinate the University's graduation ceremonies. The Deputy Academic Registrar in charge of Ceremonies (the accused) who represents the Academic registrar on the Ceremonies Committee is the secretary to the committee. In preparation for the 67th graduation ceremony that took place from 21st to the 24th of February 2017, the Ceremonies Committee held meetings at which it was inter-alia resolved that phones and cameras were prohibited from the graduation ground and that the University should not be involved in safe guarding them during the graduation ceremonies.

The prohibition of the mobile phones was communicated to the graduands in guidelines (exhibit P.2) which were issued by the University. During the 67th graduation ceremony it was discovered that phone handling services were being provided by M/s EXXON Contractors Ltd at a fee of Shs 3,000/- per phone. It was also discovered that there were other service providers who were providing food, drinks and flower vending services which had neither been solicited for nor contracted by the University for the ceremony. M/s JAALC Uganda Limited and Mirembe Juliet (EPRC Restaurant) were providing drinks/food vending service and Mr. Milton Egayu was selling flowers.

The prosecution maintains that all the above service providers were contracted by the accused person in total disregard of the public procurement laws, regulations and procedures. Also that the Academic Registrar's Department which was the user department for services, works and items required for graduation ceremonies ought to have initiated the procurement process through a request, but no such request was ever made.

The state asserts that the accused person, a member and secretary to the Ceremonies Committee knew that phones had been prohibited and that food, drinks and flower vending services were neither approved nor solicited for by the University. She moreover attended the Evaluation Committee meetings (albeit illegally) during which the bids that were submitted by the various service providers for the 67th graduation ceremonies were evaluated. The Evaluation Committee never considered any bids for any of the disputed services. The Contracts Committee which is

mandated to handle all procurements was never involved in the procurement of the disputed services.

The accused issued the illegal service providers with awarded letters which were on the University's official letter-head thereby falsifying that the contracts were awarded by the University.

It is asserted that her actions exposed the University to negative publicity. On February 26th 2017, the Sunday Monitor Newspaper published a story with a heading that: "***Makerere University Mints Shs.130m from unsuspecting graduands and parents***", which criticized the University for allegedly collecting money from graduands and their parents for keeping their phones. The newspaper article also reported about the food and flower vending businesses that were conducted at the University during the th graduation ceremonies.

It is asserted that though, on awarding them contracts, the accused person required the service providers to pay varying amounts of money to the University, the University didn't get value for money in respect of these services since the procurement processes were never followed, and there is no evidence that some of the service providers actually paid the money. In this regard, M/s JAALC Uganda Limited was supposed to pay Shs. 300,000/=, while EPRC Restaurant was supposed to pay Shs. 200,000/= for the food vending purposes. Milton Egavu on the other hand, was supposed to pay Shs. \$500,000/\$ = for the flower vending services and EXXON contractors was supposed to pay Shs. 1,000,000/ \$=\$ for the phone handling services.

The accused denied the allegations, maintaining that she legally awarded the contracts since she was authorized by the security subcommittee to award them.

Burden and standard of proof

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The state bears the burden of proving these allegations beyond reasonable doubt. The accused person is not under any obligation to prove her innocence. Where any doubt exists in the prosecution case it should be resolved in favor of the accused (see *Kiraga Vs Uganda* (1976) HCB 305).

Since the offences in all counts are alleged to have been committed under similar circumstances, the court will determine all issues relating to the four counts jointly. For each of the four counts it must be proved that;

- 1. the accused was employed in a public body,
- 2. she did or directed to be done an arbitrary act,
- 3. the act was prejudicial to the interests of her employer,
- 4. she abused the authority of her office.

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'fhc fact that the accused was a Deputy Academic Registrar with Makerere University was not contested. Since Makerere University is a public University within the meaning of Section I (e) of ACA, I find that the accused *,as employed in a public body. The first issue in each count has been sufficiently proved.

Whether the accused did or directed to be done the arbitran'acts complained about in each of the four counts.

It was in evidence and it was not denied that the accused gave permission to service providers to provide the services which are the subject of these charges. The letters in which she communicated to each of them are exhibits P10, 11, 12 and 13. The accused specifically admitted in writing (exhibit P3) that she wrote to the phone handling service provider allowing him to provide that service to the University. In her evidence in court she stated that she wrote letters of allocation to the vendors and service providers to enable them secure space on Makerere university grounds for them to conduct their businesses.

Counsel for the accused argues that the accused's actions of writing to the service providers and giving permission to them to provide the services do not amount to procurement in the legal and literal sense, since procurement is needs-based, and that in this case there is no evidence that the University ever needed the services. -dr1Or' ,//,Y)

Counsel's reasoning is strange and self-defeating. The fact that the accused chose to employ a procedure which is alien to the PPDA procurement process is the reason she was charged in the first place. She cannot be heard to say that she should be exonerated just because she did not perfect her game.

Secondly, it is not denied that the permission she gave to the service providers is the one which triggered their provision of those services. Such a communication if made in the context of a PPDA guided procurement process would have had the same result. Since the end result of her actions is the same as that which would have been arrived at in a PPDA guided procurement process, I find that she in fact procured the service providers, and this is regardless of how she did it.

The court accepts the argument that procurement by definition is needs-based and that the procurement items must be listed as budgetary items, but determines that the procurement in issue was indeed needs based. It is understood that the accused (in her individual capacity) and not the University, G.e. the accused as the representative of the Academic Registrar (the user department) and the Ceremonies committee)) is the one who identified those needs, and this is the reason she was charged with these offences. The fact that the items were not listed as budgetary items is a major aspect of the evidence that the accused acted irregularly, and that she was rightly charged with these offences. It is even strange that it is the defence which is raising these issues, since by so doing they are in fact admitting that the impugned process was not compliant with the PPDA procurement requirements.

In her submissions, Counsel for the accused consistently makes reference to the fact that the service providers onl' needed space/kiosks to conduct business during the ceremony, and that by exhibits P10 to P13 they were only granted that space. and therefore they'did not have to go through the procurement process for provision of services. Dw3 (Nabukeny Josephine) was however clear that allevents and works go through a regulatory framervork (the procurement process) and that even allocation of space goes through that process. Also that an),thing to do rvith a graduation ceremony must go through the procurement process including but not limited to space allocation. Counsels argument must therefore fall on its face. In conclusion ofthis issue i find that by exhibits P10 to Pl3 the accused procured the services in each of counts 1,2,3 and 4. .rfryq^'

1'he only' issue therefore is rlhether her actions amounted to arbitrary acts within the meaning of Section I I I (l) of the ACA. Uganda Vs Atugonza ACD CR CS 37 of 2010 and Uganda Vs Kazinda ACD CR CS t38/2010 are authorily 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 rvrong knowing it to be wrong or with reckless indifference as to whether it is rvrong or not"). This includes doing things based on individual discretion rather than going by fixed rules. procedure or law.

It is the state's case that the accused contravened the procurement laws, regulations and procedures by irregularly procuring the persons cited in the each of the four counts to provide services during the 67th graduation ceremony at Makerere University.

It urs irr cridcncc (Pn2 (\Iasikre \anroah), Pu{ (\oble Banadda) and P\r5 Paul Agaba)Iuhainrc) that \Jakrcrcrc I nirersitr treing a public institution. ils procurclnrcnt processes must be guided b) the PI']DA Act.

Further evidence u'as that Academic Registrar's department is the user department for procurement of goods and services related to graduation ceremonies. It is the one rvhich is supposed to state the services thev rvish to have for a given ceremony. The Deputy Academic Registrar in charge ofCertificates and Ceremonies (the accused) \as the responsible officer in this regard.

The gravamen ofthe accused's defence is that the Ceremonies committee decided that the issue of handling phones at the graduation ceremony would be further discussed by the security subcommittee. Further that the security subcommittee sat and discussed the issue. and decided to vet all service providers. She admits that she subsequently wrote letters ofallocation to the vendors and service providers for them to secure space to conduct their business.

Counsel for the accused makes ref'erence to the accused's evidence that she issued the letters of permission to the service providers on authorit)' granted to her by the office of the Deputy Vice Chancellor (Finance and Administration) dated 76 January 2016 (Exhibit D (a).

Sulllce it to sa) that such permission even il it u,ere granted to the accused does not overcome the legal rcquirement lhat procurement processes in Government institutions must compl)'with the PPI)A Act. a,tr

Secondll,. the contents ofExhibit D (a) are clearly irrelevant to the issue at hand. being that exhibit D(a) is a 20 I 6 document and as Dw3 (Nabukeny Josephine) testified. the letter does not indicate the particular graduation ceremony' it relates to. Her evidence (which is accepted as being logical) was that by implication the letter related to the 2016 ceremony since each ceremony has its own regulatory framework.

I noted Dw4 (ProfJohn Ddumba Ssentamu's) evidence that the 2016 letter was relevant to the 67'r' graduation ceremony (20 I 7). I am horvever cautious about the veracity ofProfJohn Ddumba Ssentamu's evidence. Prr2 (Masi\`e Namoah)'s uncontroverted evidence is that after it had been resolved to exclude the accused from further participation in the procurement process relating to the 67'h graduation ceremon). ProfJohn Ddumba Ssentamu (the Vice Chancellor then) asked him \$(Pw2)\$ to allow her attend the Evaluation committee meeting which she was not even legally supposed to attend. This points to the possibility that Dw4 (Prof John Ddumba Ssentamu) was compromised and was part of the problem from the initial stages. I preferred Dw3's evidence to that of Dw4 (Prof John Ddumba Ssentamu). In the result, the court determines that the accused was never permitted to issue the letters permitting the service providers to provide the services in issue.

It is further determined, on the basis of Pw7 (Jackson Mucunguzi) and Dw2 (Cpt Kaweesa)'s evidence, that the ceremonies committee never ceded its mandate in the procurement process to the security sub-committee as the defence asserts. Pw7 (Jackson Mucunguzi) who chairs the security subcommittee was clear that the security subcommittee deals with technical security matters like deployment and strength or number of people on ground, and that it is only comprised of security personnel. He further stated that his sub-committee only provides security to all stake holders including contractors, who have been cleared by the ceremonies committee. Dw2 (Cpt Kaweesa)'s evidence that the security subcommittee of which he is a member oversees security matters and vets vendors who are sourced by the secretariat, further that the security committee does not source vendors is consonant with that of \$Pw7\$.

Dw4 (Prof Sentamu Ddumba)'s evidence that he doesn't recall if there were any procurement procedures before the university gave permission to business operators during graduation ceremonies, or if there were any administrative procedures for allowing business kiosks to be set up during graduation ceremonies is understandable since he was clearly not a procurement \$BMA'\$ practitioner.

The particular allegation that the Ceremonies committee decided that the issue of phone handling should be handled by the security subcommittee (*in terms of clearing service providers*) when put to Pw7 in cross examination, he was clear that his subcommittee does not clear service providers but only briefs them on security matters. I believed him since he was the chairperson of the security subcommittee who had firsthand knowledge of the role of the

security subcommittee. This supports the finding as I do, that the accused's account that she was authorized by the security subcommittee to issue the awards is factually incorrect and an afterthought which I reject.

Testifying about the procurement process, Pw4 (Noble Banadda) and Pw5 (Paul Agaba Muhairwe) stated that under the PPDA Act the Procurement and Disposal Unit of the University solicits for bids and presents those proposals to the contracts committee. The contracts committee appoints and approves the evaluation committee for each contract. The evaluation committee presents its recommendation through the Procurement and Disposal Unit which is the secretariat to the contracts committee, and the contracts committee either approves or disapproves the award.

Pw4 (Noble Banadda) and Pw5 (Paul Agaba Muhairwe) emphasized that the Contracts Committee is the one which is supposed to handle procurements on behalf of the University, and that it would not be proper for a University employee to handle procurements in a personal capacity. Further that there are laid out guidelines and procedures a public institution must follow and it would not be proper if a procurement does not go through that process.

The accused's assertion that the service provider for phone handling services was cleared by the security sub-committee is against the weight of evidence as I have endeavored to demonstrate. And, if it were true that the service provider for phone handling services was cleared by the security sub-committee there is no explanation for having procured the services of food, drinks and flower angar providers.

Counsel for the accused argues that the accused did not have the criminal intent (**Mens Rea**) to commit these offences. There is however abundant evidence that the accused had the criminal intent. This includes the fact that she was a member of the ceremonies committee which decided that the University was to communicate to graduands and parents that mobile phones and cameras were prohibited items at the graduation grounds. The guidelines (**Exhibit P2**) whose existence she was aware of were clear on this issue. Uncontroverted evidence is that when she was asked not to participate in the procurement process on account of disagreements which had arisen over roles and responsibilities she decided to use the influence of the Vice chancellor (Dw4) who ensured that she even irregularly attended the Evaluation committee meeting. The extent to which she went to ensure that she continued to participate in the process shows that she had heightened interest in being part of the process. When she decided to issue the impugned letters, she neither involved the ceremonies committee nor informed her boss Pw2 (Namoah Masikye). There is no reason she would have been that secretive had she not known that what she was doing was illegal. Her conduct shows that she had presence of mind when she did what she did. I reject the proposition that she lacked Mens Rea.

On the basis that the actions complained of in each of counts 1 to 4 ran afoul of the provisions of the PPDA Act in that the accused procured service providers and awarded contracts which, as not her role under the PPDA Act, I find that her actions were illegal and therefore amounted to arbitrary acts contrary to Section 1(1) ACA. The second issue is answered in the affirmative for each of the four counts.

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According to Pn2 (Namoah Masikye) and Pw4 (Noble Banadda), the manner in which these four contracts were awarded gave the university bad publicity. The Monitor and Nerv Vision newspapers run stories portraying the University as a disorganized entity which could not manage the procurement process.

He further stated that in the procurement process there must be competition so that the institution gets value for money. This was denied by the institution.

Thirdly, for the four contracts the contracts committee did not carry out any due diligence (e.g. establishing from the URA whether the companies were tax compliant etc.), which was against public interest. [4n

The court also recalls that the accused single handedly determined the terms for the award of the contracts including how much money each contractor paid to the Institution. Whether or not the institution got value for money, and/or suffered financial loss and extent of that loss can never be fully determined. This is prejudicial to the interests of the Institution.

On the basis of the above, the court fully agrees with the prosecution that the accused's actions were prejudicial to the interests of her employer. The third issue is answered in the affirmative for all counts.

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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) HCB68).

The accused awarded contracts to service providers outside the procurement process by virtue of her office of Deputy Academic Registrar in charge ceremonies. By her actions she wrongfully side-stepped the ceremonies and contracts Committees and hijacked the contracts. She therefore wrongly used her office. The prosecution has proved that Mrs Margaret Lubega Etuusa abused her office as alleged in each of the four counts. T

The lady assessor advised that there is sufficient evidence to ground a conviction on counts one to three, but that there is no evidence to support the allegation in count four. I agree with her that there is sufficient evidence to support a conviction on counts one to three.

I however don't agree that there isn't sufficient evidence to support a conviction on count four as well. There is sufficient evidence including Exhibit P 12, that the accused awarded the contract to provide flower vending services to Milton Egayu. I accordingly enter convictions for abuse of office against the accused on each of counts 1, 2, 3 and 4.

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Hon. Lady Justice Margaret Tibulya Judge 25th August 2021.

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