

UGANDA **PROSECUTION**

HON. JIM K. MUHWEZI & 3 OTHERS :::::::::::::::::::::::::::::: ACCUSED

(Under S. 127 of the MCA, Cap 116)

A1 is charged on CT. 1 with Abuse of Office C/S 87 (1) and (2) of the Penal Code Act and it is alleged that Hon. Jim Katugugu Muhwezi being a person employed as Minister of Health in the Government of The Republic of Uganda at the Ministry of Health Headquarters in the Kampala District, between the months of March 2004 and November 2005, did unlawfully and high handedly direct to be done arbitrary acts prejudicial to the interests of the Uganda Government in abuse of his Office; to wit by endorsing/approving requisitions for and the use of the sum of Uganda Shs. 760.855.000/= received by the Ministry of Health from the Global Alliance for Vaccines and Immunization (GAVI) in total disregard of the Laws, regulations and practices governing the disbursement of public funds in the Republic of Uganda

1

A1 is also jointly charged with A2 on CT.4, with Abuse of Office C/S 87 (1) and (2) of the Penal Code Act and it is alleged that Hon. Jim Katugugu Muhwezi and FLt. Captain George Michael Mukula while being employed respectively as Minister of Health in charge of General Duties in the Government of the Republic of Uganda, between 11th and 20th February, 2005 at the Ministry of Health Headquarters in Kampala District, did arbitrary acts prejudicial to the interests of the Government of Uganda, to wit; they unlawfully and respectively requisitioned and approved and later received the sum of Shs. 263.855.000/= from the GAVI Global Fund Account of the Ministry of Health at Citibank Uganda Ltd. And proceeded to disburse the said funds in total disregard of the Laws, regulations and practices governing the use of public funds in the Republic of Uganda.

On CT. 5, which is Embezzlement C/S 268 (a) and (g) of the Penal Code Act again A1 is jointly charged with A2 and it is alleged that Hon. Jim Muhwezi and FLt. Captain George Michael Mukula, while being employed respectively as Minister of Health and Minister of state for Health in charge of General Duties, in the Government of the Republic of Uganda, between 11th February, 2005 and 28th October, 2005, at the Headquarters of the Ministry of Health, in the Kampala District, stole the Sum of Shs. 210.000.000/= from the GAVI Global fund Account of the Ministry of Health at Citibank Uganda Ltd to which they had access by virtue of their respective Offices and received the same allegedly for Health Advocacy conferences which were purposely organized by the First Lady's Office of Uganda , in Acholi Inn in Gulu District and Mt. Elgon Hotel in the Mbale District, whereas not.

On CT. 6, which is Abuse of Office C/S 87(1) and (2) of the Penal Code Act, A1 is jointly charged with A3 and it is alleged that Hon. Jim Katugugu Muhwezi and Dr. Alex Kamugisha, while being employed respectively as Minister of Health and Minister of state for Health in charge of Primary Health Care, in the Government of The Republic of Uganda, on 22nd November, 2004, did unlawfully and high handedly direct to be done arbitrary acts prejudicial to the interests of the Uganda Government, in abuse of their Office; to wit, by endorsing/approving a requisition and the use of the sum of Ug. Shs 310.400.000/= received by the Ministry of Health from GAVI in total disregard of the Laws, regulations and practices governing the disbursement of public funds in the Republic of Uganda.

A3 is charged alone on CT. 7, which is also Abuse of Office C/S 87 (1) and (2) of the Penal Code Act and it is alleged that Dr. Alex Kamugisha, while employed as a Minister for state in charge of Primary Health Care in the Government of Uganda, at the Headquarters of the Ministry of Health in the Kampala District between the months of January and December, 2005, did direct to be done an arbitrary act prejudicial to the Government of Uganda in abuse of the authority of his Office; to wit, he unlawfully endorsed/approved a proposal submitted by one Dr. Nankinga Aidah of Sheema North Constituency in the Bushenyi District, purportedly to carry out immunization activities in the said Constituency for which the said Dr. Nankinga Aidah received the sum of Ug. Shs. 10,085,000/= from the GAVI Global Fund Account of the Ministry of Health at Citibank Uganda Ltd. which money has not been accounted for to date.

At the hearing, the state was represented by Mr. Sydney Asubo assisted by Mr. Syrus Mawano Senoga and Ms. Diana Nantabazi. A1 was represented by Mr. Osca Kambona and Mr. Ahamad Kalule Mukasa, A2 was represented by Mr. Fred Muwema, while A3 was represented by Mr. Turyakira.

At the beginning of the defense submission on a no case to answer and his reply to the defence submission on a no case to answer, Mr. Asubo made it clear that prosecution evidence adduced on CTs 3 and its alternative, did not make out a prima facie case warranting accused persons to defend themselves. Since there is no evidence brought to support these charges as per the provisions of S. 127 of the MCA, I hereby acquit A1 on CT.3 of Theft C/S 254 of the Penal Code Act. I also acquit him on of Causing Financial Loss C/S 269 (1) of the Penal Code Act on the alternative count.

I also acquit A3 of Causing Financial Loss C/S 269 (1) of the Penal Code Act on CT.8. I also acquit A3 on CT.9 of Causing Financial Loss C/S 269 (1) of the Penal Code Act and also I also acquit him (A3) on the alternative Count of Obtaining money by False Pretences C/S 305 of the Penal Code Act.

In resolving the other Counts, I will follow the pattern adopted by the defence Counsel. I will therefore collectively resolve all the Counts on Abuse of Office which are Counts 1, 4, 6 and 7. Then, I will separately resolve CT.2 on Causing Financial Loss and lastly CT.5 on Embezzlement.

At this stage, I need to first find out what a prima facie case means. According to the case of *CHARLES HARRY TWAGIRA Vs UGANDA – Appeal Case No. 160 of 2002*, which was

quoted by the defence, referred to the case of Semambo Charles and Fred Musisi Ssemakula Vs Uganda – Criminal Appeal No. 67/98, which held that “A prima facie case means a case sufficient to call for an answer from accused,” and the case of Wabiro *alias* Musa V.R [1960] EA 184, held that “a prima facie case does not mean a case proved beyond reasonable doubt that at this stage the case does not have to be conclusively proved.”

The case of Bhatt V.R [1957] EA 332 at p. 335, it was held that “a prima facie case is one in which a reasonable tribunal (court) basing itself on the evidence and the law, can convict even if the accused does not offer any explanation.” Therefore, from the aforementioned definitions, a prima facie case is one, which, while although not proved conclusively, is enough to earn an accused a conviction in case the accused opts to keep quiet.

Counsel Oscar Kambona is the one who submitted on the Offence of Abuse of Office and he formulated the following ingredients under S. 87 (1): -

1. That the accused is employed in a public body or company in which Government has shares.
2. That he or she does or directs to be done an arbitrary act.
3. That the act is prejudicial to the interests of his or her employer.

I agree that these are the ingredients the prosecution has to prove to the standard of proving a prima facie case or as Counsel Kambona put it, prosecution must adduce evidence incriminating the accused.

On ingredient No. 1, it is not in dispute that the three accused persons were at the time of the commission of the alleged offences, Ministers in the Ministry of Health. They were therefore employees of the Government of The Republic of Uganda.

I will resolve ingredients two and three together. On those ingredients, Counsel Kambona submitted that the catch words running through all the charges of Abuse of Office are that the accused persons endorsed and approved requisitions in total disregard of Laws, regulations and practices governing the disbursement of public funds in the Republic of Uganda.

Counsel Kambona submitted that the two catch words in the offence of Abuse of Office are “Arbitrary” and “Prejudicial” but that they are not defined in the Penal Code Act. He

used the definition in Black's Law Dictionary which defined Prejudicial as "Damage or detriment to one's legal rights or claims". He submitted that according to the evidence on record, there is no damage or detriment suffered by the Government of Uganda, the employer of the accused persons at the time.

He submitted that all the payments in question in this case satisfied the two critical requirements/steps to be followed, that is to be authorized by the Permanent Secretary, P/S and to be examined by the Internal Auditor as per the testimony of PW4, Lubwama Jimmy, the Senior Accountant. He submitted that also PW 5, PW 6 and PW7 confirmed that the whole payment process was legal and that there was nothing wrong.

To prove that PW7, the P/S and accounting officer, Mr. Mohammad Kezaala is the one who approved the payments and not the three accused persons. He gave an example of P. Exh. 6 (a) – (c) whose requisition was initially 204 million shillings but PW7 on his own volition revised it upwards to 263 million shillings. He also submitted that PW7 testified that he approved all the payments in issue in this case because he found them "Health related".

When submitting on CT.2, which has a subject matter of Shs. 760.855.000/= he submitted that it has no basis since there is no requisition on record of such amount. He was supported by Counsel Ahmad Kalule who was replying to Counsel Asubo's submission that 760 million is a total of 250 million, P. Exh. 3, Shs. 310 million P. Exh. 5 and Shs. 214 million, P. Exh. 10 and that it is also a total of Shs. 774.400.000/= on CT. 2. However, Counsel Ahmad Kalule submitted that such addition of those figures does not amount to Shs. 760.000.000/=. He further submitted that in view of the evidence on record by PW3, PW4, PW5 and PW6 all the payments were approved by PW2 and that in view of PW7's testimony that he was not pressurized by anyone to approve the payments, then there is no evidence produced to support the charge of Abuse of Office. Both Counsel for A1 produced in Court an extract from Black Stone's CRIMINAL PRACTICE 2009 at P. 1727, which states in effect that, if there is no evidence that a crime has been committed then the Court stops the case. They prayed that accused persons be acquitted of the offence of Abuse of Office.

In reply, Counsel Asubo submitted that for example on P. Exh. 5, the Voucher for Shs. 310.400.000/= the words addressed to PW7 by A1, start with "Please Process." That therefore, those words are not advisory but that they are an instruction. That the

testimony of PW4 states that there was an anomaly in the payment process because of the instructions by the Ministers to the P/S. At p. 28 of the submissions, he also referred to the testimony of PW1 at p. 18 of the proceedings that he testified with regard to P. Exh. 5 as follows: -

“In this case, I can see the two Ministers authorizing the payment. This is contrary to the Public Finance and Accountability Act and its Regulations and the Treasury Accounting Instructions.”

It is true that PW4 when being cross-examined by Counsel Kambona testified that the payment process he outlined was adhered to but that the anomaly was the Ministers or political heads giving directions to the Accounting Officer. Also, PW8, the Investigating Officer during the conclusion of his examination-in-chief testified that Accounting Regulations were not adhered to.

During cross-examination of PW7, all defence counsel referred to S. 8 (2) of Public Finance and Accountability Act 2003, which gives the Accounting Officer the responsibility to be in control of the public monies in the Ministry - It provides as follows: -

“An Accounting Officer shall control and be personally accountable to Parliament for the regularity and propriety of the expenditure of money applied by an expenditure vote or any other provision to any Ministry, fund agency, local government or for any other entity funded through the consolidated fund and for all resources received on account of that Ministry, Department or fund.” When PW7 was asked by Counsel Muwema how he ensured the regularity of the GAVI funds, which were also Public Funds, which he was in control of, he testified that he ensured regularity by ensuring that the requisitions were for a purpose which was *“health related.”*

Specifically in connection to P. Exh. 6 (a) – (c) for the amount totaling to Shs. 263,855,000/= still in cross-examination by Counsel Muwema, PW7 testified that “the Ministers were not abusing their Offices,” and he had power to turn down a requisition by a Minister “If the payment is prejudicial to the Republic of Uganda I would refuse.” (See pages 166 – 168 of the proceedings).

Still with regard to P. Exh. 6 (a) – (c) during cross-examination by Counsel Kambona, PW7 confirmed that he was the one who adjusted the figure from 204 million shillings

to 263 million shillings and that the payment was made on the strength of his authorization. PW7 further testified that he did not write a protest note to the Secretary to the Treasury because “there was nothing wrong or irregular about the instructions” of the Ministers. (See pages 162 – 163 of the proceedings). In other words, there was nothing arbitrary.

During examination-in-chief (at pages 148 – 149), PW7 while outlining the process of payment, testified that the requisitions, after his approval are taken to the Internal Auditor who ensures the legality of the payments. It is not in dispute that all payments in issue in this case were verified by the Internal Auditor and they were found to be proper.

During cross-examination by Counsel Turyakira (Page 165 of the proceedings) in relation to P. Exh. 5 for the amount of Shs. 310.400.000/=, PW7 testified that he did not raise any objection and that he approved the payment because it was “health related.” I agree with Counsel Kambona that at P. 4 of the submissions where he submitted that the admission by PW7 that he authorized all the payments in issue and that they were paid on the strength of his authorization “was a very crucial admission which legalised the payment process. Therefore, any involvement by the accused persons was legalised by PW7 who received the requisitions and authorized the payment process which proceeded regularly after first ensuring that the payments were not prejudicial to the Government of Uganda as they were “health related.”

Going back to CT.1, I agree with Counsel Kambona and Counsel Ahmad Kalule that it has no basis. According to Counsel Asubo, it includes Shs. 214.000.000/=, 250.000.000/=, and 310.400.000/=. I agree with Counsel Kambona that Shs. 310.400.000/= is the subject matter of CT. 6 on which A1 is jointly charged with A3 of Abuse of Office. Therefore, A1 should not have been charged on another Count of Abuse of Office in respect of the Shs. 310.400.000/=. As regards Shs 214.000.000/=: which is the amount on P. Exh.10, a cheque drawn by PW5, there are no documents on record indicating who requisitioned for it and who received it. So, P. Exh. 10 has no accompanying documents to support it.

As regards CT.7 on which A3 is charged alone with Abuse of Office and in respect of P. Exh. 4, a Voucher of Shs. 10.085.000/= paid to one Dr. Nankinga Aidah purportedly to carry out immunization programmes in Sheema North Constituency, the payment was

dully authorized by PW6, Mugumya Albert Jethro, the Undersecretary in Ministry of Health at the time. He legally authorized the payment as Ag. P/S in absence of PW7.

In cross-examination of PW7 by Counsel Osca Kambona at Page 160 of the proceedings – PW7 admitted that under S. 8 (5) of the Public Accounts and Accountability Act, 2003, the P/S is accountable even if the work is done by his undersecretary to whom he delegates the work. Therefore, the payment authorized by PW6 is taken to have been authorized by PW7 and therefore it is also legalised by PW7.

In the circumstances, I find that the Prosecution has not made out a prima facie case on the charges of Abuse of Office. Accordingly, I acquit A1 of Abuse of Office C/S 87 (1) and (2) of the Penal Code Act on CT.1.

I also acquit A1 of Abuse of Office C/S 87 (1) and (2) on CT. 4, and also acquit A1 of Abuse of Office C/S 87 (1) and (2) of the Penal Code Act on CT. 6.

I also acquit A2 of Abuse of Office C/S 87 (1) and (2) of the Penal Code Act on CT. 4.

I also acquit A3 of Abuse of Office C/S 87 (1) and (2) of the Penal Code Act on CT. 6 and also acquit A3 of Abuse of Office C/S 87 (1) and (2) of the Penal Code Act on CT. 7.

On CT. 2 of Causing Financial Loss, on which A1 is charged alone, it was submitted on by Counsel A. Turyakira, who formulated the following ingredients:-

1. The accused person is an employee of the Government or Public.
2. The accused in performance of his duties did an act or omitted to do an act knowing or having reason to believe that the conduct would lead to loss of funds belonging to the employer.
3. The financial loss must have occurred.

Counsel Turyakira submitted that as already indicated, PW7 who took responsibility of all the payments in issue said that they all went through a normal process and also that accused persons had no role in the disbursement of funds. That PW7 also testified that there was no loss of funds. He quoted the case of Bakyenga Vs. Uganda [1995] 3 KALR which in effect held that if there is no evidence to support the charge sufficiently to require accused to be put on his defence at the close of the prosecution's case, accused shall be acquitted.

The submission in reply by Counsel Asubo, which seems to be relevant to this charge appears at P. 19 of the submissions where he quoted Article 164 (2) of the Constitution of the Republic of Uganda, which provides that “Any person holding a political/public Office, who directs or concurs in the use of public funds contrary to the existing instructions shall be accountable for the loss arising from that use and shall be required to make good the loss even if he/she has ceased to be in that office.” He submitted that the accused persons as Ministers then directed the P/S to use funds contrary to the existing instructions and that therefore they should be accountable.

On CT. 2, A1 is being blamed for Causing Financial Loss of Shs. 774.400.000/= by authorizing requisitions submitted by one Alice Kaboyo who had no authority to requisition for the said money and that A1 knew that such act would cause financial loss to the Government of Uganda.

I will combine ingredients 2 and 3 together. With regard to the act of approving the requisition by Alice Kaboyo, I agree with Counsel Turyakira that if loss has been already exhaustively dealt with above and it has been proved that all payments were made on the strength of the authorization of PW7 and not of A1.

Furthermore, with regard to the amount of 774.400.000/= Counsel Asubo submitted that it includes Shs. 214.000.000/=:, the amount on P. Exh. 10.

As I have already pointed out above, P. Exh. 10 is the only document on record in connection with Shs. 214 million. Therefore, without a requisition bearing A1’s approval, it is not proved at all that A1 approved that amount.

With regard to the allegation that A1 approved the requisitions by Alice Kaboyo who had no authority to make the requisitions and that A1 was aware of that, I find that there is no evidence on record proving so. Instead and as submitted by Counsel Muwema in reply to counsel Asubo’s submissions, the facts which led to the conviction of Alice Kaboyo shows that the propose of P. Exhibit 5, the requisitions for 310,400,000/= was intended to deceive A1 that Alice Kaboyo had authority whereas not.

The Principal Private Secretary in the office of the president on whose behalf Alice Kaboyo wrote did not come to testify to prove that Alice Kaboyo did not have her authority to do so.

Therefore the essential ingredients of the offence of causing financial loss are not approved in view of the fact that payments were effected on the strength of the authority of PW7.

Also there is no knowledge proved against A1 since even prosecution acknowledges that he was deceived.

Also there is no proof of the loss of 774,400,000/=. There is no proof of the requisition of 214,000,000/= which A1 approved. Also it is a fact that Alice Kaboyo refunded 250,000,000/= which is being included among the 774,400,000/= since 250 million was refunded, it is no longer a loss.

Furthermore, with the figure of 214 million, it is the subject matter of Count 3 and its alternative, where the prosecution did not adduce evidence.

I therefore find that there is no prima facie case made out on Count 2 requiring A1 to make his defence. I accordingly acquit A1 of causing financial loss Contrary to Section 269(1) of the Penal Code Act on Count 2.

The remaining count is Count 5, on which A1 is jointly charged with A2 of embezzling 210,000,000/= from GAVI Global Fund Account.

This offence was submitted on by Counsel Muwema who formulated the following ingredients;

1. That the accused must be officers of the Government and that this is not in dispute.
2. That the accused must have stolen money which they accessed by virtue of their office

Counsel Muwema submitted on the second ingredient that all prosecution witnesses especially those from Ministry of Health e.g. the Permanent Secretary, Under Secretary, Senior Accountant and even PW1, the Accountant General, testified that the ministers did not withdraw any money from the GAVI Fund Account in Citi Bank and that therefore they did not steal the 210 million. That since the witnesses especially PW7 were in custody of the funds, they are in a better position than PW8 to confirm whether or not the accused persons stole the money.

He distinguished this case from that of Teddy Sezi Cheye Vs Uganda Criminal Appeal No. 32/2010 and that of Charles Harry Twagira Vs Uganda Criminal Appeal Bo. 160/2002, Court of Appeal in which the court found that the accused in each of those cases had withdrawn the money from the Bank Account personally.

He submitted that in this case there is no prima facie case made out against the accused persons on the charge of embezzlement.

Counsel Asubo gave a lengthy submission on the count of embezzlement but the point I got is that A2 received the money in his capacity as the minister of Health for General Duties and that this was long after the money had been withdrawn by PW5, Margaret Bilabwa and that therefore indeed the present case is distinguishable from the cases of Teddy Sezi Cheye and that of Charles Harry Twagira.

I agree with Counsel Asubo. It is a fact not in dispute that A2 received and signed for all the money on P. Exhibit 6(a) – (c) totaling to 263,855,000/= for use by the First Lady's Office for Health Advocacy for conferences including immunization, malaria, safe motherhood, HIV/AIDS among others in various parts of the country.

PW8 testified that about 54,000,000/= was properly accounted for in respect of a health conference held at White House Inn in Kabale District, leaving a balance of 210 million unaccounted for.

While PW7 and some other witnesses absolved the accused persons for the part they played in instructing him to authorize payments, they never absolved any who received money from making accountability.

PW7 during examination – in – chief at page 150 of the proceedings testified that “An individual who received the money is supposed to account within the financial year.”

PW1, during cross – examination by Counsel Turyakira testified that “the persons to whom money is advanced has the primary responsibility to account for the money.” PW4 and PW6 also during cross examination by the same counsel testified to that effect.

In the circumstances, I find that a prima facie case has been made out against A2 on Count 5 of embezzlement requiring him to make a defence regarding accountability of the 210 million shillings which he received.

However, as regards A1 there is no evidence on record to prove or suggesting in any way that he received the 210 million shillings or any part of it.

Since A1 did not receive or take the money, there is no way he could have stolen the money and without proof of theft the charge of embezzlement cannot stand.

In the circumstances, I find that a prima facie case has not been made out against A1 on Count 5.

I accordingly acquit him of the offence of embezzlement Contrary to Section 269(1) of the Penal Code Act.

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IRENE AKANKWASA
CHIEF MAGISTRATE
31.07.2012