

UGANDA / JUDGMENT

Uganda v Tibiwa (HCT-00-SC 90 of 2013) [2014] UGHACAD 4 (20 May 2014)

[2014] UGHACAD 4

COURT

HC: Anti corruption Division (Uganda)

CASE / FILE NUMBER

HCT-00-SC 90 of 2013

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA****HOLDEN AT KAMPALA****SESSION CASE NO. HCT-00-SC 90/2013****UGANDA ::::::::::::::::::::::::::::::::::::::PROSECUTOR****VERSUS****ROSE MARY TIBIWA :::::::::::::::::::::::::::::::::::::: ACCUSED****JUDGMENT****20th may 2014**

It is common ground that at the time charges alleged against her arose, Rose Mary Tibiwa was Acting Commissioner, Transport Services and Infrastructures, Ministry of Works and Transport. She is now indicted on four counts. In Count I she is charged with Abuse of Office, contrary to section 11(1) of the Anti Corruption Act. A similar charge is preffered against her in Count II. In Count III she is charged with Embezzlement, contrary to section 19(a) of the Anti Corruption Act. Fraudulent False Accounting is the charge she is indicted with in Count IV.

In support of its case the prosecution called 22 witnesses. PW1 was Alex Kakooza, PW2 was Rogers Byaruhanga, PW3 was Amana Collins Barutsya, PW4 was Rogers Kisambira, PW5 was Bhat Raghutathi, PW6 was Rufus Ngethi, PW7 was Ronald Ssenyondwa, PW8 was Kintu Paul, PW9 was John Bwamiki, PW10 was Namuli Sarah, PW11 was Babirye Harriet, PW12 was Zam Nabukenya, PW13 was Gerald Kayemba, PW14 was Katushabe Winstone, PW15 was Mbalire Faisal, PW16 was Khabakha Bernard, PW17 was Oboi Charles, PW18 was Karim Hirji, PW19 was John Kyomukama, PW20 was Maurine Asimwe, PW21 was D/IP Kinyera Bernard Ocaya, while Doreen Birungi Kawooza testified as PW22. The defence opted to give no statement and no witnesses were called.

The onus is on the prosecution to prove charges brought against the accused beyond reasonable doubt. See **Sekitoleko V Uganda** [1967] EA 531. It is not the duty of the accused to prove her innocence. Any doubt arising in the prosecution case is to be resolved in favour of the accused person.

Accused is charged with Abuse of Office in Count 1. The particulars in Count I read:

‘**Rose Mary Tibiwa**, between 23rd and 27th day of November 2012 at Ministry of Works and Transport services offices – Entebbe, in Entebbe Municipality- Wakiso District, being employed by ministry of Works and Transport Services and Infrastructures, in abuse of authority of her office did an arbitrary act to the prejudice of her employer in that she instructed for initiation and authorized requisition for procurement of a sensitization workshop and view gathering for Bus Rapid Transport Route System in Greater Kampala Metropolitan Area, worth 30,204,000/=(thirty million two hundred four thousand shillings) purporting that her department was scheduled to implement a four days sensitization and view gathering workshop at Imperial Royale Hotel Kampala whereas not’

The offence charged, section 11(1) of the Anti Corruption Act, reads:

‘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.’

Subsequently it behoves the prosecution to prove the following four ingredients of the offence:

1. That accused was employed in a public body or company in which the Government has shares,
2. That accused did or directed to be done an arbitrary act,
3. That the act was done in abuse of the authority of accused’s office,
4. That the arbitrary act was prejudicial to the interests of her employer or any other person.

Accused was an employee of the Government of Uganda. This has not been contested. As such the prosecution has proved this fact.

The next element for consideration is whether accused did or directed for the doing of the arbitrary act in issue. The particulars in this count state that accused did an arbitrary act when she instructed and authorized requisition for procurement of a sensitization workshop and view gathering resulting in expense of shs 30,204,000/= but the occasion did not transpire as scheduled. That is what can be gathered from the generality of the accusation. This court in **Uganda V Francis Atugonza**, CR. CS 37 of 2010(unreported) related to what ‘arbitrary’ involves. The following words were used:

“*The prosecution must prove whether accused did or directed to be done an arbitrary act. According to the Oxford Advanced Learners’ Dictionary, 7th edition “arbitrary” is an action, decision or rule not seeming to be based on a reason, system or plan and sometimes seeming unfair. The other meaning in the definition relates to using power without restriction and without considering other people. It is a reliance on individual discretion rather than going by fixed rules, procedures or law”*.

Evidence was led to show how procurement is initiated until actualization. There is an established procedure which involves filling of a PP Form 20 initiated from the concerned sector showing that works or services described in that form are those required and that it is accurate. That form goes next to the authorizing officer indicating that procurement should be done. From the authorizing officer it proceeds to the accounting officer whose role it is to confirm that funds are after all available and budgeted for the procurement being sought.

In this case Amany Collins (PW3) wrote the Internal Memo explaining the need for the procurement being sought. He went on to sign PP Form 20 as the initial signatory. Accused signed approving while Alex Kakooza (PW1) signed as authorizing. For the record, PW1 was at the time Under Secretary, Finance and Administration in Ministry of Works and Transport. I should note also that in his testimony PW3 stated that it was not he who initiated the procurement under review but rather that what he did he did acting on instructions of the accused person. No evidence whatsoever was tendered by him to show such instructions ever existed. Besides, in the course of his testimony PW3 prevaricated a lot. He was economical with truth! In the circumstances the inevitable conclusion is that by writing the Internal Memo which accompanied the PP Form 20 which he signed as initiator PW3 renders himself as the person who initiated the process. In the absence of any evidence of instructions from accused for PW3 to initiate the process accused cannot be said to have given those instructions. It is a fact accused signed subsequent to PW3’s signature but prior to PW1’s signature. Evidence given by PW2, PW1 and PW3 himself shows that this was the normal sequence. The call off order was signed in the same order of precedence. PW3 initiated the process as project co-ordinator, accused authorized next as head of department and finally PW1 approved as accounting officer. All the above was procedural and no evidence was led that it was out of turn. PW21 also agrees.

From the above considerations what the accused did cannot be said to have been arbitrarily done.

The final element to consider in this charge is whether the interests of accused’s employer or those of any other person were prejudicial by the arbitrary act of the accused. Needless to say an interest is a right recognized and protected by law. No evidence was led by the prosecution to show what loss or prejudice resulted to the Government or any other person owing to what the accused did in the circumstances.

The assessors in their joint opinion advised me that the prosecution has not proved the charge against accused in Count I beyond reasonable doubt. For the reasons I have given in the course of this judgment regarding the charge I agree with their opinion that accused should be acquitted on this count.

She is acquitted.

Count II also charges Abuse of Office. It reads:

‘ROSE MARY TIBIWA, on the 30th day of November and 20th day of December, 2012 at Ministry of Works and Transport services offices-Entebbe, in Entebbe municipality-Wakiso District and being employed by Ministry of Works and Transport services as the Ag. Commissioner, Transport Services and Infrastructure, in abuse of authority of her office did an arbitrary act to the prejudice of her employer in that she instructed for initiation and authorized requisition for procurement of a workshop to review Interim Report for Feasibility Study to Introduce Bus Rapid Transit Route in Greater Kampala Metropolitan worth 46,718,560/=(forty six million, seven hundred eighteen thousand, five hundred sixty shillings) purporting that her department was scheduled to implement a two days workshop at Imperial Royale Hotel Kampala whereas not.’

Since it is the same offence charged in Count II as in Count I the ingredients are similar. It may be added that it is not contested that accused was at the time in issue a Government employee. This takes care of the first ingredient.

The second ingredient the prosecution must prove is that accused did or directed to be done an arbitrary act. The import and meaning of arbitrary has been discussed in Count I and this holds true even respecting Count II. In Count I also the procedure followed to initiate procurement particularly regarding procurement requisition in PP Form 20 was duly canvassed. It must be noted however that in the case involved in Count II, unlike that in Count I, no Internal Memo was filed alongside the PP Form 20. Suffice it to say PW4 signed the form as initiator confirming the need, next accused signed as Authorizing officer approving procurement and finally PW1 signed as Accounting officer confirming funding. Evidence of accused initiating the process or directing that the process be initiated was never given. Indeed signatures to the call off order followed the usual sequence. The accused person did not initiate the procurement procedure nor did she instruct PW4 or anyone else to do so. To the contrary PW4 admitted to initiating the process himself, crossing the ‘ts’ and dotting the ‘is’ before handing the document to accused to authorize. Consequently this ingredient has not been proved by the prosecution beyond reasonable doubt.

Another ingredient to be proved is that the act subject of this count was prejudicial to the interests of accused’s employer or any other person. In the instant case no evidence points to the accused acting in an arbitrary manner or causing any prejudice. This ingredient also cannot succeed.

As to whether accused did the impugned act in abuse of the authority of her office, evidence available shows accused followed normal procedure. There is nothing pointing to her having acted in abuse of her office.

The assessors opined that the prosecution did not prove the offence in Count II against accused beyond reasonable doubt and that accused should be acquitted on that charge. I agree with their opinion and as I find her not guilty on the charge she is acquitted on Count II.

Embezzlement is the offence charged in Count III. The particulars read:

‘ROSE MARY TIBIWA, between the month of November 2012 and February 2013 at Ministry of Works and Transport Services Wakiso District, and being employed by the said Ministry of Works and Transport Services as the Ag. Commissioner, Transport Services and Infrastructure, stole 76,922,560/= (Seventy six million nine hundred twenty two thousand five hundred sixty shillings) the property of her employer.’

In this offence the prosecution ought to prove:

1. that accused at the time of the offence was employed by the Government of Uganda,
2. that accused stole the money ,
3. that the money belonged to her employer, and
4. that accused had access to that money by virtue of her office.

That at the material time accused was an employee of the Government of Uganda was agreed.

The prosecution must prove however that accused stole the money in issue. The entirety of the money involved in this charge comprises money cited in Count I and that cited in Count II. Plainly put embezzlement occurs when a person employed to take care of money belonging to that person's employer turns around and steals that money which that person accesses by virtue of that person's employment. In the case at hand no evidence was led regarding the scope of stewardship accused had relative to her employer's funds in issue. What is more, no evidence was led to show she stole money from her employer or anyone else. Theft is a cardinal ingredient in the offence of embezzlement. Indeed in its absence there is no embezzlement. Theft is defined under S.254 of the Penal Code Act and materially involves one fraudulently and without claim of right taking, in this case, money or converting it to the use of any other person besides accused's employer. Such evidence is woefully lacking. I find the prosecution has failed to prove this charge against accused. Evidence that the prosecution advanced concerned payment to the Imperial Royale Hotel for services rendered to the Ministry. Indeed prosecution witnesses 5, 6, 7, 8 and 18 referred to diverse sums of money as did other witnesses but no evidence was given of theft of any money by the accused in order to sustain the allegation. Clearly the allegation in Count III cannot be salvaged either.

I agree with assessors' opinion that accused should be acquitted.

The final charge is Count IV. It charges accused with Fraudulent False Accounting. The particulars read:

‘ROSE MARY TIBIWA, between the month of November 2012 and February 2013 at Ministry of Works and Transport Services in Wakiso District, and being employed by Ministry of Works and Transport Services as Ag. Commissioner, Transport Services and Infrastructures, and being charged with the receipt and management of shs 76,922,560/=(seventy six million nine hundred twenty two thousand five hundred sixty shillings) knowingly furnished false return of it.’

Fraudulent False Accounting is an offence charged under section 23 of the Anti Corruption Act. It seeks to punish offending clerks or servants. Accused certainly is not in the category of a clerk or servant. While she is charged with fraudulent false accounting it is under S.22 of the Anti Corruption Act she is charged. Section 22 relates to False Accounting by a public officer and states:

“A person who, being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of money or property received by him or her or entrusted to his or her care, or of any balance of money or property in his or her possession or under his or her control, commits an offence and is liable on conviction to a term of imprisonment not exceeding three years or a fine not exceeding seventy two currency points or both.”*

The onus is on the prosecution to show that accused had a duty to receive, keep or manage public revenue in issue and that accused did furnish a false statement or return of money received by her, or entrusted to her care or of any balance in her possession or control. It was indeed established that accused was Acting Commissioner, Transport Services and Infrastructure in the Ministry of Works and Transport. Needless to say she was an employee of the Government of Uganda. It was never established however what her duties and responsibilities were, let alone that they came within the ambit of the offence charged in section 22 of the Anti Corruption Act. That besides, no evidence of any false statement or return made by the accused was tendered. Evidence against accused under Count IV is insufficient to prove the charge of false accounting by whatever name called.

The assessors in their opinion advised me to find accused not guilty of the charge under Count IV and acquit her. I agree with their verdict. I find accused not guilty and acquit her accordingly.

In the result I find accused not guilty on any of the four counts charged. She is acquitted and should be set at liberty except if she is charged with any other offence.

I shall be failing in my duties if I do not relate to the concern of the defence that in carrying out a search of the office of the accused Police used unorthodox methods. For different reasons the search evidence in issue was not used in determining this case. Nevertheless carrying out a search is an elaborate and delicate procedure not least because of the Constitutional provisions relating to the privacy of the individual as well as liberty and property rights. Consequently it is not for naught provisions such as section 27 of the Police Act and section 69 of the Magistrates Courts Act are in place. Those are elaborate provisions spelling out how a search is made. To negate them is to render ineffectual evidence sometimes so laboriously but sadly erroneously collected. It is disheartening to note there is a growing trend to make searches come what may.

But the pleasure of such retrieval may be momentary and forever regrettable. Police officers should therefore be sticklers to laid down procedure to support successful prosecutions.

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Paul K Mugamba

Judge

20TH MAY 2014

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