REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

CRIMINAL APPEAL 5 OF 2021

UGANDA..... APPELLANT

VRS

1. **KAKONGE UMAR**
2. **NSUBUGA COLLINS**
3. **NABWIRE AMINA ..... RESPONDENTS**

BEFORE GIDUDU, J

JUDGMENT

The Inspectorate of Government herein after referred to as the state, appealed against the decision of the Principal Magistrate Grade One where in he dismissed charges against the respondents. The 1st and 2nd respondents were employees of Wakisi Sub-county, Buikwe District Local Gov't as Senior Assistant Secretary (Sub-County Chief) and Senior Account Assistant respectively while the 3rd respondent was the Manager Time Service Station-Lugazi.

The state preferred 11 charges against the respondents as shown below: -

Count 1. Kakonge Umar was charged with embezzlement C/S19(a)(i) and (iii) of the Anti-Corruption Act 2009. He was accused of stealing 15,000,000= the property of Buikwe **DLG**.

Count 2. Nsubuga Collins was charged embezzlement C/S 19(a)(i) and (iii) of the Anti-Corruption Act, 2009. He was accused of stealing 35,576,900= the property of Buikwe **DLG**.

Count 3. Kakonge Umar and Nsubuga Collins were charged with Causing Financial Loss C/S 20 of the Anti-Corruption Act, 2009. They were jointly accused of processing and approving payment of 66,300,000 to Time Service Station purporting it was for fuel and lubricants for working on community roads knowing or having reason to believe that the act will cause Financial Loss to Buikwe **DLG**.

Count 4. Nsubuga Collins was charged with embezzlement C/S 19(a)(i) and (iii) of the Anti-Corruption Act, 2009. He was accused of stealing 11,145,000= the property of Buikwe **DLG**.

ALTERNATIVELY, he was accused of Causing Financial Loss C/S 20 of the Anti-Corruption Act, 2009 by purporting to purchase culverts from Namanve Concretes Limited knowing or having reason to believe that the act would cause financial loss of 11,145,000= to Buikwe **DLG**.

Count 5. Nsubuga Collins was charged with embezzlement C/S 19(a)(i) and (iii) of the Anti-Corruption Act, 2009. He was accused of stealing 9,300,000= the property of Buikwe **DLG**.

Count 6. Kakonge Umar and Nsubuga Collins were charged with Causing Financial Loss C/S 20 of the Anti-Corruption Act, 2009. The two were accused of processing and approving payment of 16,000,000= to Mugunga Engineering Supplies(U) Ltd knowing or having reason to believe that the act would cause financial loss of 9,300,000= to Buikwe **DLG**.

Count 7. Kakonge Umar was charged with False Accounting by Public Officer C/S 22 of the Anti-Corruption Act, 2009. He was accused of furnishing false returns for road works in Wakisi Sub-County.

Count 8. Nsubuga Collins was charged with False Accounting by Public Officer C/S 22 of the Anti-Corruption Act, 2009. He was

accused of knowingly furnishing false returns for 56,016,970 for road works in Wakisi Sub-County.

Count 9. Kakonge Umar was charged with Uttering False Documents C/Ss 351 and 347 of the Penal Code Act, Cap 120. He was accused uttering false minutes of council meeting and fuel invoice/receipts to the investigating officer.

Count 10. Kakonge Umar and Nsubuga Collins were jointly charged with Abuse of office C/S 11(1) and (2) of the Anti-Corruption Act, 2009. They were accused of doing arbitrary acts to wit irregularly approving 98,930,070= as facilitation for road works in Wakisi Sub-County which resulted in loss of 71,021,900=

Count 11. Nabwire Amina and Kakonge Umar were charged with Conspiracy to commit a misdemeanor C/S 391 of the Penal Code Act, Cap 120. They were accused of conspiring to utter a false receipt for 66,300,000= to Buikwe **DLG**.

The facts leading to the above charges are derived from the testimony of Mr. Fredrick Oketch, PW10 and investigating officer. He is said to have received a complaint of mis management of funds by Wakisi Sub-County at his office in Mukono. In the course of his investigations, he found that money had been stolen by the respondents purporting to have paid for fuel and lubricants. The accused also uttered forged council minutes and receipts for sundry purchases. The road works were not done as alleged and the fuel was not purchased. He preferred charges as outlined above.

The trial magistrate dismissed all the charges against the respondents hence this appeal. Six grounds of appeal were filed.

1. The Learned Trial Magistrate erred in law and fact when he concluded that the appellant did not prove beyond reasonable doubt that the 1st and 2nd respondents stole the money stated in counts 1, 2, and 5 of the charge sheet, thereby acquitting them.

2. The Learned Trial Magistrate erred in law and fact when he held that there were material contradictions, inconsistencies and untruthfulness in the prosecution evidence, thereby acquitting the 1st and 2nd respondents of the offence of causing financial loss.

3. The Learned Trial Magistrate erred in law and fact when he concluded that PW2 could not correctly remember the installments paid by Wakisi Sub-County to M/s Time Service Station/Shell Lugazi, thereby arriving at a wrong conclusion that the prosecution did not prove its case.

4. The Learned Trial Magistrate erred in law and fact when he held that there is no arbitrary act done by the 1st and 2nd respondents, thereby acquitting them of the offence of abuse of office.

5. The Learned Trial Magistrate erred in law and fact when he held that the work in issue was done and therefore, no financial loss was incurred.

6. The Learned Trial Magistrate erred in law and in fact when he held that prosecution did not prove that the 1st and 3rd Respondents conspired to commit a misdemeanor, thereby acquitting them.

Ms. Sylvia Nabirye and Mr. Wyclif Mutabule appeared for the state whilst M/S Kyeyune and Sewankambo represented the respondents. They filed written submissions which I have perused and noted their arguments.

My duty as a first appellate court is to subject the record to fresh and exhaustive scrutiny bearing in mind that I neither saw nor heard witnesses testify. I am required to draw my own conclusions of the case.

Grounds 1 and 3.

The complaint in grounds one and three related to the acquittal of the 1st and 2nd respondents of charges of embezzlement in counts 1, 2, 4 and 5.

The state complained of the trial magistrate's finding at page 14 of his judgment thus:

"Apart from PW10, the I.O, who raised issues of theft of these funds, none of the prosecution witnesses stated with clarity that funds were stole. PW1 the speaker said the roads were done but not well. He said the funds were spent on the roads. PW4 said he inspected the roads and they were done. He made a report. The report indicated more roads were done but the costing was not done. It was also his testimony that the culverts were delivered and some were pending installation. PW6 indicated that work was done. This was in collaboration of A1 and A2 and the testimony of all defence witnesses. However, PW10 asserted that he did a value for money audit and according to him 66.3m spent on fuel did not correlate with the budget and the supplier did not receive all the money vouchered (sic)"

The written submissions of the state in support of the complaint in grounds 1 and 3 are confusing and do not relate to the principles of law required to prove theft which is a key ingredient to charges of embezzlement. It is difficult to follow the arguments of counsel which are tailored to the testimony of PW10 who was not only the investigating officer but also assigned himself the roles of a witness of fact and expertise.

The state faults the trial magistrate for not finding that Time service station did not receive 66.3 million based on the testimony of PW10. The trial magistrate is also faulted for not finding that M/S Mugunga Engineering services did not receive 7.5 million for tractor blades in count 5.

On the other hand, the respondents supported the trial magistrate's holding and did not offer much argument.

Be that as it may. The charges in counts 1, 2, 4 and 5 relate to embezzlement of 15,000,000= by the 1st respondent in count one;

35,576,900= by the 2nd respondent in count 2; 11,145,000= by the 2nd respondent in count four and 9,300,000= by the 2nd respondent in count five. All these funds are stated to belong to Buikwe District Local Government.

Of all the ten prosecution witnesses, there was no body from Buikwe District Local government who testified that the district lost money and the same was stolen by the 1st and 2nd respondent as sub-county chief and sub accountant respectively.

Firstly, proof of ownership is essential to prove theft as defined in section 254(1) of the Penal Code Act. The Chief Administrative Officer or Chief Finance Officer of Buikwe **DLG** never testified to support the allegations of PW10 who assumed the role of the complainant.

Secondly, the money alleged to have been stolen was not subjected to audit by the competent audit function of the district or the Auditor General or other external auditors to ascertain the exact money stolen. Embezzlement is an offence of theft by an employee. It follows that the employer must testify and confirm theft. Buikwe district being a government institution must have internal auditors to verify PW10's allegations. Alternatively, the inspectorate of Government could have asked the Auditor General to do a forensic audit.

This is not to suggest that an audit report is necessary in every case of embezzlement. Where the sum stolen is easy to ascertain then an audit is not necessary but where money is fragmented in expenditures, it requires verification by an audit to ascertain how much of the released funds were abused through theft.

Thirdly, neither the proprietor of Time Service station nor the proprietor of **Mugunga Engineering Works supplies Ltd** were called to testify that their companies did not receive funds attributed to them. PW10, who is also the investigating officer, is the only one complaining on their behalf! There was no reason why PW10 opted to treat the investigation as if it was a private one.

Fourthly, the work for which payments were made involved road works. It was necessary to engage an engineer to do an engineering audit based on values of materials used and the bills of quantities.

PW4, the district engineer made a shallow report which was exhibit P8. The report does not quantify the value of the work done. It was not relevant to the prosecution. It recommended that a comprehensive assessment of the work done be undertaken. This means that PW10 brought the case to court before he had got evidence.

In short the narrative by PW10 alleging theft of money based on his opinion cannot, with respect result in a conviction. The trial magistrate's observation that the state did not adduce evidence of theft or financial loss is valid. Witnesses of fact and experts in financial and engineering audit were absent. There was no basis for finding the respondents guilty.

PW10 was an investigating officer. An investigating officer is not supposed to be a witness of fact or an expert in a case he/she is investigating. An investigating officer however competent in a particular field is not supposed to become an expert or witness of fact. It is a cardinal rule of natural justice that "**no one should be a judge in their own cause".** An investigator is supposed to assemble witnesses of fact and experts to prove his or her case irrespective of his/her own knowledge.

Another principle that emphasizes neutrality in the administration of Justice is that "**Justice must not only be done, but must also be seen to be done**"- per Lord Hewart Chief Justice of England in **Rex Vrs Sussex Justices (1924) 1 KB 256.** The prosecution case failed these two age old tests. It was important to obtain both factual and technical evidence to prove ownership and theft of money**.** Grounds one and three must fail.

Grounds 2, 4 and 5.

The complaint here is about the trial magistrate's finding that there were contradictions in regard to evidence of PW9 and PW4 regarding the presence or absence of culverts which forms count 4.

The appellant also complains about the trial court's holding that there was no arbitrary act in count 10.

There was a further complaint that the trial magistrate held that there was no financial loss in count 6.

These complaints relate to the trial court's disposal of counts 3, 4 and 6.

I must confess that the appellant's written submissions are jumbled up and difficult to follow. They are not following the counts as they appear in the charge sheet. For example, count 4 is about embezzlement of 11,145,000= by Nsubuga but the written submissions say count 4 is about causing financial loss of 9,300,000= which is count 6.

But doing the best I can, I understand the appellant to complain that PW9 who is the owner of Namanve Concrete products denied supplying culverts worth 11,145,000= and stated that the receipt was for his company but Betty was not authorized to issue it.

The respondents did not specifically address me on this aspect. The trial magistrate held at page 19 of the judgment that the financial loss of 11,145,000= and 9,300,000= attributed to the 1st and 2nd respondents was not proved because both sides tendered detailed reports which showed that work was done using materials bought by the respondents.

Shs. 11,145,000= is in respect of count 4 where the 2nd respondent was charged with embezzlement. Exhibit P11 (d) is a receipt for 11,145,000= issued by Namanve Concrete Ltd for culverts purchased by Wakisi sub-county. It was issued by one Betty. PW9 who is the director of Namanve Concrete Ltd admitted that Betty Kabasinge was his employee and that the receipt is genuine although it appears he did not deliver the products because there is no delivery note and the money does not seem to be in his treasury. In re-examination he stated he was not sure if he received that money.

The appellant submitted that this was evidence that the money never reached the supplier and so it was stolen by the 2nd respondent.

With respect that is not correct. If PW9 had denied knowledge of the receipt in exhibit P11(d) then the presumption that money was stolen by the 2nd respondent would be valid. If the receipt is genuine as it was, it was not necessary to find out if PW9 received the money or not. That is his internal business with his cashiers. If

money was paid to PW9's company and his cashier stole it, it does not mean that the company was not paid. The receipt is prima facie evidence that PW9's company received money from the respondents.

The investigator should have instituted a value for money audit by a neutral authority like the district internal audit to check if the 24 culverts purchased on 18/11/14 were delivered and if they installed. PW10 purported to do this himself but did not even tender to himself a report of his findings.

The appellant wants court to treat PW10's testimony as proof that the culverts were not delivered. With respect that is not how criminal cases are proved. PW10 is not a witness of fact or expert in road construction. It is a rule of practice that investigators gather and compile evidence. They don't turn themselves into witnesses.

PW4, the district engineer made a report to PW10 as per exhibit P8 but the report did not contain materials used or their costs. In fact, PW4's inspection report captures 20 culverts which had not been installed. Where did these come from? Investigations on this aspect were not complete despite PW10's narrative. There was no proof of embezzlement in count 4. The trial magistrate was entitled to find that PW4 and PW10 were not on the same page in regard to the non-delivery or non-purchase of culverts. The criticism from the appellant is not justified.

Turning to the complaint that faulted the trial magistrate for holding that there was no proof of causing financial loss of 9,300,000= in count 6, the appellant submitted that money was paid to Mugunga Engineering Works supplies. Apparently Mugunga engineering Works was not even prequalified by Buikwe DLG but that is a different matter.

Proof of this was based on the testimony of PW4 who said he did not know Mugunga Engineering Works. Frankly, this was not proof of charges of causing financial loss required in law.

The courts have held in a number of cases that actual loss must be proved. Count 6 is strangely crafted. The 1st and 2nd respondents are accused of processing payment of 16,000,000= to be paid to Mugunga Engineering Works for supply of tractor blades. It is out of

this 16 million that the respondents are accused of causing loss of 9,300,000=. The question I ask is where is the report that shows that 6,700,000= was genuinely spent but 9,300,000= lost with non-delivery or wasteful expenditure?

PW10 testified that he retrieved exhibits P19 (a-c) from the 2nd respondent. The documents comprised a payment voucher for 8,500,000= paid to Mugunga Engineering Works being facilitation during light grading of roads. There is also an invoice of Mugunga Engineering Works for the same figure for supply of blades, ripples and bolts and facilitation of workers. The last document is a receipt for the money from Mugunga Engineering Works.

PW10 testified he suspected this to be a false transaction. He interviewed one Ssetuba a director of Mugunga Engineering Works who denied receiving the money but admitted the invoice and receipt belonged to his company. Setuba also admitted receiving 4,100,000= but not 8,500,000=. Ssetuba was not called to testify. An attempt was made to tender his interview statement which court rightly rejected. Such a statement which is not taken on oath is useless unless it is tendered to contradict what Ssetuba had told court on oath. But what is worse is that Ssetuba did not testify. This means whatever was said of him remains hearsay.

PW10 suspected that the receipt and Invoice was written by the 2nd respondent so he subjected his hand writing to examination by Sebuwufu, PW8 a hand writing expert who made findings that the sample handwriting of the 2nd respondent was similar to the hand writing on the receipts from Mugunga Engineering Works Ltd. Is this evidence of financial loss or of forgery?

Financial loss occurs when there is no value for money. It is doing or omitting to do an act with knowledge or reason to believe that the act or omission will cause financial loss.

Respondents 1 and 2 are accused of paying 16,000,000= to Mugunga Engineering Works Ltd for no work or service rendered in return. It was expected that the proprietor would testify if the company provided the service or not. This was not done. Next would be a report of fact to ascertain if the alleged blades, ripples and bolts were supplied or not. Failure to adduce evidence from

Mugunga Engineering Works Ltd plus a value for money audit by either PW4 or internal audit of Buikwe **DLG** left the respondents as suspects but not guilty in law. The charges in count 6 were not proved beyond reasonable doubt. Evidence of forgery is not by itself proof of another charge of causing financial loss.

It is trite law that suspicion however strong does not by itself lead to a conviction. Suspicion is dominant in PW10's testimony but it is not backed up by independent, verifiable and credible evidence.

Turning to the complaint about abuse of office, it is not clear what I am supposed to consider because abuse of office is in count 10 relating to approval of 98,930,000= from which 71,021,900 was lost.

Yet in the submissions, arbitrary acts relate to acts of processing payment 66,300,000= and accounting for 50,576,900= in count 3. There is total confusion in the submissions on appeal. The submissions are at variance with the record of proceedings and the charges the respondents faced during the trial.

But doing the best out of this confusion which is also manifest in the respondents' submissions, on the basis of my evaluation of evidence and the gaps I have outlined above there is no merit in grounds 2, 4 and 5. The findings of PW10 were not conclusive in law. PW10's findings required more evidence from the owners of the money to prove not just theft but also abuse of office. It required audits for value for money and engineering works to prove financial loss.

PW10 turned himself into both a witness of fact and an expert. His evidence required the support of credible technical reports in financial and engineering matters. This deficiency meant that the charges could not be proved beyond reasonable doubt and the trial magistrate was entitled to find the 1st and 2nd respondent not guilty.

The last complaint in ground 6 related to charges of conspiracy. The trial magistrate held that there was no proof of a conspiracy on the evidence adduced. It was his view that A3 was provided with an LPO (exhibit 2(b)) through one Jonah. A3, who is the 3rd respondent only met the 1st respondent two days after when he delivered a

cheque for 15 million. The magistrate concluded that there was no prior agreement.

I have perused the record of proceedings and I am of the view that the conspiracy theory is an opinion of the investigating officer. There is no witness of fact relating to a conspiracy in law.

A conspiracy is an agreement by two or more persons to commit an unlawful act. This agreement to commit a crime is usually not written. It is deduced from the actions of each conspirator done in furtherance of the overall objective.

In this case, an **LPO** was issued by Buikwe **DLG** to the 3rd respondent as a service provider. The **LPO** was a contract between Time service station and Buikwe **DLG**. It was official. It was not a secret which is a characteristic of a conspiracy.

The **LPO** is signed by the Chief Administrative Officer and Chief Finance Officer Buikwe. The investigating officer did not find it necessary to interview these two officers to clear any suspicion. The suspicion remained his personal opinion. Ground six fails.

PW10's evidence is highly mixed with his personal opinion which clouded the investigation. By failing to engage technical persons to bolster his findings, PW10 turned himself into an accuser, witness and judge in his own cause.

Even when he got a report from the district engineer, he did not use official channels like asking the Chief Administrative Officer Buikwe to direct his/her technical staff to provide the necessary information. He gathered information like a private spy. No wonder the 3rd respondent, DW3 and DW4 made allegations on oath about PW10's improper conduct.

Those allegations were not challenged. Respondent 3 claimed PW10 wanted her to implicate the first respondent to say that fuel was not taken but she refused. She complained that PW10 took the letter from the **CAO** Buikwe that authorized cash fuel purchases by the respondents which would explain why money was being paid in installments to the tune of 66,300,000=. She ended up in the dock and losing her job.

DW3, Bwire Michael stated on oath that PW10 asked him to connive with PW1 and claim that work was not done but he refused because work was done. DW3 was not cross examined at all about this serious allegation.

DW4, a parish chief, who wrote the correct minutes which he stamped and handed them to PW10 was surprised that PW10 had manufactured bogus minutes to implicate the respondents. He was not cross examined at all despite these damning allegations on oath.

The implication of the prosecution failure to cross examine a witness is that such evidence is correct. It is for this reason that I doubt the credibility of evidence of PW2, a pump boy who was brought to testify about financial matters posing as an accountant without proof of his employment. Similarly, PW1 who is the Speaker of Wakisi sub-county appears to have been actuated by malice in framing the accused. The unchallenged testimonies of DW3 and DW4 creates a reasonable doubt in the prosecution case in regard to the genuineness of these charges.

In conclusion, after reviewing evidence adduced at the trial, I am of the view that the charges were not proved beyond reasonable doubt. Evidence from a value for money auditor and a road engineering auditor was necessary to support PW10's allegations.

There may have been some irregularities in the execution of the road works but they were not investigated. The prosecution case is based on the investigator's opinions and in some respects is tainted with impropriety. The trial magistrate was entitled to find the respondents not guilty. The appeal is dismissed.

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GIDUDU LAWRENCE

JUDGE

25th May 2022.

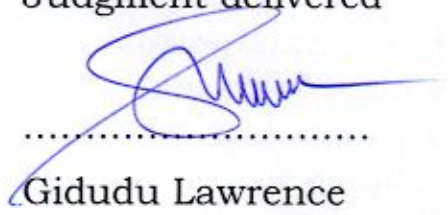
Dr. Ernest Katwesigye for the appellant

M/S Kyeyune Albert and Kato Absolom

Respondents present

Dillis Clerk

Judgment delivered



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Gidudu Lawrence

Judge

25th May, 2022