THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NUMBER 00152 OF 2009

P. C. WABWIRE ANTHONY ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

(An appeal arising from the Judgment and decision of the High Court by his Lordship Hon. Mr. Justice J.B.A. Katutsi on 30th June 2009 in Criminal Appeal No. 0087 of 2006 in the Anti Corruption Court at Kololo)

Coram: Hon. Justice Remmy Kasule, JA

Hon. Justice Eldad Mwangusya, JA

Hon. Lady Justice Faith E. Mwondha, JA

JUDGMENT

The Appellant, No. 30394 Police Constable **WABWIRE ANTHONY** worked as a cashier in a Police Savings Association, a contributory Scheme where all the Police Officers contributed monies. He worked under **CHRIS BAKESIIMA** (PW1) who was Chairman of the Association. The procedure for payment of the beneficiaries was that a beneficiary would file a claim to the Appellant who would in turn requisition for the funds from PW1. PW1 would release the funds after accountability from the Appellant for the previous releases.

The accused would sign a cash requisition voucher for the release and a cheque would be issued in his name. The accountability consisted of payment vouchers indicating the names and Force Members of the beneficiaries. P.W.1 testified that the transactions were conducted on the basis of mutual trust. During the year 1999 P.W.1 released Shs.3m for payment to the beneficiaries but he started receiving complaints that the beneficiaries were not being paid. The Appellant had disappeared. An investigation including an audit into the activities of the Association was conducted and it was discovered that a sum of Shs.28m could not be accounted for. It was alleged that the Appellant was making payment to non existing beneficiaries because the names of some of the beneficiaries paid did not tally with the Force Numbers recorded in the register. It was also alleged that the signatures attributed to the beneficiaries were by the same author. Following the investigations the Appellant was charged in the Chief Magistrate Court at Buganda Road for offences of Embezzlement C/s 257 (b) of the Penal Code Act and in the alternative theft contrary to sections ***245 and 252 of the Penal Code Act***.

The particulars of the offence of Embezzlement were that No. **30394 PC WABWIRE** and others still at large between January, 1998 and January 2000, at Police Headquarters in Kampala District being an employee of Police Savings Association stole about Ushs.28,000,000/= the property of the said company, which came his way by virtue of his employment.

In the alternative count, the particulars were that **No 30394 P.C. WABWIRE** and others still at large between January 1998 and January 2000, at Police Headquarters in Kampala District stole Ushs28,000,000/= the property of Police Savings Associated Limited.

He pleaded not guilty to both Counts. In his defence he denied having embezzled or stolen any money because he only paid the claimants after

verification by PW1 and the Force Welfare Officer. He would not receive any release to pay any beneficiary until after accounting for the previous releases. He testified that PW1 had fabricated the case against him because during the Justice Sebutinde Commission of Inquiry into the Police the company affairs were investigated and he had testified against PW1 and he (P.W.1) reminded him that although he had testified against him he was still his boss. He testified further that he had been forced to sign a charge and caution statement because he was told that if he did not sign he was going to miss an important examination. He called two witnesses in his defence.

The two witnesses' testimony was to the effect that the Appellant had never requisitioned for any file but it was PW1 who used to requisition for files for verification of the particulars of the beneficiaries.

At the conclusion of the trial the Appellant was convicted of the offence of Embezzlement and Sentenced to three (3) years imprisonment. The alternative count of theft was dismissed. He appealed against both the conviction and sentence. He raised two grounds as follows:-

1. "The learned trial magistrate erred in law and fact when she failed properly to evaluate evidence on Court record and consequently arrived at a wrong decision.

2. The learned trial Magistrate's Order of custodial sentence of three years was excessive."

The appeal was heard by the Honourable John Bosco Katutsi who on 30th June 2009 dismissed it in the following words:-

> ***"In the case of RIANO S/o LEMALAIMER and Another Vs R [1960] EA 960, a strong Court of Appeal for Eastern Africa***

comprised of Sir ALASTAIR FORBS, V P GOULD and CRASHAW JJA held that:

"It is not a sufficient ground of appeal to allege that a conviction was bad in law, or that a conviction was against the weight of evidence, and where an Appellant is represented by Counsel, he will not be allowed to argue any point under a general ground of appeal."

Here the ground that the trial Magistrate erred in Law and fact when she failed to properly evaluate evidence on Court record is too generalized as to entitle Counsel to argue any point under it. As to the second ground, even a prudent first year Law student ought to know that three years is the minimum sentence for the offence of Embezzlement. For a practicing Lawyer to complain that a sentence of three (3) years was excessive is hard to comprehend. This case shows how fraudulent advocates are fleecing their clients well knowing that there is nothing they can do for them. To make matters worse Mr. Mwebesa Arthur said he was holding a brief for Mr. Bakiza who was said to be in Kabale, while in fact Mr. Bakiza was seen within the precincts of this Court. This is an act that must be condemned in the highest terms possible. This appeal is dismissed."

This appeal is against the above judgment. **MR. HENRY RUKUNDO** who represented the Appellant in this Court raised two grounds in what he describes as a "Re amended Memorandum of Appeal."

1. The Learned trial Judge on appeal erred in Law and Fact when he failed to re-appraise evidence as a whole to scrutiny, re-evaluation occasioning

Our perusal of the Memorandum of Appeal indicates that the two grounds of appeal raised by the Appellant raise matters of mixed Law and fact which renders the Memorandum of Appeal incompetent. This same issue arose in the case of ***NALUKENGE MILDRED VERSUS UGANDA (COURT OF APPEAL CRIMINAL APPEAL NO 67 OF 2008*** (Unreported) where this Court, faced with a similar situation struck out the Memorandum of Appeal. This appeal suffers a similar fate. It is to be struck out for non compliance with the provision of **Section 45 (1)** of the Criminal Procedure Code Act because it does not raise any point of law for consideration by this Court in exercise of its jurisdiction as a second Appellate Court.

After striking out the appeal in the case of ***Nalukenge Mildred Vs Uganda*** (Supra) the Court still went ahead to consider a number of matters relating to the appeal, ***"if for nothing else but to set the record straight."*** We shall follow the same approach because there are some matters in connection with this Appeal which need resolution by this Court in order to guide Courts faced with similar issues in future.

In his submissions **MR RUKUNDO** first complained that the evidence of **CHRIS BAKESIIMA** (PW1) who had completed his testimony but was later recalled was admitted in contravention of **Sections 136 and 137** of the Evidence Act because no formal application to recall him was made.

Secondly, he submitted that there was no employer/employee relationship between the Appellant and the savings Association because no appointment letters or contract were adduced in evidence which to him meant that one of the essential ingredients of the offence of Embezzlement was not proved. Theft was also not proved against the appellant because although he had been charged with theft he had been acquitted on that Count. He submitted further that the Auditors report was wrongly admitted in evidence and so was the

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evidence of the charge and caution statement which was recorded by **KYOMUKAMA SAMUEL** who was involved in the arrest of the accused who signed the statement after being induced that he would be allowed to go and do his exams which he did not want to miss.

On the loss of Shs.28million he submitted that there was no evidence that Shs28million was missing. Further that if there was any loss at all it was attributable to loans which PW1 whom the Appellant described as his boss had paid out. As a result of his testimony before the Sebutinde Commission PW1 had rang him and reminded him that they were his bosses. PW1 bore a grudge against him for having testified against him in the Sebutinde Commission.

Mr. Byansi William, Principal State Attorney supported the conviction and on ground I he submitted that the Appellate Court was right to reject the Memorandum of Appeal as incompetent because it did not comply with ***S. 28 (4)*** of the Criminal Procedure Code Act. He submitted further that the Appellant was represented by Counsel who should have made his complaint more specific.

He further submitted that the trial Magistrate addressed all the ingredients of the offence of Embezzlement and came to the right conclusion. He submitted that there was no dispute about the Appellant's employment because from his own description of his role, the testimony of PW1 and the evidence of the charge and caution statement, there was no doubt that he was an employee of the Police Savings Association Ltd from which Shs.28m disappeared in his hands and according to Counsel, the Appellant paid the money to persons whose Force numbers were not tallying with those of the beneficiaries.

On recall of PW1 Counsel for the Appellant submitted that the prosecution had indicated that they intended to recall the witness and when he was recalled he

was cross examined by the defence and there was thus no miscarriage of justice.

The first issue is whether the first Appellate Court was correct to dismiss the appeal in a summary manner as it did. In our view the judge dismissed the appeal on sound authority from the case he cited. Where an Appellant instead of specifying the matters in which he or she faults the trial Court as required by Law goes into a generalization, as was done in this case, the Appellate Court is left with very little choice but to dismiss the appeal for non compliance with the Law. This is what was done in this case.

The second issue raised by Counsel for the Appellant touches on the admissibility of the evidence of PW1, who, after he had completed his testimony was later recalled. According to Counsel for the Appellant this is in contravention of ***Section 136 and 137 of the Evidence Act***. We do not find these sections relevant because they only provided for examination in chief, cross examination and re examination of witnesses and the order in which the examination is done. The relevant provision for recall of a witness is **Section 100 of the Magistrate' s Court Act** which specifically empowers a Court to call or recall a material witness if the evidence appears to be essential to the just decision of the case. The safeguard given is that the prosecutor or accused must be given a right to examine such a witness. In respect of PW1 the prosecution had indicated that they intended to recall the witness and when he was recalled he was cross examined on his testimony. In our view this was in compliance with the Law and the Appellant was not prejudiced by the recall because the witness was cross examined by his Counsel in accordance with the Law.

The other matter is in connection with the complaint that the ingredients of the offence of Embezzlement were not established because there was no

employer/employee relationship and once the Appellant was acquitted on the Count of Theft, which is an essential element of the offence of Embezzlement the offence of Embezzlement, could not be proved against him.

The case for the defence was closed on 07.03.2008. At the closure of the defence case Counsel for the Appellant prayed court to be allowed time to file written submissions which was granted. The case was adjourned to 23.03.2008 to allow Counsel file the submissions which were filed on 30.04.2008. The submissions set out the issues for determination and one of the issues raised was whether the accused was an employee of the government or public body or employee of a company. The second issue was whether the accused stole money being the property of his employer which he received for and on account of his employer, or by virtue of his office. The defence Counsel addressed the first issue as follows:

> ***"Regarding issue (a) <u>there is clearly no disagreement between the state and the accused and the defence shall not labour on it. It is admitted."</u> (underlined for emphasis).***

It was on the basis of the above concession by the defence that the trial Magistrate made a finding that

> ***"the issue of whether the accused was employee of the Association was not contested. The accused described himself as such. The question is therefore answered in the affirmative."***

The very appellant who conceded the issue is now raising it. To us, if he was a cashier in the Association as he describes himself and was in charge of the Portfolio when the money allegedly disappeared he is accountable to the Association for that money and that is the essence of the offence of

Embezzlement.

As to whether the Appellant stole the money in question, Mr. Rukundo's argument that since the Appellant was acquitted of the offence of theft which is an essential element of Embezzlement, he could not be found guilty of the offence, is a misconception. The trial Magistrate never made a finding that the Appellant was not guilty of the offence of theft. She simply dismissed the alternative Count after finding that the ingredients of the offence of Embezzlement had been proved. In the case of ***Mwambalafu Vs Republic (1966) EA. 459*** it was held that the proper course, in a case where the accused had been proved to be guilty on each of the two counts stated to be alternative is to convict and sentence one and make no finding on the other. It was stated as follows:-

> ***"The two counts were stated in the information to be in the alternative. Notwithstanding this the learned trial Judge convicted the Appellant on both counts, and sentenced him to concurrent terms of three and six year's imprisonment. The usual practice, in the case of alternative counts, is to convict one and to make no finding on the other. In R Vs Nassa Crinners Ltd (I), the respondent Company had been prosecuted on two alternative counts in a subordinate Court. Briggs, JA said (1955), 22 EACA at P. 436.***
>
> ***"These counts were properly treated as alternative. The learned Magistrate convicted on the first and sentenced the Company to fine of Shs.1000/=. He acquitted on the second. A more proper course would have been to make no finding on it.""***

Again, in ***Wachira Njaga Vs R (2)***, it was held in the majority judgment of the Court that:-

> ***"The recent English case of R. Vs Seymour (3) pointed out that where there are alternative counts and the conviction is recorded on one, the jury should not give a verdict on the other. Similarly we are persuaded that it is the correct practice for judges to follow in these territories, for it leaves open, where the alternative count charges a cognate and minor offence, for a Court of Appeal to substitute a verdict of guilty of that offence, a course which it could not adopt if a verdict of an acquittal had been recorded on the alternative count."***
>
> ***We have no doubt that the proper course, in a case where the accused had been proved to be guilty on each of the two counts stated to be alternative is to convict and sentence on one and to make no finding on the other""***

So the dismissal of the alternative count was not because the theft was not proved but because it was not necessary to make a finding on it. The trial Court had evaluated the evidence in relation to the offence of Embezzlement and found that all the ingredients of the offence which include theft had been established. The order of dismissal was inconsequential.

We shall briefly comment on the trial Court's finding that the offence of Embezzlement against the Appellant had been proved if only to set the record straight.

The trial Court correctly set out the elements that constitute the offence of Embezzlement. These are that the accused was an employee of the government

or public body or employee of a company and that he stole money which he received on account of his employer or received it by virtue of his office. As already observed the defence conceded, and rightly in our view, that the Appellant was a cashier in the Uganda Police Savings Association and it was by virtue of his being a cashier that he used to receive money for payment to the beneficiaries or members of the Association entitled to the same. Evidence was adduced that some of the proper beneficiaries did not receive their payments but instead persons whose Force Number did not tally received the payments. The appellant adduced evidence of Inspector of Police Tusiime Richard (DW2) and Okiror John (DW3) who was a records officer to prove that the Appellant did not have access to the files of the beneficiaries which may be correct. But the money did not disappear through payments to the beneficiaries whose records were properly documented but through payments to persons whose records were not known. The Appellant was accountable for all the money that came into his hands by virtue of his position as a cashier and he did not account for Shs28,000,000/= as established by the auditor's report. We cannot fault the trial Magistrate for her finding that the money was embezzled by the Appellant.

So, apart from the Appeal of the Appellant being incompetent for failure to comply with the provisions of the Law, we also find that had the appeal been competent, then the same would have no merit. Accordingly this appeal is dismissed with the result that the Appellant will serve the sentence of three years imposed by the trial Court.

Dated at Kampala this 25th day of March 2015.

Hon. Justice Remmy Kasule,
JUSTICE COURT OF APPEAL

Hon. Justice Eldad Mwangusya,
JUSTICE COURT OF APPEAL

Hon. Justice Faith Mwondha,
JUSTICE COURT OF APPEAL