THE REPUBLIC OF UGANDA

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

CRIMINAL APPEAL NO.24 OF 2019

(Arising out of Anti-Corruption Division Criminal Case No 46 of 2015)

LUBEGA STEVENSON **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

BEFORE JANE OKUO J

JUDGEMENT

This is an appeal from the decision of Her Worship Lamunu Pamela Ochaya, Chief Magistrate sitting at the Anti-Corruption Division delivered on 25th October 2019 in which the Appellant was convicted on two counts of Embezzlement contrary to **Section 19(b)(i) of the Anti-Corruption Act 2009** and sentenced to one (1) year imprisonment on both, running concurrently. He was also ordered to compensate the complainant **UGX 46,231,000** (Forty-Six Million Two hundred and thirty-one Thousand).

The case for the prosecution was that the appellant, Lubega Stevenson, a banking officer with United Bank of Africa, together with others still at large on April 4th and August 19th 2014 stole **UGX 17,125,000/=** and **UGX 29,106,000/=** respectively the property of the bank, by debiting the bank's Money Gram Head Office Account UGX No. 51992527017 of those sums, and crediting it on account number 0680009034 belonging to a one **Isabirye Robert** (Pw2).

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Isabirye was alleged to have opened the account on the advice or recommendation of **Christopher Kibuuka Nathan Mugoote (PW1)** who informed him that a friend of his wanted to do business with someone who had a bank account with United Bank of Africa. He accordingly opened the account in April 2014. Two days thereafter, he received a notification that UGX 17,125,000/= had been credited to his account and instructions from PW 1 that his friend had also notified him about the deposit and he was to withdraw UGX 3,000,000/= and take it to him. He received several similar

instructions subsequently from PW 1 and he withdrew and took the money to him. A second deposit was made in August 2014 and was dealt with in similar manner. He did not know who this friend was. It was established later that the money deposited on the account had been fraudulently stolen from UBA. When investigations commenced, PW 1 revealed that the friend who had asked him for a person with a bank account with UBA was the appellant. The latter was arrested and prosecuted. Eight witnesses testified in Court. At the conclusion of the trial, the appellant was convicted for embezzlement. The alternative charge of receiving stolen property of UGX 46,231,000/= the property of UBA accordingly collapsed.

The appellant being dissatisfied with the conviction and sentence filed this appeal on the following grounds;

1. The Learned Trial Magistrate erred in law and fact when she convicted the appellant on counts 1 and 2 of Embezzlement contrary to Section 19(b)(i) of the Anti-Corruption Act,2009 whose ingredients were not proved beyond reasonable doubt.
2. The Learned Trial Magistrate erred in law and fact when she relied on unreliable and contradictory evidence of PW1 & PW2 to convict the appellant.
3. The Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the whole evidence and relied on an insufficient uncorroborated and incredible evidence to come to a wrong conclusion that the appellant received money amounting to Shs.46231000 (Uganda Shillings Forty-Six Million Two Hundred Thirty-One Thousand Only) from PW1.

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Representation.

At the hearing of the appeal, **Mr. Ochieng Evans** from Ochieng Associated Advocates & Solicitors represented the Appellant while **Mr. Khaukha James,** Senior State Attorney from the **Office of the DPP** appeared for the Respondent. Both parties made oral submissions. It should be noted that at the time of hearing of the appeal, the appellant had already served the sentence and been discharged by Prisons.

Submissions of the appellant

The case for the appellant is that the element of theft in the case of Embezzlement was not proved beyond reasonable doubt. Counsel for the appellant contended that the

evidence of PW1 and Pw2 was tainted with contradictions and inconsistencies, and should therefore not have been relied upon by the Trial Magistrate in arriving at a conviction. He contended that their testimony particularly regarding the amount of money withdrawn on particular dates and allegedly handed over to the appellant was contradictory and inconsistent with **P Ex 5 (the bank Statement of PW2).** Further that this evidence was not corroborated by other independent evidence. He submitted therefore that there was no evidence supporting the claim that the appellant called PW1 on telephone about the opening of the account and coordination of the withdrawal and handing over of the money to him. Also that there was no evidence that the two had met and finally no evidence that money was given to the appellant.

It was counsel for the appellant's final submission that the compensation order of UGX 46,231,000/= (Uganda Shillings Forty-Six Million Two Hundred Thirty-One Thousand Only) was illegal and ought to be set aside.

He prayed that the appeal allowed.

Submissions of the Respondent

Counsel for the Respondent opposed the appeal. On grounds 1 and 2, he submitted that the fact that money ended up with the appellant was sufficient proof that he stole it from the bank. He was thus appropriately convicted for Embezzlement as the element of theft was proved. He conceded to the contradictions pointed out by Counsel for the appellant but submitted that they were minor and did not go to the root of the matter. He supported the trial Magistrate's reliance on the evidence of PW 1 and 2 as their testimonies sufficiently corroborated each other. There was additional corroboratory evidence from the telephone printouts and the bank statement among others.

On ground 3 counsel for the respondent submitted that the compensation order of UGX 46,231,000/= (Uganda Shillings Forty-Six Million Two Hundred Thirty-One Thousand only) was the definite amount that had been stolen by the appellant. He supported the Order as being legal.

He accordingly prayed that the appeal is dismissed and the orders and sentence of the trial magistrate upheld.

Consideration of the Appeal

This is a first appeal and as such, this court is enjoined to carefully and exhaustively re-evaluate the evidence as a whole and make its own decisions on the facts **(Kifamunte Henry Vs. Uganda SCCA No, 10 of 1997, Bogere Moses and Anor vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997 and Pandya Vs r [1957] EA 36**). Being mindful of this and the fact that I did not have the opportunity to see the witnesses testify, I proceed to review the evidence that was adduced before the trial court and make up my own mind on whether the offences of Embezzlement were proved beyond reasonable doubt and whether the judgement and order of Compensation passed by the lower court is proper.

I have considered the record of proceedings and the judgement of the lower court, examined the exhibits tendered in this case and the submissions made before this court and proceed to resolve the appeal.

Ground 1

The complaint in ground 1 is that the learned trial magistrate erred in law and fact when she convicted the appellant of Embezzlement contrary to section **19(b)(i) of the Anti-Corruption Act,2009** whose ingredients were not proved beyond reasonable doubt.

This provision reads as follows:

"A person who being a director, an officer or an employee of a company or corporation steals a chattel, money or valuable security being the property of his or her employer, association, company, corporation, person or religious organization or other organization commits an offense".

It is not in contention that the appellant was an employee of UBA or that the money in issue belonged to the bank. What this court has to resolve is whether there was theft by the appellant, and thus **Section 254 (1) of the Penal Code** Act comes into play. In order to prove this element, there should be evidence, whether direct or circumstantial that links the appellant to the fraudulent taking of the money or its movement from the MoneyGram Account to the account of PW2. **Section 254 (6)** of the same Act further provides that a person shall not be deemed to take a thing unless he or she moves the thing or causes it to move.

Of particular application to this case is **Section 254 (7)** which provides as follows:

"without prejudice to the general effect of subsection (6), a person shall be taken to have moved money if that person moves or causes it to be moved from one account to another or otherwise out of the original account"

I have carefully considered the judgement of the lower court specifically from pages 6 to 9 where this issue is resolved. It is noted that the trial Magistrate did not find evidence identifying the persons who were responsible for the movement of the money from the UBA Account to that of PW2. At page 7 she states as follows:

"It is true the investigative report PE2 focused on PW 3 and 4 as the suspects in this fraud and not the accused, but it also indicated that they were the suspects because their profiles appeared on the transactions. The report did not make a conclusive finding that they were the ones who made the transactions. This also means that the person responsible for posting the money could be out there. It could also be the accused, whom PW 4 stated was in the habit of peeping into people's computers".

The solution to the question of who stole the money lies in solving the puzzle of who moved it or made the transfers to PW 1's account, or was involved in doing so. The Trial Magistrate having found that there was no conclusive evidence of who moved the money, and having acknowledged the possibility that persons other than the appellant could have done so, should therefore not have found that the ingredient of theft by anyone, let alone the appellant, had been proved.

I have carefully considered the evidence and noted that both the transactions of 4th April 2014 and of 19th August 2014 which credited **UGX 17,125,000/=** and **UGX 29,106,000/=** respectively to PW 2's account were initiated by **Mugisha Lawrence** who testified as PW4. In his testimony in Court he denied making the transactions and suspected that someone could have hacked into the system. He denied sharing his password with anyone. Under Cross examination, he was emphatic that he had protected his password and not given it to anyone.

Evidence showed that one of the two postings was verified by **Ngabirano Jacky** who testified as PW 3 and also denied the transaction. She testified that it was possible for one to see another feeding in their password but emphasized that she had never shared her password with anyone let alone the appellant. The second posting was approved by **Beatrice Komukama** who testified as PW5 and stated that somebody must have accessed and used her password to verify and approve the payment.

If the above statements by those who the system showed as posting / verifying the transactions is to be believed, it would mean that the appellant or whoever else was responsible for moving the money had to achieve the mean feat of stealing not one but three passwords. I take note that the three were all considered suspects, but it remains unclear why their denials were taken as gospel truth in the absence of any evidence showing who else actually stole and used their identities. The evidence regarding who had the right to perform specific transactions in the bank and the normal procedure for conduct of business must be carefully considered as this case involves overrunning of established procedures and protocols.

This puzzle is complicated further by the evidence of **Mwesigye David** who testified as PW 7. He is the systems expert for the bank. He states that one would be able to do whatever they want to do in the pinnacle system, if they accessed another's username and password. At Page 61 of the record of proceedings he states as follows:

"You cannot see a user id or password if you are seated somewhere if a user had their computer open. You cannot even see the password because it is not displayed, because it is hidden"

The above statement contradicts the evidence of PW3, 4 and 5 that one could peep and be able to see their passwords.

PW 7 further confirms the use of tokens and states that if the token is enabled you cannot gain access to the system. He testified that he found **PW4 Mugisha** had enabled tokens at the time he checked the computer. This means that the appellant or whoever else transferred the money had, in addition to accessing three passwords, to also access the token to be able to enter the system. This leads the court to the conclusion that the theft was not orchestrated by one person.

There was no forensic analysis of the computers in the bank to identify which computer may have been used to pass the transactions. In a system which is networked, it should be able to determine this. The audit and other evidence from technical people in the bank falls short of identifying who made the transactions. Indeed, the audit report acknowledges that:

"in as much as the three individuals involved in the posting of this transaction claim to have no knowledge of the transaction, no other information has come to lead us to conclude that other individuals may have posted the transaction."

It is clear from the judgement that the trial Magistrate believed the evidence of PW1 to the effect that the appellant had called them about setting up a bank account, had notified them when money was credited to the said account and was the end recipient of the money. This is the evidence she used to convict the appellant of embezzlement.

At page 9 of her judgement she finds as follows:

"Tracing backwards the circumstances show that the accused was involved in the fraudulent taking of this money from the money gram account of UBA and depositing it on the account of PW2 because nothing else explains how else he would know about the deposits on PW2's accounts"

It is my view that knowledge of the fraudulent transfer to the account does not necessarily prove that one was involved in taking or moving the money. In this case where there was an alternative charge of Receiving stolen property C/S 314 (1) of the Penal Code Act, there should have been extra care taken to analyze the evidence. Even if the evidence of PW 1 and 2 was to be believed, does it prove beyond a reasonable doubt that the appellant was the one who stole it? I do not believe so. There is a remote possibility that he may not have been involved in the theft but knew about it and was at the receiving end. In the absence of evidence that places him at the point of movement of the money, he cannot be said to have stolen within the meaning of Section 254 (1) of the Penal Code Act

I agree with the arguments of counsel for the appellant that there was insufficient evidence of theft. As such the offense of Embezzlement was not proved on both Counts 1 and 2. The appeal succeeds in this regard.

Having found so, I have to consider the alternative count of receiving stolen property, which the trial magistrate did not delve into in light of the fact that she had entered a conviction for embezzlement. I am of the view that the evidence satisfied the ingredients for the alternative count. I will give my reasons after resolving Grounds 2 and 3 of the appeal. As the two grounds are related, they will be handled together.

Grounds 2 and 3:

Counsel for the appellant criticized the learned trial magistrate for relying on the evidence of PW 1 and 2 which were full of contradictions. He highlighted the differences in the testimonies of the two regarding the amounts withdrawn from the bank. These amounts were also at variance with the bank statement of PW 2's account (**P Ex 5)**

which reflected transactions that were not testified about. For example, it shows transactions of UGX 4.6 Million and UGX 450,000/= yet none of the witnesses referred to them. He submitted that the contradictions were grave. Further, he argued that there was insufficient corroboration of the evidence of PW 1 and PW2's evidence, or evidence that the appellant indeed received the moneys in issue.

Counsel for the respondent supported in full the decision of the trial magistrate, contending that the contradictions did not go to the root of the matter and that there was sufficient corroboration of the evidence of PW 1.

This court has critically analyzed the judgement of the lower court. The magistrate appropriately summarized the evidence of PW1 at pages 3 and 4 of the judgement. She found that the same had been sufficiently corroborated by the evidence of PW2, the Bank statement of PW 2's account and the telephone printouts that confirmed communication between the appellant and PW1.

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I note that the appellant and PW1 were known to each other before. This issue is not in contention. In fact, their relationship could be described as friendly/cordial, considering that the appellant himself accepts that PW1 went to see him one day when he had an accident. PW 1 testified in court on oath that the appellant contacted him asking for a trustworthy person with whom he can do business and who has a bank account with UBA. He contacted PW 2 who opened the account. He gave the account details to the appellant who then called later to notify him that money had been placed on the account. He then narrates how the money was withdrawn by PW2 and how he himself took it to the appellant.

The credibility of PW1's evidence should be considered in light of the friendly relationship that he previously had with the appellant. I see no evidence that suggests that he lied against his friend in the absence of any allegations of a grudge, ill will or fall out in friendship. His evidence is also supported by that of PW2. He confirms the discussion with PW 1 regarding the opening of the account and the reasons advanced. He confirms the deposit on his account and the fact that he withdrew moneys from it under the instructions of PW1 and took the same to him. Though he never met the appellant his testimony supports that of Pw1 as far as setting up the account and the withdrawals is concerned. From the facts, the account was set up purely for receiving money that was stolen from UBA. There are no other deposits on the said account since it was opened. The deposits were made two days after the opening of the account.

It is also not a coincidence that the appellant happened to actually work in the bank from which the money was transferred / stolen. This fact lends credence to PW 1's testimony.

There are some contradictions between the evidence of PW 1 and PW2 regarding the recounting of events, as pointed out by Counsel for the appellant. First let me consider the parts which corroborate each other. The evidence regarding the withdrawal of UGX **3 million**, **UGX 21 million** and **UGX 8 million** does not contain any contradiction. These transactions are indeed backed by the Bank Statement readings of **4th April 2014, 20th August 2014** and **1st September 2014.** These constitute 32 million out of the amounts charged.

The contradictions relate to the withdrawal of UGX 6 million on 7th April 2014. PW 1 says they withdrew 7 million but PW 2 states it was 6 million (a difference of 1 million). The two refer to withdrawal of Ushs 4 million but the bank account reflects Ushs 4.610.000/= (a difference of only UGX 610,000). PW 2 recalls withdrawing Ushs 3 million and taking it to PW1. This is reflected on the bank statement but is not mentioned by PW1. There are withdrawals of UGX 450,000/=, UGX 30,000/= and UGX 80,000/= made on 15/4/2014, 30/4/2014 and 1/9/2014 respectively about which nobody testified.

The law on contradictions and inconsistencies is well settled. **Alfred Tajar vs Uganda E.A.C.A Cr. Appeal No. 167 of 1969** (unreported); **Sarapio Tinkamalirwe vs. Uganda, Cr. Appeal No. 27 of 1989 (SC)** and **Twinomugisha Alex and 2 others Vs. Uganda, Cr. Appeal No. 35 of 2002 (SC).** Major contradictions and inconsistencies will usually result in the evidence of the witnesses being rejected unless they are satisfactorily explained away. Minor ones, on the other hand, will only lead to rejection of the evidence if they point to deliberate untruthfulness on the part of the witness.

For a contradiction or inconsistency to have the effect of fatality to the prosecution case or create a doubt from which the appellant can benefit, court must determine whether it is fundamental or central to the question in issue. In the present appeal I find the contradictions do not go to the root of the matter. The evidence is consistent on the most part and does not point to deliberate untruthfulness. These contradictions are few, and may be attributed to the passage of time and the failure of human memory. I note that the witnesses testified two years after the occurrence of events.

I have also scrutinized the telephone records admitted as Prosecution Exhibit 6. The criticism of counsel for the appellant is that there was no evidence whatsoever showing communication between the appellant and PW1, who testified in court that there were frequent calls between them on the dates of the various transactions. From the evidence PW 1's telephone lines were **0772 823389** and **0702274745.** PW 1 stated that the appellant would call him on **0790720531** but he didn't know the other numbers. PW 8, the investigating Officer told Court that PEx6 was a call printout for **0712937189** which belonged to the appellant. He does not tender any evidence to show how he arrived at the conclusion that this number was for the appellant especially considering that PW1 did not mention it in Court. There are no subscriber details from the service provider showing who owns the line. I note however that during his defense, the appellant admitted to owning the number ascribed to him by PW8 and in respect of which Prosecution Exhibit 6 was tendered. During cross-examination, he was shown PEX6 (phone printout) and he stated as follows:

*"Yes, this also shows that there was a call between me and Mugoote on 0772823389, his number. This is a call printout of my mango line **0712937189**. In the month of April there were calls between me and Mugoote Christopher"*

I am satisfied that PEX6 is indeed the printout of the telephone line of the appellant as he admitted so under cross examination. I do not agree with counsel for the appellant therefore that there was no evidence of phone calls or of ownership of that telephone line. I therefore see no reason to fault the trial magistrate for relying on this printout to corroborate PW 1's evidence and to arrive at the conclusion that these calls related to the opening of the account, and the withdrawals and delivery of money.

In conclusion, I find the evidence of PW1 and PW 2 to be reliable. I also find sufficient corroboration of their evidence from the exhibits tendered.

Receiving stolen property:

I proceed to analyze the evidence in respect of the alternative count with which the appellant was initially charged. As a first appellate court, this is my duty.

Section 314(1) of the Penal Code act provides as follows:

Any person who receives or retains any chattel, money, valuable security of other property, knowing or having reason to believe the same to have been feloniously stolen,

taken, extorted, obtained or disposed of, commits a felony and is liable to imprisonment for fourteen years

The evidence in this case shows that there was money stolen from UBA. This is a matter not in contention. The issue here is whether the appellant received money, and whether at the time of doing so, he had reason to believe the same to have been feloniously stolen.

The evidence in this case is that UBA Account No 0680009034 belonging to a one **Isabirye Robert** (Pw2) was opened by PW2 because PW 1 had requested him to get a person with whom he can do business and who had an account with UBA. Money was then credited to the account in two instalments. On both occasions PW1 was notified of the money having been deposited on the account by the appellant. It is clear that the money was being held on the account of PW2 and being managed on the instructions of the appellant. In order to prove the element of "receiving" property, the court has to ask itself whether the appellant exercised control over the money, as physical possession of the money must not always be proved. The exercise of control or dominion over items that have been stolen, is sufficient proof of receiving.

In light of the above, I am satisfied that the appellant was in control of the entire sum that was stolen from UBA and credited to PW2's account. He had orchestrated the opening of the account purely for that purpose of receiving the money. I am satisfied that the evidence of PW1 was credible and reliable and sufficiently corroborated by the phone printouts, the fact that the appellant was employed by UBA from where the money was stolen and the evidence of PW 2. The evidence shows that the two witnesses were not the owners of the money. They were at all times under the control and direction of the appellant. It therefore becomes irrelevant, how much money actually ended up in his hands. I am satisfied that the ingredient of receiving is proved.

There is no evidence linking the appellant to the taking of the money. However, it is apparent that he is a seasoned banker who knows how bank transactions are handled, and should know about the need for integrity of bank transactions. The fact that he requested PW1 to secure a person with whom he could do business and had an account within UBA and the subsequent transfer to the customer account, when actually no business had been transacted, points to the fact that the appellant should have known or had reason to believe that the money had been feloniously obtained. He was the one who notified PW1 on each occasion when the money was transferred to the customer account. He knew where the money was coming from.

In **Coughlan Versus Cumberland** (1898) 1 Ch. 704 it was observed that the first appellate court must then make up its own mind, not disregarding the judgement appealed from but carefully weighing and considering it, and not shrinking away from overruling it if on full consideration the court comes to the conclusion that the judgement is wrong".

It is my considered view that the conviction of the appellant for embezzlement was wrong. The evidence instead satisfied the ingredients of the offense of receiving stolen property.

Compensation Order

Counsel for the appellant submitted that the order of compensation issued by the trial magistrate was illegal as it emanated from the alternative count, which was not evaluated and on which the conviction was not based. Counsel for the Respondent's argument was that the compensation order was legal since it arose from the conviction on embezzlement and was the sum total of the funds embezzled.

An illegal sentence is one not authorized by law. The trial magistrate had the power to order compensation under section 197 (1) of the MCA. It is not an illegal order and clearly stemmed from the conviction on embezzlement.

Having set aside the conviction of embezzlement from which the compensation order flowed, it is imperative that I re-examine the same.

Compensation orders must be fair and reasonable. The court must indicate the reasons for the amount awarded or show the basis from which the same flows **(Ssenkungu Lutaya Versus Uganda (Court of Appeal Criminal Appeal No. 67/2012).** In the circumstances of this case, it is unclear who stole the money as there was no evidence to support that. The evidence seems to suggest that there may have been more than one person involved in the planning, execution of the offense. It's not even clear how the bank came to know of the fraud. It becomes therefore difficult to ascertain what amount is fair and reasonable. I have insufficient information upon which to base a compensation order. What becomes clear, however, is that the order for the appellant to pay the entire amount embezzled when he has not been convicted of theft of the same and in light of the other reasons given above, is not judicious. I therefore set aside the compensation order and impose none. I am mindful that imposition of a compensation order is not mandatory in law.

The sentence for receiving stolen property is a maximum of 14 years, like embezzlement. Considering the mitigating and aggravating circumstances raised in this case, I find the sentence of one-year imprisonment suitable and impose the same. This period has already been served by the appellant.

I therefore:

1. Set aside the conviction on the two counts of embezzlement and substitute with conviction for receiving stolen property, which was the alternative charge.
2. The sentence of imprisonment for 1 year is imposed for Receiving stolen property, which period has already been served by the appellant.
3. I set aside the compensation order

Jane Okuo
Judge of the High Court
28.8.2020

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Delivered in open court: