

THE REPUBLIC OF UGANDA
IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT, AT KOLOLO

HCT-00-CN-0021-2019

(Arising from HCT-00-AC-SC-0049-2013)

UGANDA.....APPELLANT

VERSUS

1. SERUFUSA ZAAKE JOSHUA

2. JOSEPHINE NAMATOVU..... RESPONDENTS

BEFORE JUSTICE JANE OKUO

JUDGEMENT

This is an appeal against the decision of the Chief Magistrate Alum Agnes delivered on the 10th of October 2019 whereby she acquitted the respondents of charges of **Embezzlement C/S 19 (b), d (i) and (ii)** of the Anti-Corruption Act and **Conspiracy to Defraud** contrary to Section 309 of the Penal Code Act.

The brief facts of this case are as follows:

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The respondents were both employed by **Steel and Tube Industries** as Store Keeper and Cashier respectively. It was the prosecution's case that between January 2011 and February 2012, the two stole **UGX 278,328,600** (Uganda Shillings Two Hundred Seventy-Eight Million Three Hundred Eight Thousand Six Hundred only) which came into their possession by virtue of their employment. The mode of theft, as stated by the witnesses, was through fraudulent manipulations of the cash payment system where A1 would alter and inflate the amounts on the original copies of the Internal Requisition Orders (IROs) and hence be paid more than the approved amount by A2. A2 was also accused of paying higher amounts than those approved on the original Internal Requisition Orders. The difference between the money alleged to have been finally paid out by A2 and the lawful authorized carbon copy IRO on several separate transactions constituted the sum alleged to have been embezzled.

It was also alleged in count 3 of the charge sheet that the two Respondents, with intent to defraud, conspired together to embezzle UGX 278,328,600 which was the subject of Count 1 (embezzlement).

The 1st Respondent was also alleged to have forged the signatures of **Sunil Saini**, the Head of Department Iron section and **Seruwooza Fred** the internal Auditor on **Internal Requisition Orders Nos. 090 and 091**. This charge constituted count 2 of the charge sheet. The 1st Respondent was acquitted on this charge at the close of the prosecution case, at the stage of no case to answer. The matter proceeded for defense hearing for both respondents on count 1 and 3 respectively. The two were subsequently acquitted on the two grounds.

The appellant being dissatisfied with the findings of the trial magistrate on grounds 1 and 3, lodged this appeal on the following grounds:

1. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record and arrived at a wrong finding by acquitting the respondents without applying the evidence on record to the essential elements of the offences of embezzlement and conspiracy to defraud respectively.
2. The learned trial Magistrate erred in law and fact when she accepted and believed the defense case in isolation and without consideration of the prosecution case thereby arriving at a wrong decision.
3. The learned trial Magistrate erred in law and fact when she failed to properly evaluate the evidence and misdirected herself on the law of evidence as regards admissibility of secondary evidence by finding that prosecution exhibit 6(a) and (b) was of no evidential value thereby arriving at wrong decision.
4. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence and completely disregarded prosecution evidence particularly exhibits 8 and 9, thereby arriving at a wrong decision.

Representation

The appellant was represented by **David Bisamunyu (Chief State Attorney)** from the **office of DPP**, while the Respondents represented themselves. All the parties filed written submissions.

Submissions of the Appellant

Counsel for the appellant argued the first three grounds together.

He contends that the trial Magistrate wrongly analyzed the prosecution case by solely focusing on the shortcomings of Prosecution exhibits 6(a) and (b), the audit report and supporting documents respectively. These shortcomings were highlighted as the vouchers with unclear figures, those with no original IROs attached and those where the signatures appeared different or were unseen.

That the magistrate erred as she included voucher no. CPY 952 dated 11/7/2011 among the vouchers with no original copies of the IRO yet this was not true.

He contended that even with missing IROs, the explanation of **PW3, Akshay Patel** (the auditor) that the figures were taken from the system was sufficient to support the findings on the audit report. Counsel for the appellant further contends that the learned trial magistrate did not pronounce herself on the vouchers which were undisputed by the 2nd respondent at pages 154 and 155 of the Record of proceedings, thus admitting her theft.

He further faults the trial magistrate's findings at page 16 of the judgment where she stated that *"looking at all the above mentioned voucher numbers and attachments, it is clear that the absence or ineligibility affects the final outcome of the figure of money that was lost if any"*. He contends that the statement does not rule out the finding that there was embezzlement but that the amount would be different without those vouchers. He referred to the case of **Mpagi Obedi Vs Uganda Court of Appeal Criminal Appeal No 151 of 2012** to support his argument that the amount stolen does not matter as long as the ingredient of theft has been proved. It is noted by court however that he does not make any submission regarding the actual amounts proven, in support of this argument.

He faulted the magistrate for ignoring the evidence of prosecution witnesses i.e. **PW4, PW6 and PW9** and contended that transactions identified by **P.W 4, Nassanga Sarah Kikomeko** were captured in the Audit report as part of the fraudulent transactions. The evidence of PW 6 confirmed that the 1st respondent would make requisitions and had forged his signature ordering for materials that were not needed. He also listed a number of requisitions that were not signed by him. Further, the evidence of **PW9 Kumar Saini** was to the effect that the 1st respondent stole some money from Steel and Tube and handed in requisitions not approved by him. He contended that all these pieces of evidence were ignored.

He also found fault with the trial magistrate's handling of the evidence of PW3 who testified as an expert witness. He submitted that PW3 was a trained professional who testified on behalf of the firm and his testimony was not shaken by cross examination, even though he did not conduct the audit himself. In his view the conclusion by the magistrate that PW3 was not well versed with the audit report had no basis.

Counsel for the appellant further contended that it was not practical to have a pre auditing meeting between auditors and auditees because the 1st respondent was arrested and in police cells by 14th February 2012 and the 2nd respondent was suspended as of 18th February 2012 and had handed over her office. That by the time of the audit report was made they were no longer employees of the company.

On count 3, counsel for the appellant faulted the learned trial magistrate for not considering prosecution evidence as was brought to support this charge at all. He relied on the decision in **Seriiso Charles Vs Uganda, HCCA 26/2003**, which held that *"Conspiracy presupposes a meeting of the minds on a common agreement to do an unlawful act or to do a lawful act unlawfully."* It is necessary that the prosecution proves "Common Agreement" as an essential ingredient in the offence of conspiracy where the accused is a party to such agreement." He therefore submitted that there was a common agreement between the 1st and 2nd respondents to pursue a criminal purpose.

On ground 4 counsel for the appellant contended that the learned trial magistrate completely ignored the evidence in Prosecution Exhibits 8 and 9 where the 1st respondent made 2 charge and caution statements confessing that he stole company funds, forged and altered the figures in the IROs to steal money. He further submitted that both respondents did not object to tendering of both P Exhibits 8 and 9 respectively.

He finally prayed that appeal be allowed, decision of the Chief Magistrate be set aside and the respondents be found guilty, convicted and sentenced accordingly.

Submissions of the 1st Respondent

The 1st respondent pointed out to court what he considered to be contradictory evidence from PW1, PW2 and PW5 relating to his posting with the complainant company. That these contradictions showed that he was no longer working in the cash office and the evidence fell short of the required standard of proof.

On the case of embezzlement, he contended that there was no audit report on stores which could have brought out clear statements on the accountability from stores records and cash office transactions records vis a vis finance and audit department reports. PW3 on cross examination had also admitted not being well versed with the audit report and was not clear about IROs that had no receipts.

These He submitted that the appellant had failed to prove that the signatures of PW2, PW4, PW6 and PW9 on the Internal Requisition Orders (IROs) were forged and manipulated by him. They also failed to prove that his arrest on 14th Feb 2012 was because of theft of company money.

On count 3 the 1st respondent submitted that the trial magistrate was right to conclude that there was no common agreement between himself and the 2nd respondent to execute an unlawful purpose, or that there was intention to deprive another party of property by dishonest means. In his view, Exhibits P8 and P9 had no supporting evidence of whether the handwritings on all documents was of the 1st respondent.

He finally prayed that the appeal be dismissed and the decision of the trial court upheld.

Submissions of the 2nd Respondent

The second respondent opposed the appeal and submitted as follows;

There was no evidence that she was involved in embezzlement and conspiracy since the persons who received money signed for it. The 1st respondent had also told court explicitly in his evidence that he had never had any deal or conspired with her in the commission of any offense.

The 2nd respondent also contends that she was not availed with the vital documents that she requested for hence denied an opportunity to adequately defend herself. These were the cash book, petty cash book, receipts, cash office diaries from 2008-2011, CPY cash control head office payment vouchers. Although PW3 had confirmed that he could present the cash books as she had requested, this was never done.

She contended that Exhibit 6(a) and (b) had insufficient information because the wrong accounting procedure was followed. The admission of PW3 that some of the figures were picked from the system contradicted his evidence in chief that they had only considered IROs, payment vouchers. She criticized them for not considering receipts and requisitions in order to arrive at a fair picture.

The 2nd respondent denied that her failure to dispute some of the vouchers was an admission of guilt.

It was further her contention that the real person who carried out the audit did not testify in court. That PW3 was not conversant with the audit procedure. He also reached conclusions without knowing the 2nd respondent's signature. Further, the audit was not done professionally since the auditors did not take time to ask for the meaning of I.O.U yet it was written on every IRO and moreover it was written by the authorizer.

She further submitted that not all vouchers were paid by her. She criticized the auditors for not considering tax invoices or receipts yet they were quoted on the payment vouchers and accused them of not bothering to read the narrations on the payment vouchers, and not establishing the real persons who paid the money.

This was exacerbated by lack of a pre-auditing meeting and the failure of the internal auditor Fred Sseruwoza to testify in court. The auditors were not informed about the receipts and the I.O.U.

It was also her submission that not objecting to tendering of both P.EXH 8 and 9 did not amount to acceptance of theft because those were statements made by the 1st respondent who wanted to force her to accept stealing company money but she refused.

She invited court to consider the case of **Uganda Vs Stephen Onyango and Others (1979) HCB 39** where it was held that a conviction should be based on actual evidence adduced and not on attractive or fanciful theories of reasoning, since in doing so, there is a grave danger of being led astray.

She prayed that this Honorable court acquits her and the appellant compensate her for all the time wasted, money and all the damages.

Consideration of the appeal

The duty of a first appellate court is to carefully and exhaustively reevaluate the evidence as a whole and come to its own decision on the facts, being mindful of the judgement appealed from and the fact that it did not have the opportunity to see the witnesses testify. **Kifamunte Henry Vs. Uganda SCCA No, 10 of 1997 and Bogere Moses and Anor vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997**). I proceed to subject the evidence to fresh and exhaustive scrutiny without ignoring the judgement that has been appealed from.

I am also mindful of the fact that the burden to prove the charge against an accused person lies on the prosecution. **Woolmington versus DPP [1935] AC 462**. This right stems from the presumption of innocence principle enshrined in **Article 28 (3) (a) of Uganda's Constitution**. Any conviction must be based on the strength of the prosecution case and not the weaknesses of the defense case (**Ssekitoleko versus Uganda [1967] EA 531**). The law is that the accused does not bear any burden to prove his innocence except in a few statutory exceptions. There are no such exceptions for the case before court.

The standard of proof to secure a conviction is well settled as proof beyond reasonable doubt. This standard was elaborated in **Miller versus Minister of Pensions [1947] 2 All ER 372** as being satisfied once all the evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent.

In the consideration of this appeal, this court will reevaluate all the testimonies of the witnesses and the tendered exhibits, while considering whether the prosecution met the burden of proof to the requisite standard, and whether therefore, the acquittal of the Respondents was an error in law.

Grounds 1

The appellant criticizes the trial magistrate for failure to apply the evidence to the ingredients of the cited offenses on the charges of Embezzlement and Conspiracy to defraud.

I will first deal with the evidence adduced to support the charge of Embezzlement brought against both Respondents. The prosecution was expected to prove the following ingredients:

1. The accused were employed by the Company
2. That they stole money, property of their employer
3. That they accessed the money by virtue of their employment

Ingredient 1

The trial magistrate resolved the issue of employment of the Respondents by the complainant company at page 4 of her judgement. She summarized the evidence of PW1 regarding the employment of the 1st Respondent at Steel and Tube Industries. She also referred to exhibits 1A, 1B and 1C and found that the prosecution had sufficiently proved this ingredient. She similarly addresses the evidence in respect of the 2nd respondent. Having had this issue resolved in their favor, the appellant does not raise it on appeal. This court however will address it as the 1st Respondent contests the same in his written submissions.

The prosecution was required to show, under section 19 (b) of the Anti-Corruption Act that the 1st Respondent was a director, an officer or an employee of a company or corporation. The particulars of the charge indicate that he was an employee. From the evidence, the appellant

does not deny his employment but rather his designation at the time of the alleged offense. He contends that insufficient evidence was led to show that at the time of the alleged fraud he was working in the cash office. He contends that the trial magistrate relied on documents i.e. job description that was not signed and bore no designation.

I am satisfied that the trial magistrate properly found that the first ingredient was proved, the unsigned job description notwithstanding. The evidence of **PW 1** (Nyachwo Julian-HR Manager), **PW2** (Nirav Patel-Finance Manager), **PW 4** (Nassanga Sarah Kikomeko-Accountant) and **PW5** (Kiyuba Nkutu Sulaiman) all confirmed his employment and the nature of the work he was doing especially in the period which is in issue. They all testified that he was the person responsible for procuring materials for the workshop (stores). Contrary to what he contends in his written submissions he was never alleged to have been in the cash office. Once the employment has been proved, it is a matter of evidence how he accessed the money that he stole from the employer. This is the link the court seeks to examine in the subsequent grounds.

Ingredient 2:

The appellant contends that the evidence presented was sufficient to prove the ingredient of theft. From the record, the prosecution relied on the testimony of PW2, PW3, PW5, PW4, PW6 and PW9 to prove this ingredient. The documents relied on were **Prosecution Exhibit 6A (audit report)** and **Prosecution Exhibit P6B** which contained the primary documents which the auditor considered. These were payment vouchers, original Internal Requisition Orders and Carbon copies of the Internal Requisition Orders

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In order to determine whether there was theft within the meaning of **Section 254 (1) and (2)** of the Penal Code Act, the above evidence (specifically Exhibit 6A and B) was scrutinized by the Trial Magistrate who noted the following in her judgement:

1. There were unclear figures on some of the vouchers (18)
2. There were vouchers with no original IROs attached (27)
3. There were vouchers with no carbon copies attached (13)
4. There were no cash payment vouchers attached (13)
5. There were those with different signatures or where signatures are unseen

She concluded that the absence of the documents and their ineligibility affected the final outcome of the figure of money lost, if any. She also found the audit report and testimony of PW3 wanting. She observed that the answers given by PW3 during cross examination showed he was not well versed with the audit process. She concluded that the ingredient had not been sufficiently proved.

The appellant faults the magistrate for arriving at this conclusion, as in his view the scenarios cited above only affected the total amount embezzled but does not acquit the accused of the

crime. As earlier noted, the appellant would have advanced his case better if he guided the court regarding the total sums that were actually proved. Nevertheless, the court will reevaluate the evidence in this regard, as it is its duty to do so.

This court has scrutinized the audit report and supporting documents which are the basis for the charge brought against the two respondents. **Ashkay Patel (PW3)** is an auditor from Grant Thornton. He informed court that the audit was carried out by **Deepak Lakhani** who was with the same firm. Whereas he was not present when the audit was carried out, he could testify about the report because the said Deepak had explained to him how he carried out the audit. The appellant contends that this witness was competent as a qualified auditor and employee of the firm, and that any of the auditors therefrom could testify.

Qual: The question before this court is whether the audit report and the evidence of the auditor (PW3) was credible and could therefore be relied upon by the court to convict the accused persons. The court is not expected to take at face value or as conclusive proof the findings of auditors. Rather, it must test the evidence to establish the accuracy of the conclusions made and form its own mind on whether it is truthful and proves the offenses charged. The report can be rejected if the court finds the conclusions made by the auditor to be false. In the present appeal the audit report and testimony of the auditor plus the supporting documents are crucial to the determination of the charge of embezzlement. This court must examine the procedure followed by the auditor in carrying out his task and scrutinize the documents he used as a basis. The auditor must demonstrate how he arrived at his findings to court. Through cross examination, the defense has the opportunity to impeach an auditor's technical capacity to conduct an audit, and ask questions that demonstrate that he used a wrong procedure, overlooked documents which may have otherwise impacted his findings and challenge his findings as being erroneous. The duty of the court is to consider all the facts brought out at trial and determine whether to reject or accept the findings. The Court may accept part of the findings and reject others. Ultimately, it falls within the discretion of the court to determine the evidential weight to attach to the audit report and testimony of the auditor.

I will first address myself to the procedures for handling cash payments, which the accused persons were accused of flaunting with fraudulent intent. **PW 2 (Nirav Patel)** the Finance manager at the complainant company enumerated the procedure as follows at Page 34 of the Record of Proceedings from paragraph 3:

"Steel and Tube process is like this: we have an internal Requisition book where people request for cash to buy anything or any expense. The request is prepared by the cashier who is requesting the money. We have two copies, the original and the carbon copy. The original goes to the cash office for collection of cash from the cashier and the carbon copy remains in the book. At the time of paying cash the cashier verifies the signature, amount and other necessary details before payment of cash."

Pw 3 also cites the procedure at page 63 of the record of proceedings and states:

"Employees of a particular department of the company would prepare Internal Requisition Order in duplicate from the preprinted books and then the employee will take that IRO to the Head of Department. The Head of Department approves and the employee takes the 2 copies to the authorized person for approval. The authorized person is the Finance Controller Mr. Patel N. The original copy of the IRO would then be submitted to the cashier. The cashier then after verification of accuracy makes payment to the employees and prints the payment voucher from the accounting software."

The critical question that arises is how and against what documents the cashier is expected to verify the propriety of the request before going ahead to make the payment. The verification is mentioned by both witnesses but none states the process. This process or rather explanation is important as it helps in the determination of the culpability especially of the 2nd Respondent.

There are various scenarios explained by the prosecution witnesses by which money would be stolen. One of these scenarios is through the 1st Respondent inflating the figures on the original copy of the IRO that he would take to the cashier for payment. Both PW2 and PW3 state that the carbon copy remains in the book, hence is not forwarded to the cashier. Under cross examination, PW3 states that the cashier was supposed to be presented with the original IRO and that she had no access to the carbon copy of the IRO. PW4 supports this position when she states under cross examination, *"on IRO 82 I could not be able to tell the amount was inflated without looking at the book copy. That applies to all the original IROs"*

If the cashier has no access to the carbon copy or any other documents or system related to the transaction in question, how is he / she to know that there is an alteration? I have not seen any satisfactory explanation from prosecution witnesses on how the cashier was to confirm. PW 3 states that after getting the original IRO, the cashier is supposed to verify it in terms of total and misrepresentation and then make payment. It remains unclear how she could confirm misrepresentations in the absence of the copy, or even note wrong totals in cases where additional items and costs had been inserted on the original IROs. This raises a significant gap especially in proving the element of mens rea in respect of the cashiers, in some of the transactions. These are extracted from the evidence of Pw3 and noted here below:

1. In CPY 720 dated 31/5/2011, the cashier paid 724,000 as per the original IRO presented. The copy of the IRO was for Ushs 4,000/= showing that the original had been inflated by 720,000/=
2. In CPY 888, the cashier paid 1,335,000/= which was also on the original IRO presented. The carbon copy that is alleged to be truthful bore the sum of 535,000/=
3. In CPY 1555 of 8/11/2011, the cashier paid 738,000/= same sum reflected on the original IRO. The copy bore 80,000/= only, hence the alleged inflation

4. In PCV 649 of 9/3/2011, cashier paid 720,000/- which is the same sum reflected on the original IRO. The carbon copy bore only 20,000 as lawfully approved.
5. In PCV 730 of 17/3/2011, cashier paid 337,000/= also reflected on the original IRO whereas the carbon copy bore 37,000/=
6. In PCV 862 of 29/3/2011, the cashier paid 400,000 which was the same sum as in the original IRO. The carbon copy bore only 100,000/=
7. IN PCV 887 of 31/3/2011, the cashier paid 417,000/= while the original IRO bore the same figure. The carbon showed the approved figure as 17,000/=
8. In PCV 998 of 8/4/2011, the cashier paid Ushs 350,000/= which was also the amount reflected on the original IRO presented to the cashier. The carbon copy was found to have only 50,000/- as lawfully approved.

In all the above scenarios, the procedure for verification by the cashier before paying off the sums on the original IRO presented to him or her is crucial to derive the mental element of a guilty mind. It leaves a gap therefore on how a cashier can be said to have been part of the theft and be culpable for the amounts allegedly lost in the above scenarios.

There There are however more issues raised by the trial Magistrate as affecting the integrity of the audit report and the evidence of PW3. This court notes the several transactions testified upon by this witness which did not have all the required supporting documents to enable the court to verify the correctness or otherwise of his assertions. These were mentioned by the trial magistrate in her judgement and included 18 vouchers with unclear figures, 27 vouchers with no original IROs attached, 13 vouchers with no carbon copies of IROs attached and 14 vouchers where the cash payment vouchers were not attached where the signatures appeared different.

I have carefully reviewed the documents in P EX 6B, I note:

1. In cases where the writings were unclear, the court cannot arrive at a conclusion that the figures quoted in the report are accurate. These supporting documents were the basis for the audit report and must be shown to court to justify the conclusions reached at the end of the audit. I will give examples. In CPY 454 of 5/4/11, the auditor testifies that the cash book amount was 1,047,000/= but this figure could not be seen in the supporting document. This begs the question of where he got the figure from. In CPY 794 of 14/6/2011 he observes that the carbon copy was not clear on the amount. On CPY 1123 of 10/8/2011, the amounts on the photocopy are unclear, On CPY 1387 of 4/10/2011, some amounts on the IRO are not visible, on CPY 1398 of 5/10/2011 the amounts on IRO 255 were not visible, on CPY 1428 he states that the cash book figures are unclear, on CPY 1465 the carbon copy IRO is not visible, on CPY 1516 of 1/11/2011 the cashbook figures were not very visible, on CPY 1600 of 22/11/2011 the numbers and words were not visible on the payment voucher and even the total amount not visible on the photocopy, on CPY 1605 of 23/11/2011 the amounts on the cash payment voucher

are not visible, on CPY 1660 of 2/12/2011 the cash payment amount is not very visible. These are some of the vouchers quoted by trial magistrate in her judgement.

2. In cases where the original IROs are not attached as supporting documents, there is inconclusive evidence that these were indeed altered or changed and that they in fact bore different amounts from the carbon copy IRO which was formally and lawfully approved. Again, they raise the question regarding where the figures contained in the report were secured from and whether they were correct.
3. In cases where the carbon copies were not attached, court can not verify the audit findings that the figures reflected in the IRO were inflated and how this was done. These documents also bear other vital evidence of who originated them and approved them. The carbon copy documents are crucial as they form the basis on which the alleged theft sprang and the difference from the amounts in the carbon copy IROs and the original IROs and the total amounts paid out on the vouchers constitutes the total allegedly embezzled. What is the source document for the information in the audit report concerning carbon copy IROs when these documents are not attached?
4. In cases where no cash payment vouchers are attached, the crucial evidence on how much money was paid, who made the payment, who received the payment, what supporting documents or narratives are contained in the payment voucher are missing. These are vital not only in terms of quantification of the amounts allegedly misappropriated but also in identifying who was involved in the commission of the fraud.

Thullen

It is the prosecution's duty to ensure that the evidence tendered in court is complete and legible. In this case this duty was not met. The appellant contends that the auditor's explanation that the figures in his report which were not supported by documents (missing IROs and Payment vouchers) or where documents were unclear were got from the system was sufficient. As noted by the 2nd Respondent this system was never produced before the court for verification. I agree with this assertion. I further note that the witness does not state that the missing figures were got from the system in all the instances. Whether the system actually exists, or whether the figures in the report are the same as those in the system remain within the knowledge of the witness and the complainant company. This evidence was not adduced before the court. The trial Magistrate cannot therefore be faulted for taking the position that the audit report is not reliable.

In order to sustain the case of theft, an accused person must be proved to have been involved in taking the money. To this end the prosecution must show that the 1st and 2nd respondents were involved in taking money that belonged to the complainant company. In this regard, the evidence that they signed and, or authored documents, originated requests and made payments, and also received payments is critical. This may be proved by adducing testimonies of witnesses who were familiar with the writings of the accused persons and their involvement

in the questioned transactions. It may also be proved through expert reports from handwriting/questioned document examiners.

The trial magistrate considered the vouchers where there were said to be varying signatures on the supporting documents. This arose in CPY 1692, 1576, 1585, 1595, 1600, VOC 12 and VOC 65-1169. She observed that since there was no analysis done on the handwritings of the accused persons, it was difficult to conclude that all the vouchers were signed by the accused persons.

I proceed to reevaluate the prosecution evidence regarding identification of signatures. The evidence of PW3 was contradictory in this regard. In his evidence in chief he was emphatic that the signatures on the vouchers belonged to the Respondents. Under cross examination by the 1st Respondent, he stated that the 1st Respondent signed on the original and carbon copies documents. He then states that they did not check to confirm that the signatures were his as that was work for the forensic department. He stated that he identified the name of Joshua through the names and the signatures on the IROs. He did not know if the signature was for A1. He just read the name and concluded that it belonged to him.

Josephine Under cross-examination by 2nd Respondent he stated that in all the transactions in issue, Josephine was the one who made the payments and that in the cash office it was only Josephine making payments. He admitted however that they did not check to establish if there were other cashiers in the company. He further admitted that he could tell that Josephine was involved from her signature and he based on the signature to prove all the transactions.

When further cross examined, he admitted that the signature in CPY 1585 did not seem to be for Namatovu. He stated that he was not sure if the signatures in CPY 1605, 1620, 1621, 1660, 1661 were for Josephine. As regards CPY 1666 the signature differed from the first signature of Namatovu, and he offered this explanation for CPY 1691, 1692, Voucher 12 of 2/1/12. He admits that all the signatures from voucher 65-1169 differed from the signature of Namatovu.

The question of who altered the original IROs and included new items not appearing on carbon copy, who approved the IROs, who paid out the money and who received the money on the vouchers is further complicated by the evidence of PW4 Nassanga Sarah Kikomeko who was an accountant in the complainant company. She stated that at the time in issue the 1st Respondent was the one procuring materials for the workshop and Josephine was the cashier. She testified that she originated the relevant IROs in voucher No 1002, 726 and 684. Regarding the alterations in the original copies she states that "I remember that I had only authorized 28,000/= on IRO 82 but *I think* in between authorization and payment, Joshua added 900,000/=" This is not a conclusive statement and it only raises suspicion.

Further, during cross examination she accepted that vouchers **1002, 684 and 726** were all paid by a one James and not the 2nd Respondent. She accepts that there were actually three cashiers during the period in question. These were Josephine Namatovu, Josephine Namagga and James.

Unfortunately, no evidence shows the specific periods when the two "Josephines" were designated as cashiers. The payment vouchers simply show that payment was made by "Josephine". The question that arises is which of the two "Josephines" made the payments in the questioned transactions? There is no solution to that question, thus leaving a gap.

The evidence of PW3 and Pw 4 analyzed above regarding the involvement of the respondents has the effect of throwing doubt on the findings in the audit report and its reliability and capacity to prove that only the two accused were involved in the fraud. It is clear that some moneys being attributed to the 2nd Respondent in the charge sheet may have been misappropriated by other cashiers. Without proper evidence linking the accused to the signatures on the documents, it becomes difficult to establish what each Respondent did, what they are culpable for, and consequently the amounts they are responsible for. It's also impossible to rule out the involvement of other parties. This is particularly of concern since the entire amount established as misappropriated in the audit report constitutes the amount in the charge against the two Respondents.

Counsel for the appellant contends that the evidence of **PW4, Pw 6 and PW 9** was ignored by the trial magistrate. I have gone through the judgement and find this contention correct. As a first appellate court, I have the duty to evaluate this evidence and consider the arguments of counsel. I proceed to do so.

Joshua Pw 4 narrates her role in three batches of transactions involving Vouchers 1002, 684 and 726 /727. In all she confirms that she approved the relevant requisitions for lesser amounts. She disowned the altered figures and amounts on the original IROs. She states that the 1st Respondent was responsible for purchases but stops short of the role he played in respect of each transaction in issue. She does not identify his signature neither does she adequately link him to the transactions in issue. This court has previously in this judgement noted her statement that *"I think somewhere between authorization and payment Joshua added 900,000"* and found it inconclusive regarding the involvement of the 1st Respondent.

I observe that voucher 1002 dated 4. 2.2012 on which Ushs 3,230,000 was paid has the following narrative: *"Three million two hundred and thirty thousand Req. No 082 Rec No 420. 4 cartons of polishing disc, 10 bolts and grinding disc"*

Voucher 684 dated 24.1.2012 has the following narrative: *"Four million three hundred sixty-six thousand shillings Reqn. Rec. 374, 375 and 378"*

Voucher 726 dated 26.1.12 has the following narrative: *"Two million nine hundred and forty thousand UGX Req. no 063, 062 rec. No 402 and 401"*

It was the evidence of Pw3 that they did not consider the receipts when they conducted the audit. He explained that *"receipts come with the IRO when the person comes to claim the money."*

I am not sure whether the money would be spent before the reimbursementthe receipts would come in under different circumstances. If a person spent money, then he or she would bring the receipt together with the IRO and he is reimbursed.... A receipt is not necessarily needed in order to receive payment based on IRO" He further states that "in international accounting standards for auditors, receipts are necessary"

This court has considered the audit report and confirmed that the receipts were not considered. The documents looked at were the amount paid as per the cash book, the amount as per the original IRO, the amount as per the carbon copy IRO, the difference between the amount paid and the original IRO and the difference between the amount as per the original IRO and the carbon copy IRO. It is from these that the figure of 278,327,600/= was arrived at.

It is perplexing to court why the receipts cited in the narrations were not addressed by the audit. Indeed, the 2nd Respondent vehemently argued that this failure meant that the audit fell short of the required standards and did not therefore reflect a true picture of the accounts. Receipts generally present prima facie evidence that moneys issued out as per the requisition were spent. The citation of these receipts on the Payment vouchers, on the face of it, show that there was evidence presented to the cashier that the money released had been spent as requested. They constitute accountability for funds received. None of these receipts is attached as supporting documents for the court to consider. None of them was considered by the auditors. There is no reason advanced to show that the receipts were irrelevant to the investigation, to the contrary, PW 3 confirmed they were. There was no investigation to ascertain if the receipts reflected the total amounts advanced, and whether they were genuine or false. This court reaches the conclusion that this was a major failure that affected the correctness of the audit. Having critically analyzed the evidence of Pw4 I find that the trial magistrates failure to address it in her judgement was not fatal and did not occasion a miscarriage of justice.

I have also reviewed the evidence of PW6 and PW9 which the trial magistrate is faulted as not having considered. I note that the essence of their evidence is that they did not sign or authorize IROs upon which payments were made. PW6 denies signing IROs 147, 143, 142, 148, 136, 051, 052, 144, 145, 053, 132, 113, 111, 112, 065, 066, 056, 055, 140, 141, 063, 062, 082, 077, 149 and 150. PW9 also denies IRO 078, 84, 083, 058. They all claim it was Joshua that forged their signatures. They did not identify his writing on the questioned documents or explain to the court the reason for their conclusion that he altered/forged documents. This is an allegation that should have been supported by other evidence especially that of the handwriting report in order to be conclusive. The forgeries were brought to their notice later probably during the audit, and the HWE would have confirmed or disputed their assertions.

In respect of the evidence of the prosecution as whole, the trial magistrate at page 11 of her judgement observed that in order to establish whether the respondents stole their employers

money, court had to consider the supporting documents in Exhibit 6B. She then analyzed all the vouchers and the supporting IROs and noted the anomalies in the supporting documents. These have been previously referred to in this judgement. She concludes at page 17 as follows: *"Bearing in mind that there was no analysis done on the hand writing of the accused persons, it's now difficult to conclude that all the vouchers considered were signed by the accused persons"*

It appears from the above that having found the audit report wanting, and having no expert evidence on the handwriting, the trial magistrate did not find it necessary to delve into the evidence of the three witnesses.

For the reasons advanced by the magistrate, and some more reasons cited hereinbefore, this court has reached the similar conclusion. I find that the prosecution failed to prove the ingredient of theft. The charge of embezzlement cannot therefore stand.

The appellant's submission that the learned trial magistrate should have addressed herself to the vouchers which the 2nd respondent did not deny authoring is considered by this court as an attempt to shift the burden to the respondent. The 2nd Respondent denied the offense, and attacked the integrity of the audit report i.e. the methods used by the auditor, the failure to be furnished with all necessary documents to make her defense, the ignoring of the receipts attached to the vouchers etc. She denied that she admitted to any of the alleged fraud. I have studied her evidence at pages 154-155 of the record of proceedings. It is noted that she accepts her signature on some of the vouchers (12) but states that the narrations and amounts were not clear. Her criticism regarding other aspects of the audit remained. Her admission that she signed is therefore not an admission of guilt.

Having failed to prove embezzlement, it goes without saying that the offense of conspiracy to defraud similarly fails, as it is premised on the charge of embezzlement.

Ground 1 of the appeal fails.

Ground 2 and 3:

These two grounds are resolved together since they are related. Counsel for the appellant argued that the trial magistrate erred in law and fact when she accepted and believed the defense case in isolation and without consideration of the prosecution case, thus arriving at a wrong conclusion. He also contends that the trial court misdirected itself on the law regarding admissibility of secondary evidence when it found that Exhibit 6A and 6B were of no evidential value.

I have studied the judgement at length and find no merit in this accusation. She duly considered the prosecution evidence. She analyzed the audit report and supporting documents plus the

evidence of PW3 in detail from pages 11-16 of her judgement. She balanced this against the evidence of the 2nd Respondent at trial, the failure of the prosecution to provide the cash book and receipts and other core documents to court and the failure to link the accused to the documents through handwriting analysis and decided to acquit.

Having admitted Exhibit 6A and B as prosecution exhibits then analyzed and found the findings of the auditor untenable, she was right to reject the same. I see no reason to fault her in this regard. I am satisfied that the Respondents were acquitted because of the weakness of the prosecution case.

In **Abdu Ngobi versus Uganda**, SCCA NO 10/1991, supreme court held that *"a final decision can't be taken until all evidence has been considered. The proper approach is to consider the strength and weakness of each side then weigh the evidence as a whole, apply the burden of proof as always resting on the prosecution and decide whether the defense has raised a reasonable doubt."*

I have reevaluated the prosecution evidence as a whole, and considered the strengths and weaknesses in their case. The weaknesses were very many and established a lot of doubt on the evidence. I am satisfied that the evidence as a whole failed to meet the standard of proof required in criminal matters.

This ground also fails.

Ground 4

The last ground of the appeal relates to Prosecution Exhibits 8 and 9. The trial Magistrate is faulted for failing to properly evaluate the evidence contained therein thus arriving at a wrong conclusion.

PEX8 is a charge and caution statement made by the 1st Respondent on 14th February 2012 at Kyambogo police post. PEX9 is a second charge and caution statement recorded by the same respondent on 20th February 2012 at Jinja Road Police Station. Both were recorded by D/AIP **Atuhaire Caleb** who testified in Court as PW 7.

I have carefully considered the judgement of the lower court and noted that this evidence was indeed not evaluated by the court at all. The contention of the appellant is therefore correct. I therefore proceed to analyze the same.

The evidence of PW5, PW7 and PW8 is relevant in this matter.

PW 5, Kiyuba Nkutu Sulaiman told court that on 11th February 2012, the chief Internal Auditor Sseruwoza Fred informed him that he had come across payment made on documents No 090 and 091 amounting to 1,972,000/= He denied signing any related documents and asked the

witness to investigate as he suspected the 1st Respondent to have forged his signature. The 1st Respondent was called and he confessed that he had forged the signature of Sseruwoza. He admitted having 1,000,000 and that the rest had been given to a one Dickens whom he called and he brought 920,000/= He witnessed the serialization of the 1,000,000/= and the 972,000/=

The evidence of PW5 is credible. The 1st Respondent admitted committing the offense to him. The admission was not made to a police officer. At the time of making it, no case had been reported to the police yet. It was after the admission that the matter was reported to the police. There is no evidence of a grudge or other ill will alleged between this witness and the accused. It is therefore reliable evidence of theft of Ushs 1,972,000/=. In **Tumuhairwe Moses Versus Uganda**, SCCA 17/1999 the supreme court supported the reliance by the lower appellate court on evidence of a similar confession made to a witness who was not a police officer.

PW7 testified that on 14th February 2012 he recorded a charge and caution statement from the 1st Respondent while he was at Kyambogo police post. It was alleged that had stolen 1,972,000/=. The 1st Respondent accepted the allegation and confirmed that he had forged the receipts and presented them for payment.

Shweli The charge and caution statement admitted as **Exhibit PEX 8** shows that accused confessed to theft of the money in issue and to forgery of the signature of Seruwoza on the requisition. He then took the document to cashier James who believed the signature as genuine and paid him the money. On the same day the forgery was discovered and he refunded the money. He was arrested on 14th February 2012 and felt he should tell the truth.

PW7 further testified that he was again called on 20th February 2012 and recorded a second charge and caution from the accused. This is exhibit PEX 9. In this exhibit, the 1st Respondent was charged with forgery of IROs. He accepted that he had been altering, forging figures on the IROs with the full knowledge of Namatovu Josephine and Namagga Josephine. He stated that James on the other hand did not know anything. He accepted a number of IROs as having been forged. The details are in the statement.

I will first deal with the issues of whether the two exhibits were properly admitted by the trial magistrate. As regards PEX8, when the prosecution made an application to tender it in court, the 1st Respondent had no objection.

As regards PEX9 however, the same respondent stated that he did not know the document. This was as good as saying that he did not make the document and had never seen or interacted with it before.

It is established law that the evidence of confessions by accused should be handled in a delicate manner. The court is required under section 23 of the Evidence Act to ensure that the same

was taken voluntarily. There are many decided cases to that effect. **Tuwamoi Versus Uganda** 1967 EA 84 at 88

In the case of **Matovu Musa Kassim Vs Uganda Criminal Appeal No 27 of 2002**, court held that *"A trial court should accept any confession which has been retracted or repudiated with caution and must before finding a conviction on such a confession be fully satisfied in all circumstances of that case that the confession is true."*

Court also noted in the case of **Amos Binuge and others Vs Uganda, Criminal Appeal No 23 of 1989**, that *"It is trite that when the admissibility of an extra judicial statement is challenged then the objecting accused must be given a chance to establish by evidence, his grounds of objection. This is done through a trial with in a trial to decide upon the evidence of both sides, whether the confession should be admitted."*

There P EX 8 was rightly admitted as the accused did not object to it when the prosecution chose to tender the same in court. On the other hand, P EX9 was improperly admitted. The 1st Respondent's claim that he did not know the document, required the trial magistrate to enquire into the circumstances of the recording of the charge and caution statement. He was not given the opportunity to state and establish his grounds of objection. The magistrate's failure to conduct an enquiry results into the admission into evidence of a confession that was not tested. This failure did not however occasion a miscarriage of justice as the trial magistrate did not rely on it in her decision. Even this court cannot rely on the improperly admitted confession as a basis for conviction.

I find the evidence of theft of Ushs 1,972,000 testified upon by PW5 to have been supported by evidence of PEX8 which was properly admitted. I am however unable to convict the accused because he was in fact never charged with the embezzlement of this money. The particulars of the charge sheet, count 1 on embezzlement allege that he stole **Ushs 278, 327,600/=**. This is the amount reflected on the audit report PEX 6A as the total amount misappropriated. I have carefully considered whether the 1,972,000 is reflected therein. I am satisfied that it is not. The last transaction captured on the audit report is voucher 1169 on which payment was made on 10th February 2012. The transactions confessed to in PEX8 were made after that date.

PEX 6B which contains all the documents supporting the audit also have the last transaction as Voucher 1169 of 10th February 2012, capturing IROs 088 and 089.

The court does not have the power to convict an accused person for offenses where no charge has been brought against him.

There is in fact no appeal before this court against the acquittal on Ground 2. The fourth ground of appeal also fails.

Accordingly, the appeal is dismissed.

Okuel

Jane Okuo (Judge)

12.11.2020

Judgement delivered in open court in the
presence of Counsel for the appellant and
the 2nd Respondent.

Right of Appeal explained - within 14 days.

Okuel

12/11/2020.

