THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HIGH COURT CRIMINAL APPEAL CASE NO. 28 OF 2004

(Arising from Buganda Road Criminal Case No. KLA-00-CR-CO-1878-2000)

UGANDA……..……APPELLANT

VERSUS

ODOCH ENSIO……..RESPONDENT

Before: Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

This judgment is in respect of an appeal that the Inspector General of Government (hereinafter to be referred to as **"the appellant"**) preferred against a decision of the Chief Magistrate of Buganda Road (as he then was - His Worship Mr. Frank Nigel Othembi) dated 14th March 2004. Under that decision the learned Chief Magistrate acquitted the respondent of the offence of corruption contrary to sections 1 (a) and 5 (1) of the Prevention of Corruption Act (Cap.121). (The latest edition of Uganda Laws cites the above offence under sections 2 (a) and 6 (1) of the Prevention of Corruption Act (Cap.121)).

The above decision aggrieved the appellant; and hence the appeal herein, which seeks to overturn that decision and replace it with a conviction followed by an appropriate sentence.

However, before this Honourable Court goes into the merits of the appeal it is important to get a full picture of the evidence that the learned trial Magistrate had before him as he made the above decision. Court will begin with the evidence that the State led, which was briefly as follows:

In the year 2000 as David Mukasa Walakira (PW1) was facing trial under Buganda Road Criminal Case No. 3275 of 1998, the respondent approached him. The respondent was, at the time, working at the Headquarters of the Directorate of Criminal Investigations in Kampala; and was the investigating officer in charge of the above case. The respondent proposed to Walakira that if Walakira paid him a sum of shillings 5,000,000/=, he would ensure that Walakira escaped punishment in the above case. Walakira pondered the matter as the respondent kept on reminding him about it. Eventually, Walakira reported the matter to the appellant's office. In turn, that office laid a trap by giving Walakira a bundle of shillings 1,000,000/=, which had been carefully marked. Walakira was to pay out that sum of money to the respondent as per the above request. Thereafter, the appellant's agents were supposed to arrest the respondent red-handed. On 23rd October 2000 Walakira made an arrangement with the respondent. Under that arrangement the respondent was to receive the money from Walakira during lunch time. The venue for that event was agreed to be Walakira's office. That office is found at Excel Insurance Company near the

railway station in Kampala. The respondent duly visited Walakira's office. In turn, Walakira paid him a sum of shillings 1,000,000/= as per the above arrangement. However, as the respondent left the above premises the appellant's agents intercepted him. He tried to run back to Walakira's office, but they stopped him in his tracks. At this point, the respondent threw away an envelope, which landed in Walakira's Secretary's office. That envelope contained the marked money i.e. a sum of shillings 1,000,000/=. The appellant's agents arrested the respondent. Subsequently, he was charged with the above offence; and tried in respect thereof.

In his defence the respondent denied having committed the above offence. He explained that Walakira and the appellant tricked him. They lured him into going to Walakira's office to fetch some documents relating to General Enquiry File No. 130/99. During that visit, Walakira gave him a sum of shillings 50,000/=, which he unwisely accepted as lunch money. Soon afterwards the appellant's agents arrested him and framed him.

After considering the above evidence the learned trial Magistrate decided to acquit the respondent. In his view, the State failed to prove that the respondent corruptly received the above sum of money. The above decision aggrieved the appellant; and hence the appeal herein.

At the time of hearing the appeal, Mr. Mulumba represented the appellant and Mr. Olanyah represented the respondent. At this point, it will suffice to say that both counsel agreed that the appeal herein raised two important issues, which were as follows:

(a) whether or not there is evidence on the record of the lower court to support a conviction for the offence of corruption contrary to sections 1 (a) and 5 (1) of the Prevention of Corruption Act (Cap.121); and

(b) the remedies available.

Court will discuss the above issues in turn.

With regard to the first issue **(i.e. whether or not there is evidence on the record of the lower court to support a conviction for the offence of corruption contrary to sections 1 (a) and 5 (1) of the Prevention of Corruption Act (Cap. 121)** Court has this to say: It will first of all lay out the law creating the offence in question. It will, then, point out the essential ingredients of that offence. Finally, it will examine each of those ingredients with a view to determining whether the record of the lower court bears evidence proving all of them.

As earlier on pointed out, in the latest edition of Uganda Laws, the offence under consideration is found in section 2 (a) of the Prevention of Corruption Act (Cap. 121); and in its relevant parts that offence is couched in these words:

"2. Corruption.

Any person who shall, *by himself or herself or by or in conjunction with any other person -*
(a) corruptly *solicit or* ***receive,*** *or agree to receive for himself or herself, or for any other person; or*
(b) …
any gratification as an inducement *to, or reward for, or otherwise* ***on account of any*** *member,* ***officer*** *or servant* ***of a public body doing*** *or forbearing to do* ***anything in respect of any matter*** *or transaction, actual or proposed,* ***in which that public body is concerned, commits an offence."***

It would be far from the truth to say that the above provision is straight forward or easy to understand. It reads like a provision that was lifted from some ancient foreign legislation and transplanted, root and branch, into our law. With respect, our drafters would have done a better job by expressing the contents of the above provision in simpler terms. All the same, the provision does cover the situation at hand i.e. where the State alleged that the respondent (i.e. a police officer) received a gratification in a corrupt manner, etc.

The essential ingredients of the offence in question, therefore, are as follows:

(a) the accused must have been an officer of a public body at the time of the offence; (Under section 1 of the Prevention of Corruption Act (Cap. 121) the term ***"officer of a public body"*** includes an officer of the Government of Uganda.)

(b) the accused must have received a gratification at the material time; and

(c) the act in paragraph (b) above must have been done corruptly as an inducement to bring about some given results in a matter concerning that public body.

The all important question to answer now is whether the record of the lower court bears evidence proving all the above ingredients beyond reasonable doubt? Messrs. Mulumba and Olanyah seemed agreed that the first and second ingredients were proved beyond reasonable doubt. However, the duo differed on the third ingredient. While Mr. Mulumba insisted that there was overwhelming evidence on the record of the lower court proving the third ingredient and, therefore, supporting a conviction, Mr. Olanyah thought otherwise. He maintained that all the evidence the State led to prove the third ingredient (i.e. Walakira and Namutebi's testimony and the police testimony) was suspect. In his opinion that evidence could not stand in the face of the respondent's defence that he was framed. Mr. Olanyah, therefore, concluded that the learned trial Magistrate was right to acquit the respondent.

This Court agrees with both counsel that the record of the lower court bears evidence proving beyond reasonable doubt the first two ingredients above. In any case, those ingredients were not contested during the hearing of the case in the lower court.

Therefore, the above leaves only the third ingredient for Court to consider and finally determine the appeal herein. Nevertheless, before Court goes further it is prudent to endeavour to understand the meaning of the word ***"corruptly",*** which is a vital component of the third ingredient.

The word "***corruptly***" is an adverb that has its roots in the adjective ***"corrupt".*** In the **Collins English Dictionary & Thesaurus at page 246** the above adjective is defined as follows:

"1. open to or involving bribery or dishonest practices: a corrupt official; corrupt practices …"

Consequently, it is with the above understanding (connoting bribery) that this Court will consider the word ***"corruptly"*** in determining whether there is evidence on the record of the lower court proving the third ingredient.

Be that as it may, the State's testimony relating to the third ingredient was essentially made up of the story Walakira narrated to the lower court. That story was very briefly as follows:

On 23rd October 2000 the respondent visited Walakira's office at Excel Insurance Company in Kampala. At that point, in time, Walakira paid the respondent a sum of shillings 1,000,000/=. That sum of money was a small portion of the amount the respondent had earlier on requested Walakira to pay him as an inducement to suppress a criminal charge the Government had laid against Walakira.

It is apparent from the lower court's record that even after cross-examination the above story stood unshaken. In fact, a string of other witnesses such as Antero (PW2), Flavia Mubiru (PW3) and D/ASP Kavuma (PW6)) corroborated that story in some of its vital areas. For example, the above witnesses testified that when the respondent emerged from Walakira's office on the day in question he quickly realized that he was in trouble. Therefore, he pulled an envelope out of his jacket and threw it away. On checking its contents, the said witnesses found that the envelope contained a sum of shillings 1,000,000/=. The notes making up that amount were the exact notes the appellant's agents had marked and handed to Walakira with a view to arresting the respondent as soon as the respondent received that money from Walakira.

There is no doubt that the sum total of the above evidence presents a very strong case against the respondent. To make matters worse for the respondent, at this point, the burden of proof shifts; and the respondent would only escape conviction if he proved that he did not receive the money in question corruptly i.e. as a bribe.

To confirm the correctness of the above position in law, Court will below reproduce the relevant parts of section 10 of the Prevention of Corruption Act (Cap. 121). Those parts read as follows:

"10. Presumption of corruption in certain cases.

Where, in any proceedings against a person for any offence under section 2 … it is proved that any gratification has been paid … or given to a person employed by a public body, by …a person who …seeks to have any dealing with any public body, the gratification shall be deemed to have been paid … corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved."

In an effort to discharge the above burden the respondent explained, in his defence, that on the material day he received a sum of shilling 50,000/= from Walakira under the innocent belief that it was "***money for lunch"***. However, to his utter surprise Walakira and the appellant twisted that event and framed him by saying he received a sum of shillings 1,000,000/= in order to suppress a criminal case against Walakira.

In his judgment, the learned trial Magistrate decided that the above story offered a reasonable explanation exculpating the respondent. Therefore, he did not find it difficult to acquit the respondent.

However, this Court does not share the learned trial Magistrate's sentiments, for there is a lot in the respondent's explanation that does not add up. For example it is difficult to understand why the respondent, a police officer who had investigated Walakira in respect of a criminal offence, found it right to visit Walakira when that criminal case had not yet been disposed of.

Secondly, the admission that the respondent received some ***"money for lunch"*** from Walakira during the above visit tends to work more against him than in his favour. For under the workings of public bodies, particularly the traditional civil service, receipt of such dubious gifts however small and whatever name they might be given portrays the receiver as a dishonest, unethical civil servant, who readily succumbs to bribery.

Thirdly, the respondent's explanation above contradicts the gist of his charge and caution statement (i.e. Exhibit P3). In that statement the respondent, at least, admitted that he received a

sum of shillings 1,000,000/= from Walakira on 23rd October 2000. (The admission of the above statement on the record of the lower court is difficult to fault because the police officer who recorded it seems to have done so in compliance with the relevant law. **(See sections 23 and 24 of the Evidence Act (Cap. 6) and the Evidence (Statement to Police Officers) Rules – Statutory Instrument 6-1).** Besides, the respondent and his advocate did not oppose the introduction of that statement on the above record.)

Fourthly if there is a police officer who buys for himself lunch worth a sum of shillings 50,000/= on any single day, it must be the respondent and him alone!

In view of the foregoing, therefore, this Court must reject the respondent's defence or explanation referred to above. It is not a reasonable explanation as to how the money in question came to be found on him on the material day. Instead, it represents a big lie the respondent crafted in order to try to save his skin in the face of the charge in question. The plain truth, however, is that the respondent corruptly received a sum of shillings 1,000,000/= from Walakira on the day in question as an inducement to suppress a criminal case against Walakira. In other words, the respondent received a bribe of shillings 1,000,000/= in order to destroy the case against Walakira.

All in all, Court is satisfied that there is evidence on the record of the lower court to support a conviction for the offence of corruption contrary to sections 1 (a) and 5 (1) of the Prevention of Corruption Act (Cap. 121) – currently sections 2 (a) and 6 (1) of the Prevention of Corruption Act (Cap. 121).

With regard to the second issue **(i.e. the remedies available)** since Court has resolved the first issue in favour of the appellant it means that the appeal herein has succeeded. For that reason one would expect Court to grant the appellant some remedies directed at addressing the grievances that gave rise to the appeal herein. Therefore, the important question to answer here is this: What are those remedies?

Before the legislature amended the Criminal Procedure Code (Cap. 116) and reduced its numerous sections to only a few scores, the remedies in a situation of this nature were found in section 331 (1) (b) in Part X under ***"APPEALS FROM COURTS".*** That section read as follows:

"331. (1) …After hearing the appellant or his advocate, and the respondent … the court … may -

(a) …

(b) in an appeal from an acquittal or dismissal remit the case together with the judgment of the High Court thereon to the court of trial for determination whether or not by way of re-hearing, with such directions as the High Court may think necessary."

The above meant that after hearing an appeal of this nature the High Court would remit the case to the lower court together with the judgment of the High Court and the directions that would enable the lower court to dispose of the case. However, presently the above provision is no longer the law in this area. What remains of the Criminal Procedure Code (Cap. 116) to guide Court in this area is perhaps found in section 35 thereof; and that section reads as follows:

"35. Powers of appellate court on appeals from acquittals.

The appellate court may, on an appeal from an acquittal or dismissal, enter such decision or judgment on the matter as may be authorized by law and make such order or orders as may be necessary."

Unfortunately, the above section is vague. For example, it is not clear from that section as to what kind of "***decision or judgment"*** the appellate court must enter in a case of this nature. It is not clear, too, as to what kind of "***order or orders"*** the appellate court is supposed to make in such case. In the end, the above section only seems to leave a hope that the type of remedies i.e. "***decision or judgment"*** and the necessary "***order or orders"*** an appellate court may give in a

situation of this nature would be settled by law. To put it differently it is doubtful whether the above section on its own gives an appellate court power, in a case of this nature, to confirm or reverse a lower court's decision and where necessary to pass a sentence against the respondent unless there is a specific law authorizing such exercise of power.

For the above reasons, therefore, it seems it is only the Court of Appeal that has the power to confirm or reverse, on appeal, an acquittal of the High Court in the exercise of its original jurisdiction and where necessary to pass sentence against the respondent. This is because the Court of Appeal is empowered to do so, in no uncertain terms, by a specific law i.e. subsections (1) (c) (f) and (2) of section 132 of the Trial on Indictments Act (Cap. 23). For the sake of removing any doubt this Court will, below, reproduce the relevant portions of the above provisions.

"PART X – APPEALS FROM THE HIGH COURT

132. Appeals to the Court of Appeal from the High Court.

(1) ***subject to this section –***

(a) …

(b) …

(c) where the High Court has, in the exercise of its original jurisdiction, acquitted an accused person, the Director of Public Prosecutions may appeal to the Court of Appeal as of right on a matter of law, fact or mixed law and fact, and the Court of Appeal may –

(d) …

(e) …

(f) confirm or reverse the acquittal of the accused person.

(2) Where the Court of Appeal reverses an acquittal under subsection (1), it shall order the accused person to be convicted and sentenced according to law. ”

(Obviously, the above provisions were drafted in a rather confusing way that almost made them unintelligible. For immediately after paragraph (c) of subsection (1), sub-paragraphs (i), (ii), and (iii) should have logically followed the presentation above.)

All in all, the foregoing boils down to this: In the absence of a specific law authorizing this Court to overturn the lower court's decision and to pass sentence against the respondent, this Court's hands are tied. For section 35 of the Criminal Procedure Code (Cap. 116), on its own, does not appear to offer a clear basis for such intervention. Consequently, the only remedy that this Court will provide, in the circumstances of this case, is simply a declaration that the decision of the lower court acquitting the respondent was absolutely wrong; and it is so ordered. In other words, what finally happens to a case of this nature in this Court is exactly what used to happen in the Supreme Court before the enactment of Statute 19 of 1996 whenever the Supreme Court was faced with an appeal against an acquittal from a decision of the High Court in exercise of its original jurisdiction. At that time, the Supreme Court could not ***"confirm, vary or reverse"*** the decision of the High Court acquitting an accused person. It could only ***"review the case or such part of it"*** as was necessary ***"and … deliver a declaratory judgment thereon.***" **(See Steven Mugume and another v Uganda SCCA No. 4 of 1994; and Uganda v Tigawalana and others etc, Court of Appeal Criminal Appeal No. 21 of 2005.)**

Finally, before Court takes leave of this matter it wishes to make two comments which are as follows: Firstly, some where in the middle of writing this judgment, Court was troubled by the fact that in view of section 204 (5) of the Magistrates' Courts Act (Cap. 16) it seemed the IGG had no power to file the appeal herein. However, when Court referred the matter back to counsel for guidance Mr. Mulumba easily provided an answer showing the IGG had the power to file the appeal herein. **(See section 14 (9) of the Inspector of Government's Act (Act 5 of 2002.)** For that, this Honourable Court is greatly indebted to Mr. Mulumba.

Secondly, up to now this Court has not yet understood why the record of the lower court contains two judgments i.e. one judgment acquitting the respondent and the other one convicting him! Curiously, the latter seems to be a product of a better considered process than the former.

E. S. Lugayizi (J)
17/12/2008

Read before: At 10.26 a.m.
Respondent
Mr. Olanyah for the respondent
Mr. Mulumba for the appellant
Ms. J. Aceng c/clerk

E. S. Lugayizi (J)
17/12/2008