THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(ANTI-CORRUPTION DIVISION KOLOLO)

CRIMINAL APPEAL NO 004 OF 2021

(Arising out of Anti-Corruption Division Criminal Case No 42 of 2017)

SP NO. 02340 GEOFFREY LEO OGWOK ::: APPELLANT

VERSUS

UGANDA ::: RESPONDENT

BEFORE: Hon. Justice Okuo Jane Kajuga

JUDGEMENT

This is an appeal emanating from the decision of the Magistrate Grade 1 sitting at the Anti-Corruption Division delivered on 3rd September 2021 in which the Appellant was convicted for the offenses of **False Accounting by a Public Officer, Embezzlement** and **Abuse of Office,** c/s 22, 19 and 11 **of the Anti-Corruption Act 2009,** respectively.

He was sentenced to one (1) years imprisonment on Count 1, Five (5) years imprisonment on Count 2 and three (3) years imprisonment on Count 3, all running concurrently. He was barred from holding a Public Office for 10 years under Section 46 of the Anti-Corruption Act and Ordered to refund Ushs 6,000,000 (six million) embezzled, to be paid to the beneficiaries.

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

1. That the learned trial Magistrate erred in law and fact when he did not entirely evaluate evidence of witnesses on record thereby arriving at a wrong conclusion and occasioning a miscarriage of justice.

2. The learned trial magistrate erred in shifting the burden of proof to the accused or defense, thereby occasioning a miscarriage of justice

3. The learned trial magistrate erred in law and fact in blaming or condemning the appellant for giving unsworn evidence thereby arriving at a wrong conclusion and miscarriage of justice

4. The learned trial Magistrate erred in law and in fact in convicting the appellant based on his self-recorded statement thereby arriving at a wrong conclusion and a miscarriage of justice

5. The learned trial magistrate erred in law and in fact in relying heavily on the report of an expert witness which was marred with contradiction, thereby arriving at a wrong conclusion and a miscarriage of justice

6. The learned trial magistrate erred in law by not taking into account all the mitigating factors presented by the appellant in passing the sentence thereby occasioning a miscarriage of justice

7. The learned trial magistrate erred in law and in fact in charging, convicting, sentencing and ordering a refund of the Ushs 6 million yet there was evidence that some beneficiaries acknowledged receipt of the money thereby occasioning an injustice.

The Brief facts:

The appellant was an employee of the Uganda Police Force and at the time in question, deployed to Yumbe as the District Police Commander (DPC). The police were providing guard services for Electoral Commission (EC) offices. The money for paying allowances to individual guards would be released by the Secretary, EC to the Account of the District Registrar. The Registrar would withdraw the money and hand it over to the accused, along with the payment voucher. The accused's role was to effect payment to the officers thereafter submit accountability to the Registrar.

It is the prosecution's case that in the period of January 2012 to December 2014, the appellant received a total of Ushs 6,000,000 (six million) for payment of police guards,

which money he stole. Further, that he submitted false accountability showing that he had paid the officers whereas not.

Representation:

At the hearing of the appeal, the appellant was represented by **Machel Nyambok**, while **Micah Lutete** of the **Inspectorate of Government** appeared for the Respondent. Both parties filed written submissions and in addition, made oral submissions.

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"

In addition, **Section 34 (1) of the Criminal Procedure Code Act** sets further parameters under which a court may allow an appeal against conviction, as the following: i) If the judgement is unreasonable or cannot be supported having regard to the evidence, ii) If the decision appealed against is wrong on any question of law if the decision has in fact caused a miscarriage of justice or iii) on any other ground if court is satisfied that there was a miscarriage of justice. Once satisfied of the above, the court may allow the appeal.

On the other hand, this provision similarly makes it clear that the conviction may be upheld, even where the court may decide a point in favor of the appellant, as long as the court is not satisfied that there was a miscarriage of justice occasioned. This principle was stated in the **Kifamunte case** (Supra) where the Supreme Court further noted that:

"Even when the trial court has erred, the appellate court will interfere where the error has occasioned a miscarriage of justice"

A miscarriage of justice has been defined as a grossly unfair outcome in a judicial proceeding as when a defendant is convicted despite a lack of evidence on an essential element of the crime **(See Black's Law Dictionary, 8th Edition at page at 1019).** Justice Stephen Mubiru in **Olanya versus Ocitti and 3 others (Gulu Civil Appeal 64/2017)** observed that a miscarriage of justice occurs when it is reasonably probable that a result more favorable to the party appealing would have been reached in the absence of the error. I agree with this position and add that for as long as the court is satisfied that the appellant lost a chance at an acquittal as a result of the error of the trial Court, then it may exercise its power to allow the appeal.

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.

Ground 1: ***That the learned trial Magistrate erred in law and fact when he did not entirely evaluate evidence of witnesses on record thereby arriving at a wrong conclusion and occasioning a miscarriage of justice***

It is the appellant's submission that the trial magistrate did not evaluate all the evidence on record. First, that the court did not consider the testimony of PW1 while under cross examination, to the effect that there was no money lost at the hands of the appellant. In his considered view, this evidence proved that the appellant was innocent of the charges. Secondly, that the magistrate evaluated only the evidence of PW1, PW2, PW3 and PW13, and used the same to validate the evidence of all the other prosecution witnesses, and thirdly, that the trial magistrate did not evaluate the testimony of the defense witnesses especially DW1 and DW2 who unequivocally confirmed having

received their payments. He faulted the trial magistrate for making a blanket condemnation of the testimony of these witnesses.

He supported his argument with the authority of **Bogere Moses and another versus Uganda** (supra) where it was held that

"the court must not base itself on the isolated evaluation of the prosecution evidence alone, but must base itself on the evaluation of the evidence as a whole. It is incumbent upon the court to evaluate both versions judiciously and give reasons why the one and not the other version is accepted. It is a misdirection to accept the one version and then hold that because of the acceptance per se, the other vision is unsustainable. He also cited the authority of **Barungi Ignatius versus Uganda (1988-90) HCB 68** to the same effect

Counsel for the respondent replied that it was not true that there was no loss occasioned by the appellant or that the accountabilities were never questioned. He submitted that when the accountability documents were first received, there was no suspicion that they were false, however subsequent complaints of nonpayment by police officers nd investigations revealed the anomaly with them. He submitted that the testimonies of PW 4 to PW10 showed that their signatures were forged and they never received any money from the appellant. He concluded that the trial Court analyzed the evidence as a whole, including the defense case and chose to believe the prosecution case as against the latter. He pointed the court to pages 5 and 6 of the judgement of the lower court which in his view, demonstrated a wholesome evaluation.

In resolving this issue I have considered the evidence of PW1 in totality. He testified that he worked with the Electoral Commission (EC) as Registrar in Yumbe District from 2008-2015. That he was responsible for paying police officers who were offering guard services to the EC through their District Police Commanders. He outlined the process by which the moneys would be received by him, handed over to the appellant, paid out and accounted for. He stated that he would ensure that the appellant signs and stamps the vouchers upon which he had paid the officers, then he would put the papers together and forward them to Kampala as accountability. He stated that he could not be able to verify if the guards had received their money as they used to work in the night.

It is clear that the involvement of PW1 in this case did not go beyond the described role. The question of how the case came to be investigated, and the findings of that investigation were not within his knowledge. He did not do any verification to confirm

the propriety or accuracy of the accountability he received. It is therefore a rather narrow analysis of the case to argue that there was no loss just because PW1 stated that there was no problem with the accountability. It's the respondent's argument that considering the evidence as a whole, loss was proved through other witnesses and not PW1. I agree. The judgement shows that the trial magistrate evaluated the evidence of other prosecution witnesses who confirmed this fact.

The second limb of this ground is that the evidence of other prosecution witnesses was never analyzed, and that the magistrate relied on the evidence of PW1,2,3 and 13 to validate the other witnesses. It is also contended that the trial magistrate failed to evaluate and consider the evidence of the Defence witnesses who testified that they had been paid.

I have considered the judgement of the lower court at page 6 paragraph 2 which reads as follows: ***"the sum up of the evidence of the police officers who were the beneficiaries i.e. PW4 Okumu James, PW5 Christopher Yada, PW6 Eyataru Agnes, PW7 SPC Mariam Tanga, PW8 Risal Night, PW9 Chandiru Afisa, PW11 Aluzamiru Anguale and PW12 Gift Zulika was that they worked as guards at the EC Offices. That they were never paid the guard allowances and they admitted their names appearing on the spreadsheet of those who received money although they never received it and also denied the signatures against their names. PW 10 Alex Guma a health worker at Yumbe police station specifically told court that although his name appeared on the list of beneficiaries, his duties were of a health worker, he was never deployed for any guard duties and was not entitled to get the said allowance"***

However, upon reading through the record of the testimonies of the witnesses mentioned above, I noted that contrary to the findings of the magistrate as summed hereinabove, **PW 11 (Aluzamiru Anguale)** informed court that he had received all the money due to him. I noted that his name appears on the acknowledgement of receipt of money sheets exhibited as **PEX 1 (f) (iv) and (v)** at number 10 and 5 on the list respectively and at **PEX 1 (g) (v)** at No 5 and **PEX (h) (v)** at no 3 on the list. This is a total of 80,000/= that he acknowledges receipt of since each guard was to be paid Ushs 20,000/= for each night of guarding.

PW 12 (Gift Zulaika) on the other hand did not demonstrate to court where her signature was forged, or whether she had received the moneys indicated against her name or not. She states that she was paid on some occasions, but not on others. In fact,

her evidence was so indecisive regarding the issue of payment. Under cross examination she stated that she did not get some of the money and did not know what she got and what she did not get. This means that the prosecution failed to prove to the requisite standard of proof beyond reasonable doubt that the amounts indicated against her name were not paid to her, hence stolen. Her name appears fifteen times on the accountability records at PEX (1)(a) (iv, v, vii, viii, ix), PEX(1)(b) (v, vii, viii), PEX(1)(e)(vi), PEX(1)(f) (iv, v), PEX(1)(g)(v) and PEX (1)(h)(iv)(v)(vi) thus the total of 300,000/= was not proved.

It is apparent that by the blanket handling of the evidence of the witnesses above, the court missed out on vital evidence from prosecution witnesses which did not support the prosecution case. It is because of this approach that court concluded that all the witnesses had satisfactorily proved that the entire amount indicated as embezzled on on the indictment had been stolen.

The prosecution proved the following losses through the evidence of the following witnesses who testified in court and denied receiving money:

No	Name of witness	Evidence of denied signatures on the accountability lists	Total amount
1	Okura James, PW4	PEX 1 (b)(iv), (vi) and (ix)	60,000
2	Christopher Yada, PW5	PEX 1(c) (iv)(v)(vi), PEX 1 (d) (iv), (vi), PEX 1 (e)(v) and PEX 1 (g)(v)	140,000
3	Eyataru Agnes, PW6	PEX(1)(a)(iv), (v),(vi),(vii),(viii) PEX (1) (b) (v)(vii)(viii) PEX (1)(e)(vi), PEX (1)(f)(iv)(v), PEX (1)(g)(v) and PEX (1)(h)(iv)(v)(vi)	300,000
4	Marion Tayanga PW7	PEX(1)(a)(iv)(v)(vi)(vii)(viii) PEX (1)(b) (v)(vii)(viii) PEX(1)(c)(iv)(v)(vi)	

		PEX(1)(d)(iv)(v)(vi) PEX(1)(e)(v), PEX(1)(f)(v), PEX(1)(g)(v) and PEX(1)(h)(v)	360,000
5	Risala Night PW8	PEX(1)(a)(v)(vi)(vii)(ix) PEX(1)(b)(v)(vii)(viii) PEX(1)(e)(vii), PEX(1)(f)(iv)(v), PEX(1)(g)(v)	220,000
6	Chandiru Afisa PW9	PEX(1)(f)(v)	20,000
7	Alex Guma PW10	PEX(1)(c)(iv)(v)(vi) PEX(1)(d)(iv)(v)(vi)	120,000
	Total		**1,220,000**

The specimen signatures of all the above witnesses were submitted for analysis and it was established by the Hand writing Expert HWE (PW 13) that their signatures on the accountability forms had been forged.

There is another category of persons who did not testify, but whose specimen signatures were submitted to PW13. These are **SPC Awuga Maduga Mindiason**, **Adiru Pamela** and **Apangu Mohamed Abubakari**. Their sample signatures were marked **R, T** and **X** respectively and submitted along with the acknowledgement slips to PW 13 for analysis. These specimen signatures were taken by PW 3, Godfrey Mubiru, the investigator from IG. He testified to the effect that the results from the HWE showed that the owners of the specimen signatures were not the ones who signed along their names in acknowledgement of receipt.

The above was corroborated by the HWE when he stated that ***"there were fundamental differences between sample signatures on R, T and X, and the corresponding questioned signatures attributed to them in Exhibits 1-8 (original payment vouchers with attachments showing beneficiaries and amounts received)."***

The records indicate the three did not receive moneys as alleged in the accountabilities prepared by the appellant.

a) **Awuga Maduga Mindiason**: His name appears on PEX (1)(a) (iv,v,vii,viii,ix), PEX(1)(b)(iv,vi,ix). The amount he did not receive amounts to Shs 160,000/=

b) **Adiru Pamela**: Her name appears on PEX(1)(a)(v,vi,ix), PEX (1)(b)(iv,vi,ix), PEX(1)(g)(iv,vi) and PEX(1)(h)(iv,vi), all totaling Ushs 200,000 which she did not receive

c) **Apangu Mohamed Abubakari**: His name appears on PEX(1)(c)(iv, v, vi), PEX(1)(d)(iv,v,vi), PEX(1)(e)(v), PEX(1)(f)(vi), PEX(1)(g)(iv,vi) and PEX(1)(h)(iv,vi) and the amount not received is Shs 240,000/=

I am satisfied that the prosecution proved forgery of the signatures of the above persons, the amounts against their names is therefore sufficiently proved. A sum of the money not paid to the above three and Ushs 1,220,000 of the matrix provided hereinabove totals Ushs 1,820,000/= and not the 6,000,000 on the charge sheet. The proof adduced in that respect met the requisite standard.

The prosecution did not lead any evidence at all to prove that signatures of the following persons indicated in the accountability as having been paid had been forged. They did not testify as witnesses; neither were their signature samples taken for comparison by the HWE. The other witnesses did not talk about them. These include, **Gule Mansur**, **Adru Zulaika Faima**, **Alemiga Adinan**, **Ijaga Ismail**, **Debele Festo**, **Paruru Rasul**, **Chiriga Rashid**, **Bakole Rashid**, **Ajaga Rahumani**, **Dradriga G**, **Atekere Yusuf**, **Abiriga Siraji**, **Ofezu Wilson**, **Ayiman Milliano**, **Alionzi Adam**, **Osuman Miraji**, **Wadri Swali**, **Okot Ronald**, **Ijosiga** and **Mayodi Elvis**. In light of this, there was no evidential basis for the conclusion that the entire Ushs 6,000,000 sent to the appellant did not reach the intended recipients.

I find the appellant to be justified in the contention that the evidence of the prosecution witnesses was not properly evaluated, to his detriment.

I now consider the question of whether the Defense evidence was well evaluated. The appellant's counsel submitted that the trial court chose to disregard the evidence of defense witnesses. He quoted page 1 of the judgement where the court observed, "... ***there was an attempt by DW1 and DW2 to suggest that they received the allowances from the OC and in charge. But this version is wanting and untruthful having been challenged by the State in cross examination".*** That crucial evidence of defense witnesses to the effect that they were paid was ignored.

I have carefully scrutinized this evidence. **DW1 Gule Mansur** (record wrongly cites name as Mansion) states that he was attached to Yumbe police station as a Constable and was deployed to guard the EC Registry. He testified that he received payment from the appellant as allowance for his guard duties. He stated that on Exhibit PEX 1 (a) (iv) it was his friend who signed on his behalf and gave him the money but that he himself signed and received the moneys indicated on PEX 1 (a) (v), (vi) (viii) and (ix). I have carefully scrutinized the signatures and to the naked eye it is apparent that the signature he attributes to his friend is very similar to the one he claims belonged to him. It is noted that all the acknowledgements corresponding to DW1's name on the above mentioned exhibits begin with the word "for" and there is a distinct separation between this word and the actual signature. The question therefore is whether it is conceivable or believable that DW1 himself signed as evidence of his personal receipt of money and indicated "for" before his signature. The use of the word "for" signifies that it is not the person whose name appears who has signed but that someone else signed on his behalf. I find DW 1 not truthful in his testimony to that extent.

I have considered the acknowledgments under PEX 1 (b) and noted that the signature he claims to belong to him in PEX (1) (b) ((iv), (vi) and (ix) are all apparently different from those he claims belong to him on PEX (1) (a) analyzed hereinbefore.

In light of the above I find the evidence of DW1 to be untruthful and unreliable to support the proposition that he was actually paid the money, and that the appellant therefore did not steal it nor account falsely. His evidence is a pack of lies and was rightly disregarded by the trial magistrate when he held as follows at page 9 ***"There is contradiction in the statement of DW1 he stated that he received money and signed for the same but later when handed the exhibit documents he could not find his signature, he stated that a colleague received the money and signed for him. I found this ridiculous and superfluous liar"***

On the other hand, **DW2 Ateker Yusuf** stated that he received the money reflected on **PEX 1 (b)(v), (vii) and (viii)** totaling **Ushs 60,000** (sixty thousand shillings) and had no problem with the appellant. During cross examination, he was asked to write his signature on a piece of paper which was admitted by the Court as PEX 5. I have compared the signatures and find them to look closely alike. His evidence was in my view not broken down by cross examination. It is not possible to tell without expert

opinion, that the signature sample taken in court was different from the one on the vouchers as proof of payment. I find a reasonable doubt was created by the defense case regarding the moneys allegedly stolen in respect of DW2. The trial Magistrate in my view did not rightly analyze this evidence when he dismissed the evidence of DW2 at page 12 as follows ***"There was an attempt by DW1 and Dw2 to suggest that they received the allowances from the OC and in charge. But this version was found wanting and untruthful having been challenged by the state in cross examination."***

I do not see how the testimony of DW2 was successfully challenged in cross examination and if there were other aspects e.g. demeanor of the witness noted by the trial court from which a deduction of untruth could be made, it should have been indicated on the record. It was not.

The trial Magistrate does not refer to the evidence of DW3. I have considered it in detail. He is **Ijosiga Ben** and he testified that he received money indicated on PEX 1 (a) (iv), (v), (vi), (vii) and (ix), PEX 1 (b) (v), (vii) and (viii), PEX 1 (c) (iv), (v) and (vi), PEX 1 (d) (iv) and (v), PEX 1 (f) (iv) and (vi), PEX 1 (f) (iv) and (vi), PEX 1 (g) (iv) and PEX 1 (h) (iv) and (vi). During cross examination he stated that he has only one signature and provided a sample which was received as PEX 6. He however admitted that there were differences in how the signatures appeared. I too have seen the differences in signature. He stated that the difference is caused by the fact that at times he signed hurriedly. In addition, he admits that he did not actually sign on some of the vouchers as he had earlier indicated during his evidence in chief. In a bid to explain the differences he had to come up with an explanation and he found solace in stating that it was in fact someone else who signed on his behalf. In departure from his earlier testimony he said that when he was away someone would sign for him. I find the evidence of DW 3 contradictory and inconsistent, and not reliable. Failure of the court to analyze it in the judgement did not occasion a miscarriage of justice.

However, whereas I too find Dw1 and Dw3 as untruthful, their testimonies given to support the defense case cannot be the basis of a finding that the prosecution had discharged its burden to prove the specific allegation brought against the appellant. Doing so would be tantamount to condemning the accused on the basis of the weakness of the defense and shifting the burden of proof to the accused, considering that the prosecution did not tender even a single piece of evidence in respect of the three officers i.e. Ijosiga Ben, Ateker Yusuf and Gule Mansur. All the prosecution exhibits show is their

signatures alongside their names in acknowledgement of receipt of monies indicate therein.

The result of the failure of the court to properly evaluate all the witness evidence is that it arrived at the erroneous finding that all the amounts charged as stolen had been proved beyond reasonable doubt. This is what an in-depth analysis of the prosecution and defense evidence shows.

This ground partially succeeds

Ground 2: ***The learned trial magistrate erred in shifting the burden of proof on the accused/defense, thereby occasioning a miscarriage of justice***

Counsel for the appellant submitted that the magistrate shifted the burden to prove the case to the accused as evidenced at page 9 of his judgement, paragraph 2, lines 7-14, where he wrote: ***"...the defense did not demonstrate that the accused indeed passed on the funds to his line officers for distribution by way of summoning them as witnesses..."*** He invited the court to regard **sections 101 and 102 of the Evidence Act** on the burden of proof.

In reply, Counsel for the respondent disagreed with this supposition and submitted that at page 9 of the judgment, the magistrate extensively dealt with the evidence of the appellant (DW1) and resolved that he was not truthful at all. Further that he had employed a "birds eye view" of the evidence on both sides before arriving at a conviction.

In rejoinder, it was submitted that a "birds eye view" of evidence is not provided for by law and that the court had indeed shifted the burden of proof to the appellant.

In the **Mizan Law Review, Vol 8 No 1 of September 2014, Worku Yaze Wodage** presents a detailed paper on "**Burdens of proof, presumptions and standards of proof in criminal cases" a**t pages 252-270. The author observes that it is a legal truism that burdens of proof and standards of proof have meanings in relation to facts in issue and relevant facts in particular cases. There are no burdens of proof in the vacuum. The facts in issue are those disputed issues of fact while relevant facts are those other facts that are related to or have a connection with the facts in issue. In criminal proceedings,

in respect of the substantive matters in a criminal charge, it is the prosecutor that always has to open the case and lead evidence. The prosecutor has to adduce evidence in support of the facts in issue. The principle of presumption of innocence to which any criminally accused person is entitled compels prosecuting authorities to bear this initial evidential burden. In some exceptional circumstances provided by the law, the prosecutor may be relieved of this burden for some of the material or moral elements of the offense or in respect of some incidental or circumstancial matters in the charge. This occurs in cases where the accused, unlike the prosecutor, is in a better position to produce some form of evidence that is within his personal knowledge or within his reach. In such circumstances the legislature may determine to ease (but not to exonerate totally) the evidential burden on the prosecutor by employing some form of presumption to particular facts or related circumstances that are deemed to be within the knowledge or the reach of the accused. What is eased in such circumstances is the partial and not the whole evidential burden on the prosecutor.

Further, where an accused has been put on his defence the accused is required to shoulder and discharge his burden by leading rebuttal or counter evidence. Failure of an accused to discharge his tactical burden by adducing such rebuttal or counter evidence entails a potential risk of conviction.

Clearly, an analysis of the evidence adduced in rebuttal by a trial judge does not automatically mean that the burden of proof has been shifted to the accused.

This issue has been considered before by our courts, in interpreting Section 105 of the Evidence Act which sets the burden on the accused to prove facts specially within his knowledge. The Court of Appeal in the case of **Teddy Ssezi Cheeye v Uganda (CACA No.105 Of 2009)** handled an appeal emanating from the Judgement of the High Court where the Judge had reached a conclusion similar to that made by the trial magistrate in the present appeal.

The trial Judge in that case had observed that money paid for activities of global fund were withdrawn by the accused and he alone knew where the money had gone and had not explained himself. The trial Judge was on appeal, criticized by the appellant for shifting the burden of proof. The Court of Appeal in resolving this issue considered the application of **Section 105 (1) of the Evidence Act** and in its judgement observed as follows:

"In the instant case the prosecution proved beyond reasonable doubt that the appellant withdrew the money in question from his company's accounts. It is incumbent upon him to tell us where the money went since the matter is especially within his knowledge."

"At the trial in the high court the appellant was given an opportunity to tell the people of Uganda what happened to the money. He chose to keep quiet. That of course was his constitutional right but the right is not absolute as it is fettered by Section 105."

The Supreme Court of Uganda upheld the above decision when it handled the same issue in **Criminal Appeal No. 32/2010: Teddy Ssezi Cheeye Versus Uganda**. The court stated as follows: *"We are satisfied that the appellant was correctly convicted of the offence of embezzlement. We are equally satisfied that on the facts of this case, both the learned trial judge and the learned Justices of Appeal correctly relied on S.105 of the Evidence Act for the view that the appellant was the only person who knew how the money put on UCA account of which he was the only and sole signatory was spent. The fact that the appellant supervised PW2 to make false vouchers and other false reports about accountability of money certainly shows he knew where the money was or went. It was upon him to explain. When he exercised his right wrongly not to testify, he took risk. There was no shifting of the burden of proof in the circumstances of this case.*

In the instant case, money was given to the appellant to pay police guards. The manner in which he did this lay within his knowledge. He was the one who knew what happened to the money. When he was put on his defense he adduced evidence in rebuttal which the trial magistrate analyzed and found wanting, as he was legally entitled to do. He observed that *"the defense did not demonstrate that the accused indeed passed on the funds to his line officers for distribution by way of summoning them as witnesses..."*

Having considered the record and the evidence in rebuttal, I agree with the trial Magistrate. This does not amount to a shifting of the burden of proof nor was the appellant dispossessed of the presumption of innocence as alleged by counsel for the appellant. I am satisfied that the appellant was convicted on the strength of the prosecution case and not on the weakness of the defense.

This ground fails

Ground 3: ***The learned trial magistrate erred in law and fact in blaming or condemning the appellant for giving unsworn evidence thereby arriving at a wrong conclusion and miscarriage of justice***

Counsel for the appellant criticized the trial magistrate for not giving the parties an opportunity to make submissions on whether there was a case to answer or not.

Secondly, the failure of the trial Magistrate to explain to the appellant his rights on defense as required by Section 128 of the magistrates Courts act was fatal. It was submitted that the provision of the law is couched in mandatory terms and that failure of the trial court to explain these options occasioned a miscarriage of justice. This miscarriage was allegedly reflected in the trial magistrates holding that ***"...the defense did not demonstrate that the accused indeed passed the money to his line officers.....being mindful that his unsworn testimony was not put to scrutiny by way of cross examination by the State. This in my view was calculated to leave the court in guesswork"***

The respondent on the other hand argued that the appellant was a police officer and therefore knew the options available to him. Further he was represented by Counsel who must have advised him appropriately, evidenced from the fact that the appellant was able to notify court that he was changing from giving sworn evidence to giving evidence not on oath.

Regarding the submissions on no case to answer, I have considered the record of proceedings at page 37. At the closure of the prosecution case, the prosecutor stated as follows, ***"We leave it to court to make a ruling***". Counsel for the accused was in court and said nothing, thus acquiescing to the position advanced by the prosecutor. If counsel for the appellant had wanted to be heard in submissions on no case to answer, he should have raised it at this point. He did not. It is unfair therefore to critique the trial court for not giving a chance to parties who had waived their right to make submissions.

In respect of the failure to explain to the accused his rights on defense, **Section 128 (1) of the MCA** provides as follows:

"At the close of the evidence in support of the charge, if it appears to court that a case has been made out against the accused person sufficiently to require him or her to make a defense, the court shall explain the substance of the charge to the accused, and shall inform him or her that he or she has the right to give evidence on oath and that he or she will be liable to cross examination or to make a statement not on oath and shall hear the accused and his witnesses"

I have again looked at the record of proceedings. At page 38, the court made a ruling on an adjournment sought by the defense to prepare itself before proceeding. This was after the accused had been put on his defense. I reproduce the same here:

"The accused is present in court today and the defense has had ample opportunity to prepare since the 31st of July 2019 when the parties last appeared in court. Court scheduled this matter for today morning and will hear the accused who is in court. The witnesses will be accorded only one day to

come and testify. Defense counsel should have been courteous enough to inform court in advance of their inability to proceed today. Section 128 of the MCA complied with."

Thereafter, the defense counsel prayed for the matter to be stood over for ten minutes for him to consult the accused on how to conduct the defense.

In light of the foregoing, I find the contention that Section 128 was not complied with baseless. It is on record that it was complied with.

This ground fails.

Ground 4: *The learned trial Magistrate erred in law and in fact in convicting the appellant based on a self-recorded statement by the appellant thereby arriving at a wrong conclusion and a miscarriage of justice*

Counsel for the appellant contends that the reliance of the trial court on the accused person's written statement where he admitted signing against the names of the names of the police officers was wrong in law. That the essence of this was that the accused was made to testify against himself without being warned that he was doing so, contrary to the Constitution, Article 28.

In reply, the respondent argued that there was no miscarriage of justice since this investigation that led to the appellant's arrest and prosecution was sanctioned by the IGG and PW3, the lead investigator had recorded a statement from the appellant. He contended that the statement was shown to court and the accused agreed to it in totality, thus it could be relied on by court.

I have considered the evidence of PW3, the investigator from the Inspectorate of Government. Nowhere in his testimony does he mention the recording of the statement by the appellant, nor explain the circumstances leading to the same. He does not testify in respect of the information that he received from his interaction with the accused.

The appellant's statement marked PE3c found its way onto the record through the evidence of PW13, the HWE on 1st August 2019 as a specimen exhibit submitted for examination. It was marked as specimen N and is referred to in Exhibit 3b which is one of two reports produced by the witness. The appellants signature was marked Nx using a pencil and the expert was asked to compare the signature thereon and determine if it matched the signatures on questioned documents.

It was not tendered as proof of its contents. This court has previously pronounced itself in similar cases.

In the case of **Jimmy Patty Odera versus Uganda, Criminal Appeal No 10/2020 arising from criminal case No 58/2019,** counsel for the appellant contended that the trial court had erred in heavily relying on the confession of the appellant contained in his statement recorded by the IGGs office. It was argued that the investigators did not testify about the statement and that it was tendered in evidence by the Hand writing expert to prove the issue of signature and not the content of the document. That the truthfulness of the statement was never proved; neither was the content of the document testified upon. This court agreed with the appellant that the court was right to rely on the same in as far as issues of signature and authorship is concerned but not the confession that was contained in the said statement. The content had not been proved as having been made voluntarily.

In determining this issue, I have considered pages 13 and 14 of the judgement where the trial magistrate observed as follows:

"Besides the unsworn testimony of the accused I have had the benefit of reading Pex3c the record of the interview of accused, and he did state that he personally paid those who guarded, and each would sign for it and that at times he would send the funds to in-charges but would get accountabilities and forward them to the Registrar EC. However and very interestingly at the bottom of page 17 accused states as follows "I wish to add that although I had previously stated that in my statement dated 10th June 2016 that the different police officers indicated on the different payment sheets attached to different payment vouchers shown to them today the 190th June 2016 signed against their names, I wish to clarify that because of the urgency the District Registrar wanted these accountabilities and some of the police officers in the different payment sheets were not readily available at Yumbe Central Police Station I was forced to sign in their place against their names but gave them their monies when they appear. So I am the one who signed against all the above names indicated on all the payment vouchers showed to me. I have never done accounting in my education so I humbly request the Inspectorate General of Government not to charge me for abuse of office, false accounting and embezzlement ... I will never repeat"

The trial Magistrate then held as follows, ***"The above statement from a person of DPC who has not expressed that he did state it under any duress or torture speaks volume and goes to the truth of the fact that the beneficiaries did not sign for the money and cannot be doubted as to non-receipt.***

From the foregoing it is clear that the trial magistrate relied on the self-implicating statement recorded by the accused. The statement can be considered as a confession on count 1 and count 3, and was used to support the prosecution's assertions that money was never paid to the intended beneficiaries. It should be noted however that the appellant only admitted to signing the forms but not to the theft. His case was that he still went ahead and paid the police officers, as he had signed in their place because he needed to account speedily.

Article 28 (11) of the Constitution provides for the right against self-incrimination in the following words:

"Where a person is being tried for a criminal offense, neither that person nor the spouse of that person shall be compelled to give evidence against that person."

The above provision vests the court trying a criminal matter with the duty to ensure that the right of the accused is protected and that he is not forced or intimidated or in other ways compelled by law enforcement agencies to give evidence that implicates him in the commission of a crime. This means that the court must concern itself with establishing the circumstances under which an accused made or recorded a self-incriminating statement. It is admissible and can only be relied upon when the court is sure that it was made voluntarily, with full awareness that the law enforcement agency would rely on it in proving the matter against him.

In **Miranda versus Arizona 384 US 436 1966**, the US Supreme Court dealt in detail with the principle against self-incrimination and held as follows, ***"The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of an accused person unless it demonstrates the use of the procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him ...the defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly and intelligently."***

In our jurisdiction, the law for recording of inculpatory statements from accused persons while in the custody of police officers is in the Evidence Act Cap 6, Sections 23 to 27 thereof. Under section 24, confessions made involuntarily, through violence, force,

threat, inducement or promise are irrelevant, because these factors result in untrue confessions. This position of the law has been expounded in many court decisions including **Festo Androa Asenua versus Uganda**, Supreme Court Criminal Appeal 1/98.

Justice Stephen Mubiru in **Uganda versus Oromchan and 6 others**, Criminal Session Case No 93/2015 discussed the right against self-incrimination as follows: ***"The principle against self-incrimination reflected in Article 28 (11) of the Constitution of the Republic of Uganda is meant to protect against unreliable confessions and the abuse of power by the State. This protection manifests itself in the form of the right to silence. It is therefore triggered only where the individual being compelled to give information is an adversarial or at least an inquisitorial relationship with the State. Common law draws a fundamental distinction between incriminating evidence and self-incriminating evidence: the former is evidence which tends to establish the accused's guilt, while the latter is evidence which tends to establish the accused's guilt by his or her own admission, or based upon his or her own communication. The principle against self-incrimination requires protection against the use of compelled evidence which tends to establish the accused's guilt on the basis of the latter grounds and not the former"***

I agree with this decision.

The evidence Act does not refer to statements taken from accused persons arrested or in the custody of other law enforcement officers that may not be police. In this case it is not the police, but an inspectorate officer charged with investigative powers in cases of corruption who recorded the statement. Nevertheless, the constitutional safeguard against self-incrimination applies to the Inspectorate Officer and any other law enforcement agencies eliciting information from persons suspected or accused of committing crimes. For such statements to be relevant, it must be demonstrated that the inculpatory statement was recorded voluntarily, with knowledge that it could be used in the trial against him and that therefore its contents are true and can be relied upon by the court. In this case, there being no evidence regarding how Pex3c was recorded, then it becomes irrelevant and should not have been relied upon by court.

I note the trial Magistrates observation that the accused did not object to having made the statement. When you consider the circumstances under which PEX3c was tendered through the handwriting expert, it cannot be ruled out that the accused may have thought the statement was only relevant for the purpose of signature comparisons. I am convinced that the manner of admission of PE3c as an exhibit, and the reliance of the

court on the same occasioned a miscarriage of justice. The appellant was not granted the opportunity to object to its contents or explain the circumstances of its recording.

The impact of this error however does not occasion a miscarriage of justice as there is other evidence upon which the court relied to convict the appellant.

Ground 5: ***The learned trial magistrate erred in law and in fact in relying heavily on the report of an expert witness which was marred with contradiction, thereby arriving at a wrong conclusion and a miscarriage of justice.***

Counsel for the appellant based his arguments on this ground on the misconception that Exhibit N was not mentioned anywhere. This misconception was owned up during hearing when he realized that he had not addressed himself to all the exhibits, especially the two handwriting reports.

I feel no need to delve into this ground, further, his concerns regarding courts not considering the defense case was addressed in count 1

I will handle grounds 6 and 7 together as they are related

Under these grounds it is contended that the *learned trial magistrate erred in law by not taking into account all the mitigating factors presented by the appellant in passing the sentence thereby occasioning a miscarriage of justice. Also, that the learned trial magistrate erred in law and in fact in charging, convicting, sentencing and ordering a refund of the Ushs 6 million yet there was evidence that some beneficiaries acknowledged receipt of the money thereby occasioning an injustice.*

It was the appellant's case that the trial court did not take into consideration the fact that the appellant had been on interdiction for 6 years without pay. That under the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions 2013, Regulation 44 (f) this information was relevant. The sentence of imprisonment with no option of a fine and the order of compensation of Ushs 6,000,000/= was considered unfair.

The respondents reply was that the magistrate exercised his discretion at sentencing judiciously and there was no need to reverse or alter the same.

I have looked at the record and found no proof that the trial magistrate did not consider the period spent on interdiction. Rather, after considering all the submissions of the parties, he was convinced that the aggravating factors outweighed the mitigating factors. The court arrived at its sentence on the basis that the appellant was bestowed with high trust as DPC. He had an obligation to be exemplary and he abused that trust.

It is a settled position of the law in our criminal justice system that sentencing is a matter of discretion of the trial judge. The appellate court can interfere only where the lower court has overlooked a material fact relevant or where the sentence is illegal, or manifestly harsh or excessive.

In the instant case, the court has found in favor of the appellant in that the prosecution did not prove theft of Ushs 6million as alleged. This court has found that the evidence on record supports only Ushs 1,820,000 as having been stolen. In light of this finding, it in in the interest of Justice that the court reconsiders the sentence in respect of the offense of Embezzlement. Taking into consideration all the factors raised by the prosecution and the defense at trial in mitigation and aggravation, a sentence of three years' imprisonment is more suitable. The Sentencing Range for this offense is 2 years to 14 years, as per Part VI of the sentencing guidelines. Under paragraph 42, court is to consider the amount of money involved. In this case it is below 2 million. However, there is a breach of trust involved as the appellant was a District Police Commander.

Apart from the above, the other errors noted by the court did not occasion a miscarriage of justice. When the evidence is considered as a whole, the convictions on all the counts stand.

I therefore order as follows:

1. The conviction on Count 1, False Accounting by a Public Officer c/s 22 of the Anti-Corruption Act and the sentence of One year's imprisonment handed by the trial court is upheld
2. The conviction on Count 3, Abuse of Office c/s 11 of the Anti-Corruption Act and the sentence of three years' imprisonment is upheld
3. The conviction in respect of Count 2, Embezzlement of Ushs 6,000,000/= c/s 19 of the Anti-Corruption Act is set aside and substituted with a conviction for Embezzlement of Ushs 1.820,000/. The sentence of Five years is set aside as

harsh and excessive in light of the fact that prosecution proved theft of only Ushs 1.820,000/= out of the 6 million charged. A sentence of three years is substituted, on the basis that the appellant is part of law enforcement, expected to act properly and with integrity at all times. All custodial sentences are to run concurrently.

4. The Order of compensation of Ushs 6,000,000 is set aside and substituted with an order for compensation of Ushs 1,820,000 to the beneficiaries.
5. The Order barring the accused from holding public office under section 46 of the Anti-Corruption Act for ten years is maintained.

Okuo Jane Kajuga (Judge)

28.2.2022