

UGANDA / JUDGMENT

Uganda v Musinguzi and Another (Criminal Session Case 2 of 2022) [2023] UGHACD 3 (17 May 2023) [2023] UGHACD 3

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Gidudu, J

CASE / FILE NUMBER

Criminal Session Case 2 of 2022

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA****ANTI-CORRUPTION DIVISION****HOLDEN AT KOLOLO****CRIMINAL SESSION CASE 2 OF 2022****UGANDA. ::::::::::::::::::::::::::::::****VRS****A1. MUSINGUZI GODFREY****A2. BUKENYA BARTHOLOMEW. ::::::::::::::: ACCUSED****BEFORE: GIDUDU, J****JUDGMENT**

Musinguzi Godfrey hereinafter referred to as A1, and Bukenya Bartholomew hereinafter referred to as A2\$ are charged separately with Abuse of Office \$C/S\$ 11(1) of the Anti-Corruption Act, 2009

In count, one, \$A1\$ who is a Principal Human Resource Officer (PHRO) of Kagadi District Local Government (DLG), is accused of doing an arbitrary act prejudicial to the interests of his employer by irregularly placing 60 personnel on the payroll without following the requisite processes.

In count two, \$A2\$ who is the District Education Officer (DEO) of Kagadi DLG is accused of doing an arbitrary act when he recommended the posting of teachers without following the requisite processes.

The gist of the prosecution case is that the two officials flouted established procedures to facilitate 60 primary school teachers to get posted to schools in Kagadi district and access the Government Pay Roll when they had not been duly appointed by the District

Service Commission of Kagadi DLG. This act is said to have been prejudicial to Government in that funds in form of salaries were paid to people who were not Government employees.

A1 was held liable for processing bio data of the bogus employees without first ascertaining if their names actually appear on the Instrument of Appointment vide **Instrument 13 of 2019** of Kagadi District Service Commission (DSC). He uploaded their names on the Integrated Personnel and Payroll System (IPPS), which enabled them to receive salaries yet they were not Government employees.

\$A2\$ was held liable for proposing the posting of more teachers than 10 had been requested for in the submission to the DSC. He is blamed for not questioning where and how the extra teachers had been recruited yet a lesser number had been asked for in the submission to the DSC and the advert in the press. The Advert had 50 vacancies only.

A1 and A2 denied any wrongdoing with each contending that they did what they were employed to do.

A1 contended that the teachers presented appointment letters signed by one Balemezi, Deputy CAO who he trusted had read the Instrument of Appointment from the DSC and proceeded to open 20 files and processed their bio data. After he had uploaded them on the IPPS, Balemezi, the Deputy CAO approved them to access salaries. He stated that he never looked at the DSC Instrument of Appointment for the employees because the CAO, PW3, Mahaba Maliki, did not avail it to him. He denies preparing the submission of 50 teachers to the DSC. He admits he is supposed to look at the Instrument of Appointment before preparing appointment letters but he claims the letters were processed from the CAO's office instead of his \$(A1)\$ office. A1 was absent on the day PW3 received the Instrument from DSC. 30

A2 also denies being responsible. He contends that he had gaps of up to 350 teachers. It was his evidence that the wage bill was sufficient to cover more teachers and when he got extra numbers he did not bother because there was sufficient money on wage. He

denies knowledge of the advert or submission which only had 50 teachers and so he could not suspect that more names had been smuggled in. He trusted that the Deputy CAO was doing the right thing.

Both accused contend that Balemezi, the Deputy CAO had delegated authority to act for the CAO on these matters. In short, both accused shift the blame to the CAO's office.

The burden of proof is upon the prosecution to prove all the essential ingredients of the offence beyond reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt but must be strong as to leave only a remote possibility of doubt. The accused has no duty to prove his innocence. See *Woolmington Vrs DPP (1935) AC 462*

The prosecution must prove the following elements of the offence beyond reasonable doubt on the two counts of **Abuse of office C/S \$11(1)(2)\$** of the ACA, 2009.

- The accused are employees of Government \$(i)\$
- They did or directed to be done an arbitrary act \$(ii)\$
- The arbitrary act was prejudicial to the interests of the \$(iii)\$ employer, in abuse of the authority of office.

Mr. Khaukha appeared for the prosecution whilst Mr. Kiyonga Bosco Asasira appeared for the two accused.

Count One.

The charges in count one relate to \$A1\$. There is no doubt that he is the PHRO of Kagadi DLG. His appointment letter to his current position was admitted as **exhibit P1**. Proof of his employment is not The first ingredient is, therefore, proved beyond disputed. reasonable doubt.

Did he do or direct to be done an arbitrary act? The prosecution contends so but \$A1\$ denies it. 30

The Mr. Khaukha submitted that by uploading employees whose appointments he had not verified against the Instrument of Appointment, A1 acted arbitrarily because his action facilitated bogus people to receive Government salaries. \$A1\$ was the technical person to verify if those submitting bio data were actually duly appointed in the first place. It is \$A1\$'s office that advises others on authenticity of appointments.

On the contrary, \$A1\$ contends that he never saw the Instrument of Appointment from the DSC because the then CAO, Mahaba Maliki, PW3 never gave it to him. He further contends that he trusted the Deputy CAO to be doing the right thing.

Was \$A1\$ right or justified to rely on one Balemezi, a Deputy CAO, to verify if teachers were genuinely appointed or not? \$A1\$ also testified that he did not make the submission of the 50 teachers and the additional 13 therefore, he had no knowledge of numbers of staff required.

Mr. Asasira for the accused submitted that Balemezi had delegated authority to sign appointment letters and also had approval rights to validate whatever A1 had done. It was his view, that whatever \$A1\$ did was approved by the deputy CAO. This means there was nothing arbitrary.

The term arbitrary is an English word defined in the \$7^{th}\$ edition of Oxford learner's dictionary as:-

" 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 issue is, who was supposed to verify that whoever has an appointment letter was duly appointed by the DSC? Was it the CAO, Deputy CAO or the PHRO?

It is an undisputed fact that all appointments signed by Mr. Balemezi as **Deputy CAO** Kagadi were not appointed by Kagadi **DSC**. The Minute quoted on the bogus letters signed by Mr.

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Balemezi vide MIN.320/4/2019 contains only 50 names who were genuinely appointed. The ones A1 and Balemezi uploaded on the **IPPS** were not appointed by the **DSC** as **per exhibit P3**.

It follows that whoever facilitated the 60 bogus teachers to get into government service acted arbitrarily because only the DSC can appoint staff in local governments. Article 200(1) of the Constitution of Uganda provides as follows:

200. Functions of district service commissions.

- (1) Subject to the provisions of this Constitution, the power to 10 appoint persons to hold or act in any office in the service of a district, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in any such office and to remove those persons from office, is vested in the district service commission.

Evidence of Mahaba Maliki, PW3 who was the CAO of Kagadi **DLG** between July 2017 and July 2019 when the bogus employees were supposed to have been recruited, is that he never delegated the function of signing appointment letters to his deputy. It was his testimony that all employees including the accused knew that he (PW3) signed all appointments.

Further, it was his evidence that he signed all appointment letters of the 50 teachers appointed by the DSC as per MIN.320/4/2019 in exhibit P3. He stated that the bogus employees were appointed after he, (PW3), had left the district and that they were backdated to appear as if they were recruited during the time PW3 was CAO. That is why they were paid arrears. PW3 was not challenged on this evidence during cross-examination. That evidence is intact and I believe it.

Mr. Ndifuna Mathius, CAO Kagadi, who took over from PW3 testified as PW1. He stated that in December 2020, he got a whistle blower alleging that there were illegal employees on the payroll.

He instructed the Internal Auditor, Bamwine Nathan, PW2, to investigate and report. PW2 made to reports. A preliminary report revealed 13 primary school teachers had been illegally recruited whilst the detailed second report revealed that 44 more teachers had been illegally appointed. These reports were admitted as **exhibits P9 and P10**. They are dated 15th March 2021 and 22nd April 2021 respectively. The reports faulted A1, A2 and the D/CAO for acting illegally to employ persons who had not been appointed by the DSC. PW1 held A1 liable for failing to ensure that every appointment has a valid minute from the DSC.

PW2, Bamwine Nathan, Principal Internal Auditor confirmed that he made two audit reports. In **exhibit P9** he found 13 illegal employees had been paid UGX. 108,067,912=. In exhibit P10 he found that 47 illegal employees had been paid UGX. 345,446,911=. He concluded that this was a loss to the district, which should be recovered.

He testified further, that before A1 uploads employees on the payroll, he first submits their files for audit purposes. During audit, PW2 discovered that some files passed through audit while others did not and were even missing! 12 files were missing. PW2's evidence is that they assumed that A1 as the technical officer for appointments had verified from the minutes of the DSC that every appointee was validly appointed. He discovered that A1 had made false submissions during the audit. That is when he accessed the Instrument from the DSC and discovered that 57 teachers were not validly appointed at all.

In short, all prosecution witnesses insist that it was A1's duty to ensure that only persons appointed by a minute of the DSC access the payroll.

On the other hand, A1 denies any wrongdoing contending that PW3 was the one who caused the mess by delegating One Balemezi, a Deputy CAO to handle appointments and for not sharing the Instrument from the DSC containing appointment.

It was his evidence that although appointments are supposed to be processed by his office, on the day appointments were done he was not in office and PW3 detailed his secretary to prepare letters. He stated that the Instrument of appointment was not availed to him to verify the names. He faulted PW3 for causing the letters of appointment to be issued without his participation.

But uncontroverted evidence of PW3 was that he never delegated the function of signing appointment letters to his Deputy. Further, he signed only the 50 appointments made by the DSC. He also testified that the mess in this case was done after he had left that is why the bogus employees had to be paid arrears. This evidence was not challenged at all by the defence.

Courts have held in a number of cases such as **Uganda Vrs Dusman Sabuni** (1981) HCB 1 that whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all.

It is clear to me that the appointments signed by Mr. Balemezi were outside the 50 appointed by the DSC. It is also true, on the evidence of PW3 that this was done after he had been transferred and a new CAO was in place. Mr Balemezi was jointly charged with the accused but he pleaded guilty under a Plea bargain. He was convicted, fined and barred from employment in the public service for ten years.

A1 shifted blame to one Mr. Balemezi, Deputy CAO for generating appointment letters which he trusted to be genuine whereas not. He denied making the submission for the 50 teachers and the additional 13 teachers to the DSC. A1 conceded in crossexamination that he was supposed to confirm the appointment letters by looking at the Instrument from the DSC but did not do so.

A1's schedule of duties was not tendered in court but from the oral testimonies of his supervisors like PW1 and PW3, it is clear that A1 as PHRO was the technical head of human resource supposed to confirm that whoever is appointed has a valid minute from the DSC

to support the appointment. \$A1\$ conceded in his defence that he was supposed to do the verification. He blames the anomaly to the fact that PW3 did not give him the Instrument or wait for him to return to office to process the letters. But I have already found that the appointments that PW3's secretary generated were all genuine and were signed by PW3.

PW3 never delegated to any Deputy matters of staff appointments between July 2017 and July 2019. It was his evidence that all the appointments he made during his time were proper and backed up by minutes of the DSC. He pointed out that the illegal employees were recruited after he had left and their appointment letters backdated to appear as if they fell in his period of tenure whereas not.

Exhibit P13 which is a letter by Balemezi the then **Deputy CAO** explains that it is \$A1\$ that gave him letters that he signed appointing teachers. Balemezi also refers to approval credentials on the **IPPS** which he got on \$22^{nd}\$ July 2019. This was after PW3 had been transferred. The new CAO, Mr Ndifuna took over on 1st July 2019. 22 days later, he delegated Mr. Balemezi with a vital function which he immediately abused.

It is, therefore, clear that Balemezi was able to facilitate the illegal access to the payroll after PW3 had left. Further, PW3's testimony that the letters were backdated is valid because the bogus appointees were paid arrears. If the bogus employees had been appointed during PW3's time and assumed duty, why would they be paid arrears?

I find as a fact that \$A1\$ was the responsible officer for verifying appointments. That is the role of the **HRM** which I take Judicial Notice of in addition to the evidence adduced by PW1, PW3, PW2 and PW4, Tumwine, Secretary DSC. A1 cannot run away from this critical mandate.

I also find as a fact that the bogus appointments were made after PW3 had been transferred and were backdated to earn salary arrears. Balemezi, who was deputy CAO, only thrived in his criminal scheme once PW3 had left. PW1 being a new CAO was generous in trusting Balemezi with a mandate on the **IPPS** which led to disastrous consequences.

I find, on the evidence of PW3, that a scheme to recruit bogus staff was hatched and implemented by A1 and Balemezi. A1 broke the law to initiate access to the **IPPS** people not appointed by the appointing authority. Absence of some files for some of these bogus employees demonstrates impunity on the part of \$A1\$ to pay public funds to illegal persons purporting to be employees of government. The prosecution has proved beyond reasonable doubt that \$A1\$ acted arbitrarily.

Was A1 and Balemezi's acts prejudicial to the employer? The answer is yes. Kagadi **DLG** paid out a total of **UGX. 345,446,911** in form of salaries and arrears to the bogus employees. These bogus employees were stopped from holding office and have since sued the **DLG** for wrongful termination. The district is grappling with a court case because of the criminal acts of \$A1\$ and Balemezi. This is prejudicial to the district. This ingredient has been proved beyond reasonable doubt.

The lady and gentleman assessors advised me to find A1 not guilty. 20 It was their opinion that \$A1\$ was acting on instructions of his boss the deputy **CAO** and such compliance cannot be criminal as against A1. With great respect to the lady and gentleman assessor, I am unable to follow that advice because the evidence of PW3, who appears to have been a strict \$CAO\$, shows that there were no more appointments to be made since the \$50\$ teachers had already been appointed.

Further, investigations by PW2, the internal auditor, shows that 12 of these people were earning salaries yet they did not have files with the office of the **PHRO**! It means there was no bio-data compiled by 30 A1. I believe the lady and gentleman assessors did not appreciate that it is A1's office that manages the human resource records in terms of appointments, promotions, and retirements. The CAO relies of the technical advice of \$A1\$ to manage the staff of the

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district. \$A1\$ cannot run away from that function. If Balemezi had acted without \$A1\$, it would have been impossible to execute the deal. Only A1 can initiate employees on the **IPPS** before the CAO approves. The duty of \$A1\$ is to ensure that only validly appointed staff access the payroll. A1 does not rely on the CAO for the authenticity of appointments. He relies on the Instrument of Appointment from the **DSC**. If A1 chose not to access the **Instrument of Appointment** to verify the names, then he has no defence. It is a demonstration that he chose to break the law.

The result is that all the essential ingredients in count one have 10 been proved beyond reasonable doubt.

Count Two.

The charges in count one relate to \$A2\$. There is no doubt that he is the **DEO** of Kagadi **DLG**. His appointment letter to his current position was admitted as **exhibit P2**. Proof of his employment is not disputed.

Did \$A2\$ do or direct to be done an arbitrary act? The prosecution contends so but he denies it

The prosecution contends that by proposing the deployment of more employees that had been appointed, \$A2\$ acted arbitrarily in that his action facilitated bogus employees to receive Government salaries.

\$A2\$ on the contrary denied acting arbitrary. He contended that he had asked for 350 teachers for his department but got less. It was his evidence that he was neither privy to the submission to the DSC nor to the DSC advert in order to ascertain if the number was 50 and \$13\$ only.

A2 tendered **exhibit D3**, which is the District Recruitment Plan for **FY2018/19**. This plan was submitted to the Ministry of Public Service by the CAO. It contained a request for 350 primary school teachers. \$A2\$ testified that he never participated in the interview for the primary school teachers so he could not ascertain what the required number was. Besides, he was not privy to the Instrument of Appointment to ascertain genuine appointments.

A2 denied acting arbitrarily by proposing postings because the appointment process is managed by other offices. It was submitted that A2 merely complied with the deputy CAO's letter asking him to propose postings and since he had asked for more teachers than he got, he had no reason to suspect that there was something wrong with the names. A2 tendered exhibits D1 and D2 which are letters from the Deputy CAO asking him to propose posting stations for teachers.

I have already stated what amounts to an arbitrary act in count one. It should be 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 prosecution submitted that it was incumbent upon A2 to ascertain if the extra numbers he was being asked to propose posting had been validly appointed. The defence submitted that appointments are managed elsewhere and A2 is not privy to the process. Besides he was only too glad to have more teachers because the district had enough wage for it.

The prosecution had to adduce evidence to place a duty of care upon the DEO to ascertain the authenticity of appointed teachers. PW2, the internal auditor in his reports in **exhibit P9 and P10** held the Deputy CAO, A1 and A2 liable for the bogus appointments.

PW1, PW3 and PW4 explained the staff appointment process in their evidence. It starts with human resource planning. A submission is made to the Ministry of Public Service for approval. The approval is sent back to the CAO who sends information to the DSC to advertise the vacancies and manage the interview process. What is planned is not necessarily, what is approved. This is common sense.

Appointments are made by the DSC through an Instrument. The DEO only learns about them when asked to propose postings. According to PW4, the DSC has since this scandal started publishing successful candidates on Notice Boards for transparency to avoid illegal appointments.

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Is A2 mandated to verify the authenticity or validity of appointments? Can A2 go out to ask the CAO, the PHRO or the internal auditor if the names are genuine? The answer is no. On the evidence adduced, the moment appointments are made by the DSC, they are processed by the CAO, PRHO and the internal auditor.

PW2, the internal auditor admitted that during the audit, he found out that some of the bogus employees' files were not submitted by A1 for pre-audit before they were initiated on the IPPS for salaries. Others had no files at all. How then could \$A2\$ who is not a \$CAO\$, PHRO or an auditor go fishing for information about the validity of appointments?

Besides, salaries were processed by the PHRO, internal audit and the CAO. The DEO is not part of that process. The blame made by PW2 against \$A2\$ in this saga without clear evidence of a conspiracy is not justified. \$A2\$ had no duty imposed on him to ascertain the validity of appointments and did not commit any arbitrary act by proposing postings. Without more, he remains a mere suspect. It is trite that suspicion, however strong cannot sustain a conviction. See *Israel Epuku Vrs R* (1934) 1 EACA 166

Consequently, in agreement with the lady and gentleman assessors, 20 I find that \$A2\$ did not commit an arbitrary act. This alone means that the charge of Abuse of office has not been proved beyond reasonable doubt against \$A2\$.

In conclusion, it is my finding after consideration of the evidence for both sides both oral and documentary that \$A1\$ acted arbitrarily by initiating the payment of salaries to persons who were not duly appointed by Kagadi DSC. Because of A1's arbitrary acts, salaries were paid to non-staff, which caused a loss to Government. I find A1 guilty of abuse of office in count one and convict him accordingly.

As regards \$A2\$, I find that proposing postings of the illegal teachers was not a critical role in the crime. \$A1\$ as initiator and the deputy CAO as approver had already committed the crime. \$A2\$ could only come on board if there was evidence of a conspiracy to defraud. \$A2\$

is not part of the recruitment process especially regarding access to the IPPS. I find A2 not guilty in count two and acquit him acco

J JUDGE

17th May,2023.

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