THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(ANTI CORRUPTION DIVISION)

CRIMINAL APPEAL NO 001 OF 2021

(Arising out of Anti-Corruption Division Criminal Case No 0088 of 2017)

ALIGANYIRA BETTY :: **APPELLANT**

VERSUS

UGANDA :: **RESPONDENT**

BEFORE: Hon. Justice Jane Okuo Kajuga

JUDGEMENT

This is an appeal from the decision of His Worship Nabende Moses M (Magistrate Grade 1) sitting at the Anti-Corruption Division delivered on 3rd March 2021 in which the Appellant was convicted for the offenses of **Embezzlement c/s 19 (a) and (iii) of the Anti-Corruption Act 2009** and **Unauthorized Access c/s Section 12 (2) and (7) of the Computer Misuse Act 2011.**

She was sentenced to a fine of Uganda Shillings 3,000,000 on both counts and in default, to imprisonment for 4 years on count one and three years on count two. She was ordered to refund Ushs 193,365,000 which was the amount Court found as having been embezzled, and banned from holding Public Office for ten years, from the date of the sentence.

Being dissatisfied with the conviction, the appellant filed this appeal on the following grounds:

1. That the learned trial Court erred in law and fact when it arrived at the decision that the appellant embezzled 193,365,000/= and not Ushs 210,365,000/= as was

charged thus arrived at the wrong decision to convict the appellant for the charge of embezzlement.

2. The learned trial court erred in law and fact when it relied on unlawful expert evidence to arrive at the decision to convict the appellant of the charges against her.
3. The learned trial court erred in law and fact when it relied on selectively evaluated evidence and failed to properly evaluate the evidence on record as a whole thereby arriving at the wrong decision that the appellant stole money from the SACCO and that efforts were made to conceal the theft.

The facts of the case from which this appeal emanates are as follows:

The appellant was employed as Manager of Rwenzori Diocese Cooperative Savings and Credit Society (hereinafter referred to as the SACCO) in Fort Portal. The prosecution alleged that in the course of her employment, she stole Ushs 210,000,000 /= and that the theft occurred through the formation of ghost accounts, manipulation or abuse of the software and improper issuing of loans. Complaints about these allegations were raised to the Bishop of Rwenzori who called a meeting on 9th February 2015 which resolved that the supervisory committee would conduct an audit. The audit was conducted though inconclusive. At the Annual General Meeting of 21st March 2015, it was resolved that a forensic audit be conducted by Kumanya, Karakuuzi and company Accountants. The final report is the basis for the charges levelled against the appellant in the Magistrates Court. At trial, the prosecution called a total of 10 witnesses and submitted the audit report into evidence. The appellant was then put on her defense and she called two witnesses. She testified under oath. At the conclusion of the trial, the trial magistrate entered a conviction.

Representation:

At the hearing of the appeal, the appellant was represented by **Janet Murungi**, while **Gloria Inzikuru** appeared for the Respondent. Both parties filed written submissions and in addition, made oral submissions.

The appellant opted to handle grounds one and two together, then ground three separately, while the respondent handled each ground in order.

Evaluation 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 **(See cases of Kifamunte Henry Vs. Uganda SCCA No, 10 of 1997 and Bogere Moses and Anor vs. Uganda, Supreme Court Criminal Appeal No. 1 of 1997)**

In **Kifamunte's case**, the Supreme Court of Uganda stated as follows:

"We agree that on first appeal from a conviction by a Judge the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has the duty to review the evidence of the case and to reconsider the materials before the Trial Judge. The appellate court must then make up its own mind not disregarding the judgement appealed from but carefully weighing it and considering it"

Being mindful of the law above, 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 offenses of Embezzlement and unauthorized access were proved beyond reasonable doubt and whether the judgement of the lower court is proper.

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

I will handle each ground separately.

Ground 1:

That the learned trial Court erred in law and fact when it arrived at the decision that the appellant embezzled Ushs 193,365,000/= and not Ushs 210,365,000/= as was charged thus arrived at the wrong decision to convict the appellant for the charge of embezzlement

Counsel for the respondent raised an objection to the manner in which this ground was framed and contended that it was ambiguous and offended the provisions of the Criminal Procedure Code Act which regulate the framing of grounds of appeal. It was submitted for the respondent that careful reading of ground 1 creates the presumption that the appellant's problem with the decision of the lower court was the amount for which the appellant was convicted rather than matters of evidence to prove the ingredients of the offense.

This misunderstanding is apparent from the respondents reply which focused on demonstrating why there was no error in the trial court convicting the appellant for embezzlement of some (and not all) of the money stated in the indictment.

The appellant was also criticized for arguing matters outside ground 1, including the insufficiency of circumstantial evidence relied upon by the trial court, when they had not amended the ground.

In reply, Counsel for the appellant stated that ground 1 related to the evaluation of evidence and not the amount of the money on which the conviction was based.

Analysis of ground 1

The provisions of **Section 29(3) of the Criminal Procedure Code Act** are instructive in resolving this question. They read as follows:

"Where the appellant is represented by an advocate or the appeal is preferred by the Director of Public Prosecutions, the grounds of appeal shall include particulars of the matters of law or fact in regard to which the court appealed from is alleged to have erred".

The section further provides that:

"Where an appellant who is not represented has not availed himself or herself of the provisions of section 3, nothing in this section shall be read as preventing the appellate court from raising any proper ground of appeal orally at the hearing of the appeal."

It is trite law that the grounds of appeal must be framed in a concise manner, avoiding narrative and argument. A well framed ground should specifically and without any

ambiguity point out the errors that are appealed from. Courts have consistently frowned upon the practice of framing grounds in such a general manner that the appellant can be construed as going on a fishing expedition hoping to find something along the way. Such grounds have been struck out.

I agree with the respondent's counsel that ground 1 is ambiguous, to the extent that it remained unclear even to court, what the specific matter of law or fact appealed from is. When court has to seek clarity from the appellant during the hearing, then there is no doubt that the respondent would have suffered prejudice in preparing her answer to the appeal. This ambiguity is clearly evidenced in the difficulty the respondent had in responding to the issue in her written submissions.

Ground 1 is accordingly struck out.

Ground 2:

The learned trial court erred in law and fact when it relied on unlawful expert evidence to arrive at the decision to convict the appellant of the charges against her.

The appellant's submissions

It is the appellant's case that the trial court wrongly relied on the opinion of PW7 (Twikiriza Lenius) contained in the forensics report admitted as PEX 18a and dated 25th of June 2015. He was a public accountant with Kumanya Kalabuzi and Company Certified Public Accountants. Further, that the court also wrongly relied on the evidence of PW 8 (Ruyanga Kenneth) who carried out the systems audit and prepared the audit report PE 19 dated 20th of April 2015. He was the developer of Crystal Clear software used for manning the accounts of the complainant.

Counsel for the appellant contends that the court erred in law when it ignored evidence on record from DW 2 that proved that PW 7 did not have a practicing certificate at the time he conducted the audit contrary to the requirements of the Accountants Act, 2013. Specific reference was made to Sections 25, 27, 28 and 34. The report he authored was therefore an illegal report, and was irregularly admitted and relied upon by court. The Court was invited to find the evidence as illegally admitted and disregard it.

Secondly, it was argued that the authenticity of the electronic system and data relied on to produce PEX 22 was never established contrary to sections 5, 8(2), (3), (4), (5) of the Electronic Transactions Act,2011. That no evidential weight should have been attached to the report of PW 8 by the trial court.

The Respondents submissions in reply

The learned State Attorney submitted that there was evidence on record to prove the expertise of PW7 who is a certified Public Accountant and his experience in matters of audit by detailing his work history and years of work. That the evidence of DW2, Exhibit DE 1 (a) and (b) actually confirmed that PW 7 was a full member of ICPAU (Institute of Certified Public Accountants Uganda) having enrolled on the 25th of July 2015 and that he is a practicing accountant within the meaning of the Accountants Act. He has a valid certificate. The trial Court therefore did not err in relying on his evidence.

As regards PW 8, he had 10 years' experience in developing microfinance and SACCO software that tracks savings, loans, shares and accounting.

She contended that PW 7, 8 and 9 were experts in their field and that their evidence was correctly analysed and relied upon by the court in finding a conviction.

In rejoinder, the appellants maintained her earlier submissions and reiterated her prayer that the ground succeeds.

Analysis of Ground 2

I will first consider the manner in which the trial court resolved the questions raised by the appellant regarding the evidence of PW 7 and the admissibility of the audit report.

The last paragraph of page 24 of the judgement reads as follows:

"Counsel for the accused in her final submissions submitted that court be pleased to expunge the evidence of PW7 and PW8 because PW 7 did not have a licence to practice accounts and that PW 8 did not do any accounting course. Further that the data presented was not authentic. She also attacked the testimony of PW 10 on the grounds that he did not present the CD /DVD drive as an exhibit on which he relied to generate the report. On the other hand, the state in rejoinder did submit that while the DVD was not presented, PEX22 bore the tabular extract of what was extracted and PW 10 was able to demonstrate that the evidence was authentic."

He resolved the matter thus:

"regarding electronic evidence I am very mindful of the principles laid down in Amongin Jane Frances Akili versus Lucy Akello and another, Election Petition No 1/2014. This case presented circumstances to be considered by Court before admitting digital evidence. The State rightly submitted that such evidence can be relied on if the party relying on it has proved its authenticity and the opposing party has not produced any proof of tampering with it"

At page 28 of the same Judgement the court states:

"Despite the shortfall that PW 7 did not have a practicing certificate, I have no problem to be persuaded by his opinions of expertise in regard to the findings in the forensic report PEX 18 a. As for PW8 he did not require a qualification in accounting, he told court that he did a systems audit. His task required a person with skills and qualifications in computer software and not accounting which he possessed. His evidence Corroborated that of PW 7. The works of PW 7 and 8 further corroborated with that of PW10 who established which computer and passwords were tampered with or deleted the entries as indicated in PEX22"

From the above, it is clear that the magistrate relied on the evidence of PW 7 and the audit report PEX18(a), together with evidence of PW8, 9 and 10 (on the software audit) to arrive at a conviction on all counts charged. The issue is whether this reliance was proper, and this court will examine the evidence, the submissions of both counsel and the law in resolving this ground of appeal.

A) The evidence of the Accountant:

What is in issue in this appeal is whether PW7 was authorised by law to conduct audit work at the time he carried out the audit in this case, and if not, whether that invalidates the report that he tendered in Court i.e. PEX 18a. The first part of this question was resolved in the negative by the trial magistrate who made a finding that PW 7 did not have a practicing Certificate. He was right in this regard.

I have confirmed the same from the evidence of **DW 2, Charles Lutimba** who was at the time, Manager of Standards and Technical support at the Institute of Certified Public Accountants. He testified that PW 7 was enrolled as a member of CPA on 29th July 2015. Not all enrolled members however, are practicing accountants. At the time that PW7 conducted the audit he did not have a practicing licence. Letters from Institute of Certified Public Accountants (ICPAU) were tendered in as **DE I (a) and (b)**.

I have carefully considered the two documents. **DE 1(a)** confirms that PW7 Lenius Twikiriza was enrolled as a member of ICPAU on 25th of July 2015 with membership Number FM 2224. It confirms that he is currently a practicing accountant, with a valid

practicing certificate Number F 067/20. **DE 1(b)** provides evidence that under the Accountants Act, 2013, only a person who is enrolled as a full member of the institute can apply to the Council to be registered as a practicing accountant. **DE 1(a) and (b)** are dated 6th July 2020 and 23rd July 2020 respectively.

The evidence on record shows that PW 7 was contracted to carry out the audit in March 2015, and the report **PE 18 (a)** was issued on 8th of May 2015. This is the date on the stamp of the auditor appearing on the report. The audit covered the period January to March 2015. It is clear that the appellant's assertions that PW7 was not licenced to do audit work is supported by the evidence and is true. The Trial Magistrate rightly found so.

In order to understand the import of the above on the validity and reliability of the report issued by PW 7, I have carefully considered the provisions of the Accountants Act, 2013. I also consider the evidence of DW 2 who stated as follows:

"Not all members are practicing members. There is a category of general membership and practicing accountants go beyond it. For someone to practice he must first be a member and thereafter applies to the vetting Board to be allowed to practice."

Keeping the above in mind, I proceed to consider sections 1, 25, 27, 28 and 34 (1) (a) of the Accountants Act, 2013 which the appellants counsel referred this court to.

Section 1 defines an accountant as a person who is enrolled as a member of the Institute, while a practicing accountant is an accountant registered in accordance with section 27 and issued with a practicing certificate under section 28.

For purposes of clarity, I will reproduce the other provisions here:

Section 27: Registration as practicing accountants.

(1) A person who is enrolled as a full member of the Institute under section 25, who wishes to practise accountancy, shall apply to the Council to be registered as a practising accountant.

(2) Where the Council is satisfied that a member who applies for registration under subsection (1) fulfills the conditions for registration specified in subsection (3), the Council shall direct the secretary to register the member and to issue him or her with a certificate of practice for the year.

(3) A member shall only be registered as a practising accountant, where that member has obtained the relevant practical experience as prescribed by the Council and pays the registration fee.

(4) The name of a member who is registered under this section, shall be entered in the register of practising accountants.

(5) The Council may refuse to register a member under this section.

(6) Where the Council refuses to register a member under this section, the Council shall within thirty days inform the member of—

(a) the refusal by the Council and the reasons for the refusal; and

(b) the right of the member to appeal to the High Court against the decision of the Council.

(7) A member aggrieved by a decision of the Council made under subsection (5), may appeal to the High Court within twenty-one days after the receipt of the decision of the Council.

(8) The registrar shall, for every financial year, publish a list of practising accountants and licensed accounting firms, in the Gazette and in at least one newspaper of wide circulation.

From the above, it's clear that it's the council which can certify a member as fit to practice accountancy. It is not automatic.

Section 28: Certificate of practice.

(1) A person registered as a practising accountant under Section 27 shall be granted a certificate of practice by the registrar.

(3) For an accounting firm to be recognized to offer accountancy services, all its partners or practitioners must have valid practising certificates.

(4) The Council may, where necessary, grant a certificate of practice with conditions.

(6) The Council may refuse to grant a certificate of practice to a member.

Section 34 and 35 are further instructive in this matter and are similarly reproduced below:

34. Practicing accountancy.

(1) A person shall be deemed to practise accountancy if he or she, whether by himself or herself or in partnership with another person, for payment—

(a) offers to perform or performs services involving auditing, verification and certification of financial statements or related reports; or

(b) renders any service which, under accounting practices or regulations made by the Council, is a service that amounts to practicing accountancy.

(2) All heads of accounts, finance and internal audit in public and private sector entities, with public interest, shall be members of the institute in accordance with the regulations made under this Act.

(3) A public officer or a person referred to in subsection (2) and is employed by another person to perform or render services that would otherwise amount to practising accountancy, shall not be considered as practising accountancy under this section.

35. Offence to practise without certificate.

(1) A person, shall not practice accountancy in Uganda without a certificate of practise issued under section 28 or 29.

(2) A person who contravenes subsection (1) commits an offence and is, on conviction, liable to a fine not exceeding five hundred currency points or imprisonment not exceeding two years and ten months or both.

The above provisions of the law are clear and unambiguous, and relevant to determine the question of validity and reliability of the audit report. The pertinent provisions have been underlined for emphasis.

In the facts before us, the firm contracted to carry out the audit is Kumanya Kalabuzi and Company Certified Public Accountants. It is the firm that conducted the audit and made the report which is now in issue. From the evidence of PW 7, he was the lead auditor and was assisted by Mukwenda John. Chapter 4 of the report which has the methodology corroborates this fact.

The law requires that for accounting /audit firms, all their members must have practicing certificates. The fact that this Firm took on instructions and deployed PW7 to conduct the audit when he had not registered as a practicing accountant is unfortunate, unprofessional and illegal. Both PW7 and the firm are at fault.

The evidence of DW 2 is uncontroverted regarding the fact that PW 7 was not registered as a practicing accountant. Whatever he purported to without legal authority was thus an illegality, because the law stipulates clearly that practice without registration or license is a criminal offense punishable by law. The words of the law requiring registration of practicing accountants is couched in mandatory terms with the use of the word "shall"

The question is, can the court look the other way when an illegality has been brought o its attention? I do not believe so. The position of the law is settled in the civil case of **Makula International versus His Eminence Cardinal Nsubuga and another,** Civil Appeal No 4/1981 where it was held by the Supreme court that: ***"a court of law cannot sanction that which is illegal. Illegality once brought to the attention of the Court, overrides all questions of pleading, including any admissions made thereon"***

In relying on the audit report findings, even when the illegality had been brought to its attention, the court sanctioned an illegality.

It would be improper for this court on appeal, to validate actions which are in breach of the law.

I therefore find the appellant's contention that PE 18 a should not have been relied upon by the court in determining the matter, as bearing merit.

I also observe that the expertise of PW7, though not specifically raised, is brought into issue by the provisions of the Accountants Act, 2013. The law establishes the Council of the Institute of Certified Public Accountants. This Council has to be satisfied about the competence of an applicant before going ahead to register him or her as a practicing accountant. Such a person must have obtained relevant practical experience as required by the council. There's no evidence on record as to what that is. However, it is clear from PW7's evidence that he began practicing illegally in 2012. He was just making three years in the field when he was tasked to conduct the audit. In my considered view, even if the report was valid, any court analyzing the evidence would have to be skeptical of PW 7's alleged expertise in light of the fact that he had not yet been certified to do so by the regulating Council. It would be a moot point whether he qualified to be referred to as an expert witness within the meaning of Section 43 of the Evidence Act. That however is irrelevant since I have found the report was improperly admitted and relied upon.

B) Audit of crystal clear software:

I have analyzed the evidence of PW 8, PW9 and PW 10 who handled the various pieces of evidence relating to the software used for accounting at the complainant SACCO.

PW8, Ruyanga Kenneth, a software developer with Crystal Clear testified that he carried out the audit of the system on site and prepared the draft report also onsite. The final report was made from Kampala and was admitted as PEX 19. He stated that the audit was to establish who posted and / or deleted transactions from the system, and the specific dates when this was done.

The appellant raises a concern regarding the authenticity of the report which was based on electronic data which was not produced before the court.

I note that the witness did not scan or image the actual transactions reflected on the computer which he used i.e. the computer alleged to belong to the appellant. There is

no evidence to that effect in his testimony. All Court has, is the report which I have critically analyzed. The entries on PEX19 are allegedly taken from live data on site. The primary source of the information, which is the electronic records (live data) he considered is not presented to court in any manner or form. The information on the report is from what the witness claims he saw on the system. There is no evidence by which the expert's work can be tested by an independent party, even by the court.

Counsel for the appellant relied on the decision of Justice Stephen Mubiru in **Iwa Richard Okeny versus Obol George Okot** Misc. Application 063 of 2012 where he held that the weight to be attached to an expert opinion depends on whether there is demonstrably objective procedure that guided the expert to arrive at his decision.

This court in the case of **Uganda versus Sserufusa Zaake Joshua and Namatovu Josephine** ACD Criminal Appeal No 21/2019, addressed this question while considering the expert report of an auditor. It observed as follows:

"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."

In the current matter, I have no means of testing the findings of PW 8 who examined the live data and did not scan it. Nowhere in his testimony before court did he demonstrate his findings for the trial court to examine, compare, analyze and arrive at the conclusion that they were proper and reliable.

The essence of this finding is that the court took as wholesome truth, the report of the expert when there was no evidence of the primary information. As a result, I agree with the appellant that no weight can be attached to this evidence.

The appellant further makes a rather compelling case regarding the authenticity of the data relied on, especially PW 9 and 10's, in light of the provisions of the Electronic Transactions Act, 2011.

I specifically reproduce relevant portions of section 8 thereof for clarity:

(2) A person seeking to introduce a data message or an electronic record in legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

(3) Subject to subsection (2), where the best evidence rule is applicable in respect of an electronic record, the rule is fulfilled upon proof of the authenticity of the electronic records system in or by which the data was recorded or stored.

(4) When assessing the evidential weight of a data message or an electronic record, the court shall have regard to—

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the authenticity of the data message was maintained;

(c) the manner in which the originator of the data message or electronic record was identified; and

(d) any other relevant factor.

(5) The authenticity of the electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where—

(a) there is evidence that supports a finding that at all material times the computer system or other similar device was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic record and there are no other reasonable grounds to doubt the integrity of the electronic records system;

(c) it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

(6) For the purposes of determining whether an electronic record is admissible under this section, evidence may be presented in respect of set standards, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavours

that used, recorded or stored the electronic record and the nature and purpose of the electronic record.

An analysis of the facts before the court show:

1. The prosecution did not lead evidence to show the system was working well, and that the live data on which PW 8 based his report had not been tampered with. PW 8 does not refer to the functioning of the system and its integrity. In fact, he stated under cross examination that he had never supported the SACCO before where their computers may have failed and did not know what the SACCO would do when this happened. There is no independent witness who testifies about the integrity of the system either, what was demonstrated in court is how people were using the system and the rights ascribed to them. This throws into question the authenticity of the data as the burden is on the prosecution to prove the system was working properly and that there was no cause to doubt the date, even if there had been faults. The Defense assumes no duty under the law to prove that.

2. PW 9 states that he went to the complainant SACCO's premises and recovered the hard disc in June 2016 and submitted it for analysis to the cybercrime Department. PW 10 is the cybercrime expert who analyzed the same. Interestingly, he too testifies that he travelled to Fort Portal from where he recovered the hard disc. This is a contradiction that this court does not find minor. It seriously affects the evidential weight of the data from the device or hard disc which PW 10 examined. The source is unclear.

Further, the hard disc was recovered months after PW 8 had examined the live data. The scans or images retrieved by the latter cannot be used by this court to salvage the evidence of PW 7 because of the passage of time and the absence of evidence on how the integrity of the system was maintained in that period.

I note that the respondent did not make any reply to the contests raised by the appellant in respect of the authenticity of the electronic data. Nevertheless, I find merit in the latter's assertions. The evidence should not have been relied upon. It did not pass the safeguards or tests set by the Electronic Transactions Act.

Ground 2 of the appeal succeeds

GROUND 3

The learned trial court erred in law and fact when it relied on selectively evaluated evidence and failed to properly evaluate the evidence on record as a whole thereby arriving at the wrong decision that the appellant stole money from the SACCO and that efforts were made to conceal the theft

This ground was poorly framed and lacked the specificity required under the Criminal Procedure Code Act. Counsel for the Respondent opposed the ground and asked the court to strike it out. She relied on the decision of the Court of Appeal which was dealing with a similarly framed ground in the case of **Opolot Justine and another versus Uganda** (Criminal Appeal No 155/2009) where it was held:

"The requirement of Rule 86 (1) is in our view mandatory and not regulatory. It is intended to ensure that the court adjudicates on specific issues complained of in this appeal and to prevent abuse of the legal process. The flaunting of this rule allows the appellant to ambush the respondent with issues he or she would not have contemplated on account of the general nature of such grounds of appeal. We accordingly strike it out.

Counsel for the respondent asked me to strike out ground three on the above basis. I proceed to do so.

Ground three is struck out.

Re-evaluation of circumstantial evidence:

It is the duty of the first appellate court to reevaluate all the evidence. The legal authorities were produced at the start of this appeal hence I will not reproduce them. I find it necessary to address the quality of circumstantial evidence upon which the conviction was based. The interests of justice demand that I do so.

In his judgement at page 26 the honorable trial magistrate observed as follows:

"the evidence presented is majorly circumstantial and court must caution itself before agreeing with such evidence."

Further on at page 28 paragraph two he observed:

"The accused in her testimony told court that she could leave PW 3 in her office when she goes for weekend classes and sometimes PW2. She also stated that one time she found PW 5 in her office using her computer. These are circumstances that would negate the evidence of prosecution. However, I am persuaded by the prosecution that since the manager knew the passwords of other employees, was supervisor and reached out to PW 4 and 5 to transact on the questioned accounts, there is high probative value of the fact that she had the capacity and indeed transacted on the said accounts. She was able to use passwords and computers of other employees to siphon the funds from the questioned funds"

The above conclusion in my considered view is unsupported by evidence. The real question is, did the prosecution prove to the requisite standard that it was the appellant who posted the transactions attributed to her in the system?

I have analyzed the evidence of witnesses regarding the use of passwords and access codes. What comes out clearly is that the integrity of these security features was long corrupted by the users, to the extent that it is doubtful who the actual person behind each transaction is. I will take a few pieces of evidence to demonstrate this.

a) PW1

PW 1 states that all changes to the system were made by the appellant since they were made using the server computer which was in her office, managed and controlled by her. That the forensic report they received showed that the passwords of others who had since left e.g. Kajumba were used.

When cross examined however, he retracted and stated as follows:

"When the manager goes on leave, she would leave another staff to act in her behalf and so the manager would hand over her office. I think another staff would access the server. I don't think another staff could access the server"

I do not find his testimony reliable in as far as access to the system is concerned, but he confirmed that it was possible that other staff had the manager's password.

b) PW2

PW 2 stated that the user name and password were private to the holder. ***"I think the manager also had access apart from me...she could use the password of anyone at any time. The manager once asked us to write our passwords on paper and give it to her and we did"***

He also stated under cross examination that ***"signing of money was always done on Sundays using accounts that were not hers and withdrawing moneys which were not physically deposited".***

In a scenario where it is alleged that a person's password was used by another, there is the possibility a) that it was the person himself or herself, or b) that another person is the one who used it. In that regard there is need for evidence beyond the level of mere suspicion, that it was the appellant and not the actual owner of the username and password.

c) PW4

PW 4's evidence is most interesting. She states that the manager knew her password but also, that she used to give the password to others who would sit in for her. This shows that other staff apart from the manager also knew her (Annette's) password. Under cross examination she states that Mwebesa Richard used her passwords when she was away. According to her he got the password from the Manager. Later when put to task under cross examination she said she did not see the manager give the password to Mwebesa. The question is, how did she therefore know if it was the manager who gave the password as she initially alleged?

d) PW8

PW 8 stated that he was informed that some of the users who had since left work were still reflected as logging in even thereafter.

He stated under cross examination that the computer used in the queried transactions was the Manager's and that most of the deleting was done by Annete (PW4). Majority of the deleting is done by three names. All the deletions were taken as attempts to hide information. Whereas this may be the true position, who was the actual person responsible for specific transactions? Could the persons deleting have been covering their own tracks? This remains unclear.

I am convinced that the evidence I have outlined hereinbefore is corroboratory of the appellant's claim that many people had her password, including a one Jesca, Mwebesa, and Rwakasoro Patrick.

It is my view that the conviction of the appellant was based on the assumption or suspicion that she was the one who carried out all the questioned transactions in issue.

I am unable to find the evidence sufficient to pin the appellant alone. The circumstantial evidence upon which the trial court relied is poor and of the weakest kind.

In the 1928 case of **Taylor versus Weaver and Donovan**, [1928] 21 Cr Appeal R 20 at 21, Hewart LCJ observed that ***"it has been said that the evidence against the applicants is circumstantial: so it is but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.***

The circumstantial evidence in this case does not prove the supposition that the appellant committed the offenses charged, to the requisite standard of proof beyond reasonable doubt.

CONCLUSION

The appeal against the conviction and the sentence of the lower court succeeds. They are set aside.

The appellant is acquitted of all the offenses with which she was charged.

The Order of Compensation and the Order barring employment in Public Service are set aside.

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Jane Okuo Kajuga

Judge of the High Court

Delivered on 30.11.2021. in open court in the presence of all parties