

## THE REPUBLIC OF UGANDA

## IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

## CRIMINAL APPEAL NO. 29 OF 2017

SUMBU JEAN LOUIS ..... APPELLANT

VERSUS

10 UGANDA ..... RESPONDENT

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Stephen Musota, JA

Hon. Mr. Justice Christopher Madrama, JA

15 *(An appeal from the Judgment of the Hon. Lady Justice Margret Tibulya of the High Court at Kampala Anti-corruption Division dated 15<sup>th</sup> December 2016, in Criminal Session Case No. AC-SC-0023 of 2014)*

JUDGMENT OF THE COURT

20 This is an appeal from the Judgment of Hon. Lady Justice Margret Tibulya in High Court Criminal Case No AC-SC 0023 of 2014 at the Anti-corruption Division, Kampala dated 15<sup>th</sup> December 2016, in which the appellant was convicted of embezzlement and forgery and sentenced to five years and two years imprisonment respectively.

Being aggrieved by the conviction and sentence he appealed to this Court on the following grounds:-

- 25 1. *The learned Judge erred in law when she failed to properly evaluate the evidence on record with respect to the offences of embezzlement and thereby erroneously convicted the appellant.*



- 5        2. *The learned Judge erred in both law and fact when she relied on purported confessions to convict the appellant on the offences of embezzlement.*
- 10       3. *The learned Judge erred in law when she failed to properly evaluate the evidence on record with respect to the offences of forgery and thereby erroneously convicted the appellant.*
- 15       4. *The learned Judge erred in both law and fact when she tried and convicted the appellant for the offences of embezzlement and forgery without being seized with the requisite territorial jurisdiction.*
- 20       5. *The learned Judge erred in law when she failed to expressly pronounced herself on whether the sentence passed against the appellant will run either concurrently or consecutively.*

20    The brief background to this appeal is that:-

The appellant, a Congolese National, was from 2005 to 2013 employed as a program administrator with a non-government organisation (NGO) known as Malteser International which was operating in Uganda and Democratic Republic of Congo.

25    He was in charge of administration and financial accountability and directly in charge of the organisation's project expenses.

The NGO was reconstructing and rehabilitating hospitals, supplying equipments and training personnel in Uganda. The appellant was a signatory to the organisation's bank account at Stanbic Bank Arua branch. No money could be withdrawn from the accounts without his signature.

30    He was authorized to bank money on that account and withdraw it. He could also authorize cash payments from the organisation safe deposit.

He would then account for the money requisitioned and disbursed. The accountability took form of cash books, in soft copies, vouchers in hard copies, cash account protocol, bank statements and such other accounting documents.

35    In March 2013, it was found that the money in the organisation's Bank account was far less than was reflected in its books of accounts submitted by the appellant.

5 Eventually an audit was carried out and its report indicated that Ug. shs. 599,562,500/= and US\$ 370,523 was missing.

The appellant was eventually charged with embezzlement and forgery and convicted, hence this appeal.

10 This appeal first came up on 8<sup>th</sup> January 2018 before a Coram constituted as follows:- Hon. Owiny-Dollo DCJ, Balungi Bossa, Kenneth Kakuru JJA. The panel was later constituted as follows Kakuru, Musota and Madrama, JJA on 8<sup>th</sup> May 2018.

The parties applied and were granted leave to proceed by way of written submissions. It is on the basis of the written submission that this Judgment is made.

### **Representation**

15 *Mr. Bakore Sam* represented the appellant while *Josephine Namatovu* appeared for the respondent.

### **The appellant's case**

Counsel for the appellant in his written submissions sought to withdraw ground 5 of appeal and did not submit on it.

20 Counsel also raised an issue concerning the amended indictment, contending that the same had been not signed or endorsed by the Registrar of the Court. Further he contended that, the appellant had been charged and convicted under a none existent law.

25 Counsel also contended that High Court had no right to try the appellant, since he had been detained for eight days prior to his trial beyond the 48 hours stipulated in the Constitution.

Counsel submitted further that, the appellant never forged a cheque to withdraw any money and did not withdraw money without authority.

30 Further that the trial Judge put unjustifiable weight on the appellants charge and caution statement, which did not amount to an admission of the offence.

Counsel submitted that Court ought to have found the appellant's defence credible, because he had been able to show that, the money alleged to have been lost was used to finance the complainant's operations in Democratic Republic of Congo.

  
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5 Counsel contended further that the trial Judge failed to quantify the total money lost by the complainant and the evidence adduced fell short of proving that the appellant had embezzled the amounts set out in the indictment.

10 Counsel also faulted the learned trial Judge for having placed undue emphasis and weight on the complainant's audit reports, which were largely based on hearsay, and therefore, the conviction was based not on fact but assumption.

Counsel contended that the evidence adduced at the trial failed to prove that the appellant had stolen the money in question, but could only have shown that the money was properly withdrawn from the Bank by the appellant and put to unauthorized use.

15 In respect of ground 3 Counsel submitted that the ingredients of forgery were not proved, as there was no evidence that the appellant had forged any document with intent to defraud. Counsel contended that, the prosecution had failed to link the forged bank statements to the appellants.

20 In respect of ground 4 Counsel submitted that, the learned trial Judge had no jurisdiction to try the appellant for an offence committed outside the boundaries of Uganda by a foreign national. He contended that the forged bank statements originated from D.R Congo, where they were sealed and sent to Nairobi Kenya, accordingly the High Court of Uganda had no jurisdiction over this matter.

He asked Court to allow the appeal quash the conviction set aside the sentences.

### 25 **The respondent's reply**

Ms. Josephine Namatovu learned Counsel for the respondent in her written submission objected to the appellant's raising of issues that are not set out in the memorandum of appeal.

30 Without prejudice to the above objection she submitted that, Section 227(2) of the Trial of Indictment Act does not specify the format of the indictment and there is no obligation for the indictment to be signed by the Registrar of the Court.

35 In reply to the appellant's submission that, Section 19(i) and (iii) on which he was tried were non-existent, Counsel referred us to Anti-corruption Act itself which she included in her list of authorities as confirmation that indeed that law exists. She asked us to disregard or dismiss the above issues.



5 In respect of grounds 1 and 2 of appeal which were argued together, the respondent replied as follows:-

It is not in issue that the appellant at all material times was an employee of the complainant Malteser International where he held a position as Senior Finance Manager.

10 Evidence of PW1, PW2 PW3, PW4 and PW5 together proved that the complainant maintained two Bank accounts with Stanbic Bank Arua Branch, one in Uganda shillings, the other in United States dollars and had a credit balance of Usd 18,294.08 and Ushs. Account had a balance less than what was reflected in the books of accounts prepared by the appellant.

15 This money was insufficient to cover the project cash requirements. The appellant was tasked by PW2 to explain the loss of the money. In response the appellant by an e-mail dated 21<sup>st</sup> March, 2013 to his superiors explained that he had used the complainant's money to solve his personal problem and would repay it.

20 He later recorded a statement at the Police admitting having taken and used the money without authority and promising to pay it back. The money he under took to repay is USD\$ 242,872, Ushs. 269,717,350/= . This evidence was never challenged at the trial. Bank statements adduced in Court by bank employees in respect of the complainant's two accounts and the report tendered in Court by the auditors of the complainant company confirmed that a total of USD\$ 370,523 and Ushs.  
25 599,562,500/= was lost from the said bank accounts.

It was also established by the audit reports that the funds lost had been falsely accounted for by the appellant using false bank statements, cash books and bank books which reflected higher amounts than the actual funds available. The evidence of the audit report revealed that the appellant had stolen more money than he had  
30 admitted in his charge and caution statement.

In reply to the appellant's submissions that the cash books were never produced in Court to show how the money was lost, Counsel submitted that cash book accountability was part of the documents presented in soft form on 14 compact Discs (CDs) that were admitted in evidence as PEX. 17. The e-cash book had been  
35 prepared in an excel file and forwarded to the appellant for corrections. Further that the e-cash books were relied upon by Deloittee an audit firm during the audit exercise and were attached to the audit report.





5 Counsel submitted that, the appellant had been availed all the above information and it was not true that the respondent had not complied with pre-trial disclosure process as contended by Counsel for the appellant in their submissions.

10 In reply to the submission of the appellant's Counsel that there was no proof that the appellant is the one who stole money. Counsel submitted, that, the evidence was adduced to show that the money lost had been withdrawn from the complainant's bank accounts by the appellant, who was a signatory to the accounts and could access the money singly. The money lost Counsel submitted was for use in Uganda and the Judge rightly rejected the defence evidence that, it had been used in Democratic Republic of Congo or the appellant had been exonerated by the  
15 authorities in that Country.

Counsel went on to submit that, evidence was adduced by the prosecution to satisfactorily prove that the appellant had access to it by virtue of his employment and office.

20 In reply to the appellant's submission that the offence of forgery had not been proved against him, it was submitted for the respondent that it was the appellant who had scanned and sent the forged bank statements to the complainant's offices in Nairobi. He was the source of the forged documents. They were submitted as part of his accountability. He had received the genuine bank statements but choose to submit the forged ones, to conceal the theft. Counsel asked this Court to uphold the  
25 trial Judge's finding on this issue.

30 In reply to the submission of the appellant that the trial Court lacked territorial jurisdiction to try the appellant, it was submitted that the evidence of Stanbic Bank Uganda employees proved that the stolen money had been withdrawn by the appellant from its Arua Branch. This was supported by the evidence of waste cheques and bank statements. She asked Court to reject this argument.

Further Counsel contended that under Section 5 of the Penal Code Act Courts in Uganda have jurisdiction to try offences which are wholly or partially committed in Uganda. She asked Court to reject the appellant's submission and to uphold the findings of the learned trial Judge.

35 Counsel asked Court to dismiss the appeal and confirm the conviction.



5 **Resolution of issues**

We have carefully read the submissions of both Counsel. We have also read the Court record and the authorities cited and submitted to us.

We are alive to the duty of this Court as a first appellate Court to re-appraise the evidence adduced at the trial and to make our own inferences on all issues of law and fact. See: *Rule 30 (1)* of the Rules of this Court and *Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997, Bogere Moses vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997.*

We shall proceed to do so.

The background to this appeal has already been set out earlier in this Judgement.

15 The appellant raised two issues in his submissions which are not contained in the grounds of appeal, namely that the indictment was not signed by the High Court Registrar and that the appellant was tried under a non-existent law.

Rule 102 of the Rules of this Court stipulates that:-

20 *'102. Arguments at hearing.*

*At the hearing of an appeal in the court—*

25 *(a) no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these Rules;*

30 *(b) a respondent shall not, without the leave of the court, raise any objection to the competence of the appeal which might have been raised by application under rule 82 of these Rules;*

35 *(c) the court shall not allow an appeal or cross-appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal,*



5            *without affording the respondent, or any person who in relation to that ground  
should have been made a  
respondent, or the appellant, as the case may be, an opportunity of being heard  
on that ground; and*

10           *(d) the arguments contained in any statement lodged under rule 98 of these  
Rules shall receive the same consideration as if they had been advanced orally  
at the hearing.'*

15           The above rule precludes the appellant from raising the issues that he did which are  
not contained in the memorandum of appeal.

20           We are however alive to the fact that in certain circumstances the Court may on its  
own motion or where a matter is raised by Counsel entertain it if such a matter is  
purely a question of law and concerns on illegality or unconstitutionality arising  
from the proceedings. See: *Makula International vs His Eminence Cardinal Nsubuga &  
Another, Supreme Court Civil Appeal No. 4 of 1981 and Rwabugande Moses Vs Uganda,  
Supreme Court Criminal Appeal No. 25 of 2014.*

25           In this case the signing or lack of signature on an indictment is first and foremost a  
question of evidence. Therefore it is a matter of mixed law and fact, which could  
only be determined by proving the facts first then applying the law. Since the issue  
as to whether the indictment was signed by the registrar or not had been  
determined, it could not be raised at this late stage.

              This issue was accentuated in *Ms Fang Min vs Belex Tours and Travel Limited SCCA  
No. 06 of 2013*, the Supreme Court held that:-

30           *"... on appeal, matters that were not raised and decided on in the trial court  
cannot be brought up as fresh matters. The Court would be wrong to base its  
decision on such matters that were not raised as issues and determined by the  
trial Court."*

              In *Teddy SseeziCheye vs Uganda, Supreme Court Criminal Appeal No. 32 of 2010*,  
Court held that:-

35           *'We are of the considered opinion that the arguments by appellant's counsel  
about what he appears to refer to as a defective indictment on the first count  
are technical and have not been shown to have occasioned any injustice to the  
appellant.'*





5 The second issue related to the existence or none existence of the law upon which the appellant was tried. The appellant was indicted of the offences mentioned above on 20<sup>th</sup> January 2015. At that time the Anti-corruption Act was in force and the sections under which he was indicted were part of that law. We find no basis for this ground and we reject it.

10 The contention by the appellant that he was not availed with all the necessary documentation to prepare his defence, is unsustainable and there is no evidence that, he even applied for any documents from the prosecution which were not availed to him and which were in their possession.

15 There was an attempt by the appellant to amend the memorandum of appeal. The amendment was filed on 10<sup>th</sup> October 2017. However the appellant neither sought nor was granted leave to do so. In this regard Rule 67 of Rule of this Court provides that:-

*'67. Supplementary memorandum.*

20 (1) *The appellant may, at any time, with the leave of the court, lodge a supplementary memorandum of appeal.*

25 (2) *An advocate who has been assigned by the Deputy Chief Justice or the presiding judge to represent an appellant may, within fourteen days after the date when he or she is notified of his or her assignment, and without requiring the leave of the court, lodge a memorandum of appeal on behalf of the appellant as supplementary to or in substitution for any memorandum which the appellant may have lodged.*

30 (3) *Any person lodging a supplementary memorandum under this rule shall cause a copy of it to be served on the respondent.'*

35 Clearly this Rule was not been complied with. We shall therefore proceed to determine this appeal on the basis of the memorandum of appeal which was filed on 9<sup>th</sup> February 2017 the contents of which have been reproduced earlier in this Judgment. We note that the submissions of both Counsel were based on this memorandum of appeal.

40 We shall first dispose of ground 4 which challenges the jurisdiction of the trial Court. The learned trial Judge found that the money alleged to have been stolen, was withdrawn by the appellant from the two accounts belonging to the complainant

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5 held at Stanbic Bank Arua, in Uganda. The evidence that was contained in waste cheques confirmed the above. The accountability made by the appellant which was found to have contained forged bank statement was done in Uganda.

We find that the trial Court had jurisdiction to try the appellant as indicted and we dismiss this ground.

10 We find that grounds 1 and 3 are too general and ambiguous. They do not specify the complaint against the decision of the trial Judge. Both offend the provisions of Rule 66 (2) of the Rules of this Court which provides as follows:-

15 *'(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided.'*

20 This rule is mandatory and not merely regulatory. It is intended to give an opportunity to both Court and the respondent to address the exact issues complained of. The two grounds of appeal as they are set out are just a fishing expedition hoping that somehow through re-evaluation this Court may on its own find some fault with the decision of the trial Judge. We find both grounds 1 and 3 offend Rule 66 of the Rules of this Court and we strike them out.

25 Be that as it may, we shall proceed to re-evaluate the evidence as a whole and come to our own conclusion in the process of resolving ground 2.

30 At all material times the appellant was employed by the complainant NGO, as an administrator. He was a signatory to the organisation's two bank accounts held at Stanbic Bank Uganda Ltd Arua branch. He was a signatory together with others, but could singly withdraw money from both accounts. In *Teddy Sseezi Cheye vs Uganda*, (Supra), Court found as follows:-

35 *'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*

5            *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.'*

10        As the organisation's Financial Manager his duties included preparing and making regular financial reports to his superiors who sat at the originations head office in Nairobi. He was in charge of preparing the books of accounts, receiving money and disbursing it in accordance with instructions of his superior.

15        This is the evidence of Dr. Kinzel Bach PW1. It is undisputed. Proof that the appellant was signatory to company's accounts was tendered in Court by PW1 in form of letter to the Bank from the complainant.

The appellant and PW3 Ayale could withdraw money from the Bank, record it and receipt it and keep in the safe for official use.

20        In 2013 when PW3 Ayale went to withdraw money from the Bank, the funds were insufficient. The office accountability documents submitted by the appellant to his superiors indicated that there was more money on each of the accounts to cover the cheques that had been drawn. The inquiry then begun. The appellant faced with the above facts was quick to admit fault. In a hand written letter, written in French and translated into English.(Exhibit PEX5) he stated as follows:-

25            *'Act of undertaking*

*I, the undersigned, Jean-Louis SUMBU, projects Administrator of Malteser International hereby acknowledge that I owe the organization the following sums of money.*

*-242,872 US Dollars*

30            *-269,717,350 Uganda shillings*

*That I was coerced to use without due authorization from my supervisors*

*I undertake to settle it or to refund it, in installments, with the first half being paid between now and 30<sup>th</sup> June 2013 and shall clear the remaining balance between now and 30<sup>th</sup> September 2013.*

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5                    *As security, I suggest to submit to the organization the land titles of my plot of land located at Ave Mobuto No. 10 Ariwara as well as the receipt of purchase of land in Busabala, Kampala.*

*Done at Kampala on 23<sup>rd</sup> March 2013*

*Signature – Jean Louis SUMBU*

10                    *Stamp of Malteser International Regional Office and Signature.'*

The trial Judge found that the appellant admitted to having stolen the money on four occasions.

15                    He admitted the theft to PW2 in the letter reproduced alone, reported the same in the presence of PW1 and PW2, then put it in writing while at the Police station in a charge and caution statement and lastly he admitted it during cross examination.

Even if admission and the charge and caution statements had been repudiated and or retracted, the Court would still have been at liberty to convict on that basis . See:- *Tuwamoi Vs Uganda [1967] EA 84*

20                    *'(ii) a trial court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated and must be fully satisfied that in all the circumstances of the case that the confession is true'*

The learned trial Judge did find evidence a part from the confession that was sufficient to sustain all the convictions.

25                    This evidence was in form of waste cheques submitted by Bank official in Court showing the amounts of money withdrawn by the appellant which money he had not indicated in his accountably. Further evidence was produced by them in form of genuine bank statements by bank officials in respect of the complainant organisation's Bank accounts. The contents of those statements were at variance with those the appellant had sent to his superiors in Nairobi attempting to account  
30                    for the funds he had stolen. They were produced in Court by his employers. It was upon being confronted with this evidence that he admitted to the theft.

35                    We do not accept the appellant's contention in ground 2 that the Judge based the convictions on only the confessions made by the respondent. The trial Judge went much further to analyse the evidence adduced by all the witnesses both for the prosecution and the defence.

5 She found that indeed the Bank statements submitted by the appellant to account  
for the lost money were forgeries. He relied on the evidence of PW6 Otim Ochera the  
Stanbic Bank Manager Arua, who disowned the forged statements and stated why in  
detail. Further, he produced the genuine ones and showed that they reflected the  
10 true entitles when contrasted with deposits and withdraws as indicated on waste  
cheques.

The waste cheque are directly linked to the appellant in the same way as the false  
bank statements are linked to him which were all exhibited in Court. We have found  
no reason to fault the trial Judge in her findings of fact in this regard.

15 As to the exact amount stolen, in addition to the admission and confession made by  
the appellant, the internal and external auditor of the complainant were able to  
ascertain from the company's books of accounts, the bank statements and interview  
the exact amount lost and attributed to the appellant. They were able to link the loss  
to the appellant, through the false accounting he presented to his superiors through  
the use of forged bank statements and falsified cash Court protocols. These were all  
20 exhibited in Court and remain unchallenged. This evidence was produced by PW5  
Jacob Clemence.

The evidence adduced was that the appellant had falsified cash-count protocols,  
cash borrowed Bank statements in order to hide the loss of US\$379,523 and  
Ushs. 399,563,500/= embezzled from the Bank Account. Further that he stole  
25 Ushs. 200,000,000/= in Cash making a total of Ushs. 599,562, 500/= which is the  
amount that appears on the indictment.

PW14, Ralph Holl in his evidence testified that he examined the internal auditor's  
report and as statutory auditor made his own recalculations. He filed a report which  
also included the US\$ 379,523 equivalent to Ushs. 599,562,500/= that had been lost  
30 by the complainant and embezzled by the appellant.

The appellant denied any wrong doing. He attributed the loss to PW3. He denied the  
knowledge of the forged bank statements and pointed a finger at PW2 as the  
possible culprit.

35 He admitted having written an undertaking to repay the money but contended that,  
the same did not extend to an admission to theft or embezzlement. He brought to  
Court a witness DW2 who testified that, the money must have been lost by the Bank  
and not the appellant as evidenced by a Civil Suit brought by the complainant



5 against the Bank at the Commercial Court Kampala, seeking to record the same money.

DW3 Magistrate DRC testified as a defence witness. He stated that he conducted an investigation and found that the complainant had not lost any money to its account by European Union and there were no funds embezzled from the complainant.

10 The defence evidence pales in front of the detailed documentary and oral evidence adduced by the prosecution.

We find that the learned trial Judge meticulously evaluated all the evidence adduced and came to the correct conclusion that the appellant had embezzled the money set out in the indictment in doing so he had forged documents and presented false  
15 accounts.

We also find that, there was sufficient direct and circumstantial evidence to prove that the appellant is the only one who could have forged and presented the false bank statements and other books of accounts to his employer. Even if he had not been the very person who had physically made the false statements, there is no  
20 doubt that he is the one who master minded the forgeries, presented the forged documents and falsified the reports. He would be guilty of the offence of forgery on the doctrine of common intention.

We find no reason to fault the trial Judge on her findings of fact. We also find that she applied the law correctly to the facts before her.

25 We therefore find no merit whatsoever in this appeal which is hereby dismissed.

The appellant's conviction is upheld and the sentences confirmed.

The appellant's bail hereby lapses he should be arrested and detained to serve the sentence set down by the trial Court.

30 The complainant is at liberty to recover the lost money by execution through the civil Court process.

It is so ordered.

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5 Dated at Kampala this 11 day of March 2019.


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.....  
**Kenneth Kakuru**  
**JUSTICE OF APPEAL**

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.....  
**Stephen Musota**  
**JUSTICE OF APPEAL**

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**Christopher Madrama**  
**JUSTICE OF APPEAL**

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I write that the appellant is sick & faint frail.  
I order that he be placed in the hands of  
Punsa medical officers, & if so determined be  
given immediate medical attention. He should be  
The Registrar of this court is directed  
prepare the record of appeal and await  
it to the appellant with delay in  
The court that he desires to attend  
this decision



11/3/2019