

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Bossa, Kakuru & Egonda-Ntende, JJA]

CRIMINAL APPEAL NO. 152 OF 2012

[Arising from the High Court of Uganda [Anti-Corruption Division]

Criminal Session Case No. 30 of 2011]

GODFREY WALUBI

APPELLANT NO.1

KITENDA ZAKARI

APPELLANT NO.1

VERSUS

UGANDA

RESPONDENT

*[On appeal from the judgment of the High Court of Uganda,
(Bamugemereire, J.,) of 23 May 2012]*

JUDGMENT OF THE COURT

Introduction

1. The appellant No.1, Godfrey Walubi, was charged with 2 counts of causing financial loss, contrary to section 20(1) of the Anti Corruption Act, as count No.1 and No.2; one count of corruptly neglecting duty contrary to section 2(1) and 26 of the Anti Corruption Act, as count No.3.

The appellant No.1 jointly with appellant No.2 were charged with one count of conspiracy to defraud contrary to sections 309 of the Penal Code Act as count No.4 and one count of theft contrary to section 254(1) and 261 of of the Penal Code Act as count No.5. On the 23 December 2012 the High Court of Uganda convicted the appellant no.1 of counts 1, 2 and 4. The appellant No.2 was convicted of count no. 4 and 5.

2. The appellant no.1 was sentenced on counts 1 and 2 to six years imprisonment on each count. In respect of count 4 he was sentenced to 1 years' imprisonment. The appellant No.2 was sentenced to 1 years' imprisonment in respect of count No.4 and one and half years' imprisonment on count No.5. All sentences were to run concurrently.

3. The facts of this case are not substantially in dispute. It is the legal consequences that they attract that is really contested. The appellant No.2 operated a saving account with Orient Bank Ltd, Busoga Square branch Jinja. The appellant no.1 or some other bank official authorised the payment of UGX440,000,000.00 referred to in count 1 out of the account of appellant No.2 against uncleared effects to the appellant No.2. The appellant No.1 or some other bank official authorised the payment of a further sum of UGX444,000,000.00 referred to in count 2 against uncleared effects. The uncleared effects in the end were not honoured by the bank on which they were drawn and the appellant No.2's account with the complainant in this case, Orient Bank Ltd, was overdrawn. Orient Bank Ltd charged interest on the appellant No.2's account. As of the 2nd January 2011 the account was overdrawn to the tune of UGX890,298,476.00 inclusive of interest. Some money was paid into this account reducing the overdrawn amount to UGX517,652,881.00 as at 3

August 2011. During this period the bank had debited the account with interest and other bank charges slightly in excess of UGX30,000,000.00.

Appeal

4. Dissatisfied and aggrieved by the judgment of the trial court the appellants appealed to this court against conviction. The appellant No.1 set forth 4 grounds of appeal which we set out below.

‘1.The learned trial judge erred in law and fact when she ignored the bank’s refusal to honour the court’s order to provide me with the documents for my defence and in so violating my right to a fair hearing.

2. The learned trial judge erred in law and fact in failing to properly evaluate the evidence before her thus reaching a wrong conclusion.

3. The learned trial judge erred in law and fact in convicting me of Causing financial loss C/S 20 (1) of the ACA whereas she condemns and notes the persons who caused the actual loss on page 4 of the sentencing part of the judgment.

4. The learned trial judge erred in law and fact in convicting me of Causing Financial loss c/s 20 (1) of the ACA whereas she notes at page 2 and 3 of the sentencing part of the judgement that Bejal V Malae is remitting back part of the money he took.’

5. The appellant no.2 set forth the following 5 grounds of appeal.

‘1. The learned trial judge erred in law and fact when she convicted the appellant on insufficient evidence to prove

the ingredients of the offence of conspiracy to defraud and theft.

2. The learned trial judge erred in law and fact when she did not exhaustively consider and evaluate the evidence on record and eventually wrongly convicted the appellant.

3. The learned trial judge erred in law and fact when she convicted the appellant without paying due regard to the contradictions, both in prosecution exhibits and witnesses.

4. The learned trial judge erred in law and fact when she failed to give the defence a proposed instruction / never explained to the accused their rights on how to give their defence.

5. The learned trial judge erred in law and fact when she allowed witnesses to give evidence without taking oath and heavily relied on those witnesses to convict the appellant.’

Duty of a first appellate court

6. It is the duty of a first appellate court to review and re-evaluate the evidence before the trial court and reach its own conclusions, taking into account of course that the appellate court did not have the opportunity to hear and see the witnesses testify. See Rule 30(1) of the Court of Appeal Rules; Pandya vs R [1957] EA 336; Ruwala vs. Re [1957 EA 570; Bogere Moses vs Uganda Cr. App No. 1/97(SC); Okethi Okale vs Republic [1965] EA 555; Mbazira Siragi and Anor v Uganda Cr App No. 7/2004(SC). We shall do so accordingly.

Submissions of Counsel

7. Mr Asuman Nyonyintono appeared for the appellant No.1. Mr Francis Xavier Egwado appeared for the appellant No.2. Mr Maxmi Erizooba appeared for the state.

8. Mr Nyonyintono submitted that Orient Bank Ltd failed to produce documents that the court had by consent ordered to be made available to the defence and as a result the appellant no.1 was denied a fair trial contrary to Article 28 of the Constitution. In relation to ground of appeal No.2 Mr Nyonyintono submitted that the learned trial judge ascribed evidence to PW6 which evidence had not at all been adduced on record of trial. He stated that the learned trial judge claimed that PW6 had stated that the appellant had been ordered to close the PAPCO account and not to accept Papco cheques.

9. Mr Egwado submitted that though the appellant No.2 had served his sentence in full he still maintains his innocence, and appeals against conviction. He submitted that this court had a duty to re examine the evidence. With regard to ground of appeal No.1 he submitted that though the learned trial judge had set out the ingredients of the offence of theft correctly she reached the wrong conclusion in relation to the ingredient No.3. She misdirected herself as the appellant No.2 had a claim of right to the funds reflected on the cheques presented for payment [or rather collection]. The bank did not return the said cheques to the appellant for non-payment. In relation to count 4 for conspiracy Mr Nyonyintono submitted that there was no evidence to establish an agreement between the appellant No.2 and appellant No.1. The evidence of appellant No.1 was to the effect that he did not know the appellant No. 2 and could not have connived with him as alleged.

10. Mr Egwado chose to argue grounds 2 and 3 together. He submitted that the learned trial judge failed to exhaustively evaluate the evidence on record and eventually wrongly convicted the appellant No.2. There were contradictions in the testimony of the prosecution witnesses, PW6 and other witnesses in relation to codes under which payments were made. This contradiction ought to have ensured the trial court held that no theft or conspiracy had been committed.
11. Turning to ground no 4 Mr Egwado submitted that the learned trial judge, in contravention of section 73 of the Trial on Indictments Act had failed to explain to the appellant no. 2 his rights in relation to the defence of his case, especially as he was unrepresented at that point. His advocate had not turned up on that day. The failure to explain to the appellants had led to a miscarriage of justice.
12. In reply Mr Erizooba, for the state, opposed the appeal and supported the convictions. With regard to ground 1 of the appellant no.1's appeal he submitted that the appellant no.2's advocate had not raised with the trial judge the failure of Orient Bank Ltd to provide them with the documents that they had sought to be furnished with at the trial. He drew our attention to page 216 of the record where the trial judge told the defence to obtain the necessary documents before the start of the defence case. It was clear that this matter was not raised at the trial during the course of the defence case. He submitted that it was too late now to raise it for the first time.
13. Turning to ground 2 Mr Erizooba supported the trial judge's evaluation of evidence in relation to counts 1 and 2. He suggested that the first 3 ingredients of the offence were not really in dispute. He pointed to the

evidence of PW9 which confirmed that the cheques against which payments were made had not been honoured by the Bank of Baroda by reason of insufficient funds and the evidence of PW3 that Orient Bank Ltd had not recovered the funds paid out. This was sufficient to prove the last ingredient of the offence that Orient Bank Ltd had incurred a loss.

14. Turning to ground no.3 he submitted that even though the trial court found that the beneficiary of the scheme was not before the court this did not absolve the appellant no.1 from liability as he was responsible for overriding the controls in place to avoid such a loss. And with regard to the last ground of appeal it was immaterial that the money was being paid back. Mr Erizooba submitted that this court ought not to tamper with the findings of the trial court with regard to counts 1, 2 and 4 of the indictment.

15. With regard to the appellant No.2's appeal and in particular to ground 1 thereof, Mr Erizooba submitted that there was sufficient evidence for the trial judge to return the verdicts she did on counts 4 and 5. He supported the analysis of the law and the evidence by the trial judge which resulted in the conviction of the appellant No.2.

16. With regard to the last ground that the trial judge failed to comply with section 73 of the Trial on Indictments Act Mr Erizooba submitted that all along the appellant No.2 was represented by counsel and he chose to keep quiet in his defence, one of the options available to the appellant. No miscarriage of justice was occasioned to the appellant No.2. He prayed that the appeal of both appellants be dismissed.

Analysis

Counts 1 and 2

17. It is not in dispute that the actions of the appellant no.1 were not in accordance with the internal rules of the bank and in fact he disobeyed both standing instructions and directives from his superior officers to authorise the said payments. The question for consideration is not whether or not he acted correctly or not. The question is did Orient Bank Ltd incur a financial loss in the sums claimed? In order to answer this question it may be useful to have regard to the Financial Institutions Act and the regulations made thereunder and in particular S I No. 43 of 2005.

18. Loss is defined in the interpretation section of the S I No. 43 of 2005 as, **‘means a classification of a non-performing credit facility that meets the criteria stated in regulation 10.’**

19. Regulation 10 (9) states, in part, in relation to non-performing assets classified as **loss**, as follows,

‘(9) Criteria for Loss Classifications are as follows—

(a) subjective criteria which includes any of the following—

(i) credit facilities that are considered uncollectable or which may have some recovery value but it is not considered practicable nor desirable to defer write-off (even though partial recovery may be effected in the future);

(ii) an account classified as Doubtful with little or no improvement over the period it has been classified as such; and

(b) objective criteria which includes non-performing credit

facilities meeting the criteria specified in regulation 6, on which principal or interest remains unpaid or where credit line is exceeded or expired, for one year or more.’

20. Regulation 7 requires that a Commercial Bank reports to the Central Bank the non performing credit facilities on its portfolio and failure to do so attracts sanctions. Regulation 8 relates to overdrafts. This does not matter whether the overdraft complied with internal guidelines or did not as in the present case. It states,

‘8. Overdrafts

(1) Upon meeting the non-performing criteria under regulation 10, overdrafts and other credit facilities without a pre-established repayment schedule are to be converted to a reasonable amortization schedule consistent with the borrower’s financial condition.

(2) The conversion of overdrafts and other credit facilities without preestablished repayment schedule into term loans shall not change the classification category and the corresponding level of provisions.

(3) To facilitate review of overdraft accounts, a financial institution shall maintain an analysis sheet for each account showing monthly balances and a summary of movements indicating the total amount and number of deposits and withdrawals and accruals and repayments of interest charges.’

21. On the evidence before the trial court there was no indication that Orient Bank Ltd had complied with the foregoing reporting regulation or amortization of the overdrawn account as required under Regulation 8. PW3 stated that the overdrawn account, [appellant no.2’s account] was

being paid off without disclosing what had been paid off. She also stated that it was being charged interest. Clearly if it was not reported as a loss and due for write off Orient Bank Ltd did not regard it as a loss. It was not even classified as a non performing asset given that no report of such status was made to the Bank of Uganda.

22. The learned trial judge in making a finding that financial loss had been proved, stated,

‘The prosecution submitted that accused no.1 knew and had reason to believe that by authorising officers under him to pay forty four cheques without waiting for the four days clearance, he could cause financial loss. The prosecution also relied on the email exhibits P10 in which his supervisor ordered A1 to stop paying the cheques when there was no corresponding cash. The arguments for count 1 and count 2 can be made contemporaneously since these are twin actions in many ways. First when PW2 and PW6, received the cheques exhibits P19, 20 and 21) and attendant slips eh P5 and P14, there were received in bulk. The actions carried out for example the pay-in slips eh P3 (1-6 and P4 (1-5) were received in respect of not one cheque but in respect of three to four cheques each time. My finding in count no.1 is that the prosecution has proved beyond reasonable doubt that Orient Bank incurred loss when twenty two cheques marked Exh P19 (1-22) were paid into A2’s account when there was no money from their corresponding accounts. I also find that the same Bank continued to incur a loss when cheques exhibited as P20 and P21 were equally paid into A2’s account and money drawn out. I therefore find A1 guilty of the offence of causing financial loss in count no.1 and convict him accordingly. I also find A1 guilty of causing financial loss

in second count and convict him accordingly.’

23. We are unable to agree. We part company with the learned trial judge.

There is no evidence adduced to show that Orient Bank Ltd lost the amounts specified in counts 1 and 2. Those amounts have not been written off the bank's books of accounts as required by the Financial Regulations as a loss. Those amounts were not reported to Bank of Uganda as non-performing assets. At the same time Appellant No.2's account which was overdrawn has not been closed and interest thereon relegated to suspense account. Interest is being posted to it. The overdrawn amount is being paid though no exact figures were provided by the bank officials. There is simply no proof that the Orient Bank Ltd has incurred the financial loss alleged in counts 1 and 2.

24. The definition of loss in regulation 10(9) of SI 43 of 2005 provides an idea of what had to be proved to establish that Orient Bank Ltd did incur a financial loss of the sums alleged in counts 1 and 2. The sums alleged to be a financial loss were debited to A2's account and it became overdrawn. It attracted interest like all overdrawn accounts. There was no evidence adduced to establish that it was either uncollectable or it was a doubtful debt that had been non performing for the requisite period. The debt was not written off. Efforts of recovery are on-going and have yielded some success.

25. Financial loss is both a matter of law and fact. As a matter of law in so far as Orient Bank Ltd had to comply with regulation 7 of SI No. 43 of 2005 with regard to reporting to the Central Bank that A2's overdrawn account was now a loss and uncollectable. Secondly the exact loss

incurred by the bank has to be proved. It is not enough to assume as both the prosecution and the trial judge did that it is the authorising of payment against uncleared effects that proved the loss alleged. Authorising payment may be the causative fact that would eventually lead to actual loss. It is no proof of loss whatsoever. The actual loss itself would be on the bank's books of accounts and had to be proved. No evidence was called to establish these facts and prove this loss. It was simply assumed that the possible causative factors would lead to financial loss.

26. The potential loss was not only the sums paid out as set out in counts 1 and 2. It includes charges and interest that accumulated on the A2's account by reason of the overdrawn amounts. It is actually the total of all that would potentially be a loss if they were not paid by the account holder or some other person by arrangement of the account holder and the bank.

27. The actions of the appellant no.1 were unauthorised and to say the least reprehensible. This, however, is not sufficient to prove loss both at law and fact. Financial loss on a bank's books of accounts must be both reported and proved which was not done in this case. A2's account is still open and recovery is on-going. No loss has been established. It was simply presumed. The loss claimed in counts 1 and 2 has not been established on the evidence. In fact the Internal Auditor of Orient Bank Ltd referred to this matter as a potential loss. It is a potential loss on account of the possibility of non-recovery, a risk prevalent in every advance, authorised and non-authorised advances. Potential and actual loss are 2 different things. What the law criminalises is actual loss and

not potential loss. The evidence in this case does not meet the threshold of actual loss.

28. The burden of proof to prove each element of an offence lie on the prosecution throughout the trial and does not shift. No evidence was adduced to show the alleged loss in both counts No.1 and 2. What is on record are allegations in the indictment without more.

29. On a re-evaluation of the evidence adduced in this case, we are satisfied that the element of actual financial loss in counts 1 and 2 remained unproven by the prosecution. The conduct by the appellant no.1 may have been reprehensible. That is not what the offence of causing financial loss criminalises. Nor is it sufficient to prove financial loss at law and or in fact.

30. We allow the appeal by the appellant no.1 against conviction on counts 1 and 2, upholding ground 2 of the memorandum of appeal of the appellant No.1. In light of that finding it is unnecessary to consider grounds 3 and 4 of the said appeal.

Count No. 4: Conspiracy to Defraud

31. The appellants No.1 and No.2 were convicted of count 4. The particulars of the offence are that the appellants and another still at large between the months of December 2010 and January 2011 at Orient Bank, Busoga Square, Jinja District, conspired to defraud Orient Bank of shs.880,000,000.00 only.

32. The trial court dealt with this count in the following words.

‘Briefly stated, the ingredients of the offence of conspiracy to defraud are as follows: 1. Existence of two or more persons 2. Agreement to pursue an unlawfully purpose it does not matter if the purpose is criminal or amounts to a civil wrong

The defence argument on conspiracy was that A1 and A2 could not have been in agreement since they did not know each other. The defence further relied on R v Thomson 16 QB 832 where it was held that in an indictment of two people having conspired with an undisclosed person it was deemed unsafe to convict any of the two accused and therefore an acquittal was advised.

My finding is that to gain understanding on the jurisprudence of conspiracy Thomson (supra) must be read together with Scott v Commissioner of Police for the Metropolis 1973 All ER 1033 and R v Anderson 1985 All E R 961. The latter two cases reflect the jurisprudence of East African Courts.

The prosecution on the other hand relied on the case of Ongodia & others v Uganda 1967 EA 137 in which it was held that a person can be found guilty of conspiracy even he conspired with an unknown persons. I find that there was a ringed conspiracy in which A1 and A2 both conspired with Bijal, now at large, to defraud Orient Bank limited. I make the finding because there is undisputed evidence that A1 handled the Bijal account exclusively even when his bosses had warned him not to deal with this individual as shown in exhibits P7 to P12. He had also been warned to stop honouring PAPCO cheques signed by

Bijal yet he insolently ignored all admonishment. On the other hand A2 allowed Bijal to use his account no.11892925010102 to siphon money out of the bank. PW1 and PW6 stated that on many occasions, whenever A2 was in the Bank to withdraw money drawn from PAPCO cheques, the said Bijal was waiting in tow. Further, PW3 stated that Bijal started repaying some of the money using telegraphic transfers which came through A2's account. A2 literally walked into the conspiracy with his eyes open and has only himself to blame. I am convinced that the prosecution has proved beyond reasonable doubt that A1 and A2 conspired to defraud Orient Bank (U) Ltd. I find A1 and A2 guilty of the offence of Conspiracy c/s 309 of the PCA and convict each of A1 and A2 accordingly.'

33. Section 309 of the Penal Code Act states,

'Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, commits a misdemeanour and is liable to imprisonment for three years.'

34. The essential elements of this offence would appear to be three. Firstly an agreement between two or more persons. Secondly, by deceit or fraudulent means to, thirdly, defraud a particular person of any property.

35. It would appear to us that the trial court's analysis of this offence was erroneous and got the elements of the offence wrong. The elements of the offence are at least three and not two as determined by the trial

court. The court did not examine the evidence to establish whether or not there was an agreement between both appellants, **by deceit or any fraudulent means**, to defraud Orient Bank Ltd of the sum of Shs.880,000,000.00 as alleged in the indictment. The act or acts of deceit or the fraudulent means were not specified. Neither was the person or persons deceived.

36. What is evident from the facts of this case is that the appellant No.1 and some other officers of Orient Bank Ltd, authorised withdrawal of money from the appellant No.2's account, without corresponding credit, giving same day value to cheques that had been deposited on the appellant No.2's saving account, while they remained uncleared. No one was deceived in effecting this payment. It may have been against internal regulations of the bank resulting in an unauthorised overdraft to the appellant No.2 as his account became overdrawn. Nevertheless once overdrawn the Bank has treated this account as an overdrawn account, charging interest on it and continuing to collect or receive payments on the same. The account is still active to that extent. It has not been shut down as the subject or conduit of fraudulent actions.

37. On a fresh review of the evidence we find that there was insufficient evidence to support a conviction on this count. We set the conviction aside accordingly.

Count No.5 Theft

38. Both Appellants were charged with theft, contrary to sections 254 (1) and 261 of the Penal Code Acgt. The particulars of the offence are that the appellants with others still at large between the month of December 2010 and January 2011 at Orient Bank Busoga Square in Jinja

District, stole cash Ug. 880,000,000.00 the property of Orient Bank Ltd. Only the appellant No. 2 was convicted of this offence.

39. The trial court treated this matter, in part, as follows.

‘The act of theft was complete whenever A1 filled in a withdrawal slip (exhibit P14 1-6) and withdrew money from Orient Bank. The money did not belong to A2. Neither did it belong to the third party A2 might have handed it to. Theft of this money caused loss to the Bank. The prosecution has therefore proved beyond reasonable doubt that A2 stole money. I find A2 guilty of the offence of theft c/s 254(1) and 261 of the PCA and convict A2 accordingly. I however find A1 not guilty of the offence theft and acquit him of theft accordingly.’

40. The evidence in this case establishes that the appellant no.2 operated an account with Orient Bank Ltd. He used withdrawal slips provided by Orient Bank Ltd to withdraw money from his account. He had banked on it cheques that had not been cleared. The bank chose to pay against uncleared effects. The appellant No.2’s relationship with Orient Bank Ltd was that of customer and banker. The money paid to the appellant No.2 was debited to the appellant No.2’s account. This cannot constitute theft. It is a risk that a bank takes whenever it chooses to honour a bill of exchange by a customer whose account does not have sufficient funds to meet the withdrawal request. In effect the Bank, through its officers, grants the customer an overdraft pending the clearance of the cheques or repayment by the customer.

41. There is nothing criminal in this transaction. By presenting the withdrawal form to the bank the appellant No. 2 committed no offence. The bank could choose to honour or reject the same. The bank was aware of the state of the appellant No.2's account. Honouring the withdrawal form and accepting to pay the sums indicated on it was a normal civil transaction with legal consequences for either party. Theft was not one of those consequences. No one was deceived. The sums paid to the appellant No.2 were debited to his account and the bank is charging interest upon the same. In the bank's books of accounts this overdrawn account is reflected as an asset, yielding income. There is evidence that some of it has been paid back though the bank refused to disclose the exact amounts that have been paid back on that account as at the time of the trial. The account has not been closed.

42. On the facts of this case no criminal intent to permanently or otherwise deprive the bank of its money is established.

43. We allow ground 1 and 2 for the appellant no.2. We set aside the conviction of the appellant No.2 on counts 4 and 5 accordingly. In light of our findings above it is unnecessary to consider ground 3 as it is really subsumed in grounds 1 and 2. Ground 5 was not at all argued and we take it that it was abandoned. We shall now consider ground 4.

Ground No.4

44. Ground 4 takes issue with the trial judge for not giving the directions she ought to have done under section 73 of the Trial on Indictments Act. The record reveals that no such direction was given to the accused persons at the conclusion of the case for the prosecution. We shall set out the relevant portion of the trial record. Counsel for A1 stated,

‘We intend to call two witnesses, A1 and Ben Lewis the

CEO of Orient Bank Limited. This is how we shall defend; A will give unsworn evidence while A2 elects to remain silent.’

45. Prior to the foregoing statement of the counsel for Appellant No.1, there was no statement from the court advising the appellants of their rights at that stage of the trial.

46. Section 73 of the Trial On Indictments Act states,

‘73. Close of case for the prosecution.

1. When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is no sufficient evidence that the accused or any one of several accused committed the offence, shall, after hearing the advocates for the prosecution and for the defence, record a finding of not guilty.

2. When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is sufficient evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each accused person of his or her right—

(1) to give evidence on his or her own behalf;

(2) to make an unsworn statement;

(3) to call witnesses in his or her defence, and shall then ask the accused person, or his or her advocate, if it is intended to exercise any of the rights under paragraphs (a) or (b) and (c) of this subsection and shall record the answer. The court

shall then call on the accused person to enter on his or her defence, except where the accused person does not wish to exercise any of such rights, in which event the advocate for the prosecution may sum up the case for the prosecution.

47. The substance of foregoing provisions was considered by the Supreme Court in CPL. Mike Muwonge and others v Uganda Criminal Appeal of 16 of 1990 [unreported] in which it was contended on appeal that there was a mistrial in the High Court as the trial judge had failed to record that he had complied with the then section 71 of the Trial Indictments Decree (now section 73 of the Trial on Indictments Act). The Supreme Court found that though this had not been recorded the trial judge must have informed the accused persons and their counsel of their rights as he recorded their responses. The failure to record the directions necessary under section 73 was taken as curable based on the circumstances and facts of that case.

48. The duty of the trial court under section 73 is couched in mandatory terms requiring the trial court to make a finding of whether or not there is case to answer and informing the accused persons of their rights as set out therein. It is unfortunate that the trial judge ignored her statutory duties in this regard. Counsel for Appellant no.1 purported to hold a brief for counsel for appellant no.2 and gave the position that the appellant no.2 would take. The appellant no.2 opted to remain silent in his defence. Whether he had any witnesses or not was not indicated, and in fact did not call any witnesses. The complaint is not that he had witnesses he desired to call and did not call them because he was unaware of his rights. Nor has it been asserted by appellant No.2 that counsel who purported to speak for him had no such instructions. In spite of the failure

trial judge to give directions as she ought to have done no miscarriage of justice occurred in the circumstances of this case, that should lead to setting aside the trial in the court below and ordering a re-trial.

49. We would urge trial courts to comply with both the letter and spirit of the law in order to ensure that trials are conducted in accordance with the law in a fair and just manner with accused persons being fully informed of their rights.

Decision

50. All convictions against both appellants are set aside. The sentences imposed on both appellants are quashed. Unless the appellants are held on some other lawful charge they are liberated from custody immediately.

Dated at Kampala this 26th day of May 2016

Solomy Balungi Bossa

Justice of Appeal

Kenneth Kakuru

Justice of Appeal

Fredrick Egonda-Ntende

Justice of Appeal