THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Hellen Obura; Stephen Musota; Percy Night Tuhaise, JJA

Criminal Appeal No. 69 of 2015

Arising From Criminal Session Case No. 22/2014

Uganda .....Appellant

VERSUS

1. Kisembo Moses Bahemuka
2. Kocho Mark ::::::::::::::::::::::::::::::::::Respondents
3. Ilukol Lomenen

[Appeal arising from the judgment/orders of the Anti-Corruption Court of Uganda at Kololo in Criminal Session Case No. 22/2014, before the Hon. Justice Lawrence Gidudu, dated 2nd March 2015]

JUDGMENT OF COURT

This is an appeal against the judgment and orders delivered on the 2nd March, 2015 where the trial Judge acquitted the three respondents of the offences of causing financial loss, neglect of duty and abuse of office. They were alleged to have committed the offences while they were employees of Nakapiripirit District Local Government (NDLG). In the same trial, Ms. Ogobi Lillian, the fourth accused person (A4) who is not part of this appeal, was convicted of embezzlement and abuse of office, and acquitted on conflict of interest.

Background to the appeal

In the financial year 2010/2011, Nakapiripirt District Local Government (NDLG) received funding from World Bank and the Government of

Uganda to be given to the communities, as Community Driven Development (CDD) funds/grants.

Mr. Kisembo Moses, the 1st respondent, who was then Chief Administrative Officer (CAO) of the said district, by a letter dated 5th May, 2010 (exhibit **P9**) tasked Ms. Ogobi Lillian, then Commercial Officer (A4) to verify existing viable banks or microfinance groups in the sub-counties of Namalu, Kakomongole, Nabilatuk, Loregae, Lolachat, Lorengedwat, Maruita and Nakapiripirt Town Council. It was a requirement under the CDD guidelines that CDD funds be disbursed through a financial intermediary.

A4 recommended Nakapiripirt Teachers SACCO (Savings & Credit Cooperative Society) as the financial intermediary. The groups were then required to open membership accounts with the SACCO before accessing the funds. In the meantime a Memorandum of Understanding (MOU) was drawn to manage the disbursement process with the SACCO. The sub-counties and the Town Council were required to transfer the funds to the SACCO which would then pay the various groups.

At the end of the disbursement, only Kamongole subcounty and Nakapiripirit Town Council groups had accessed the funds under the arrangement. The other six sub-counties did not get their money totalling Uganda shillings 88,480,000/= (eighty eight million four hundred and eighty thousand).

The matter came to light when A4 reported that she had been robbed of Uganda shillings 50,000,000/= (fifty million) from Mbale where she had withdrawn the money to deliver to the SACCO. It is then that it transpired that A4 was the sole signatory to the SACCO Bank Account. Investigations revealed that out of Uganda shillings 115,000,000/= (one hundred and fifteen million) transferred to the SACCO, a total of Uganda shillings 88,480,000/= (eighty eight million four hundred and eighty thousand) was unaccounted for. The four accused persons were arrested and charged.

The trial court acquitted A1, A2 and A3 (respondents in this appeal) of all the offences. It convicted A4 of embezzlement which she had been

singularly indicted with, and abuse of office. It acquitted her on conflict of interest. The appellant appealed against the acquittal of A1, A2 and A3.

The appellant's memorandum of appeal raised 4 grounds of appeal namely:-

1. That the learned trial Judge erred in law and fact when he held that the above offences could not be proved beyond reasonable doubt, in the absence of a witness presented from the ministry of local government responsible for the supervision of the respondents.
2. The learned trial Judge erred in law and fact when he justified the action of the respondent compelling the beneficiaries of Community Driven Development (CDD) funds to commit themselves to Nakapiripirit Teachers Savings & Credit Cooperative Society (SACCO) as opposed to other saving institutions in the District.
3. The learned trial Judge erred in law and fact when he held that it was not within the mandate of the respondents to ascertain and know the financial and legal status of Nakapiripirit Teachers Savings & Credit Cooperative Society (SACCO), before authorizing and approving remittance of CDD funds to the said SACCO.
4. The learned trial Judge erred in law and fact when he did not exhaustively consider and evaluate the evidence on record and eventually wrongly acquitted the respondents.

Representation

The appellant was represented by Mr. Rogers Kinobe, a Senior Inspectorate Officer. The respondents were represented by Ms. Nyaketcho Racheal.

The appellant's submissions on ground 1

The appellant's counsel faulted the trial Judge's observations and conclusions that all witnesses from Nakapiripirit who testified were subordinate to the accused; that none of them was in a position to know the limits or powers of the accused; that the evidence of Ministry officials responsible for CDD funds or the Permanent Secretary in the Ministry of Local Government would have been essential; and that the sub-county

chiefs and CDOs paraded in court were not in a position to support the charges of causing financial loss since they operate below the accused persons in the CDD funds management chain.

He also faulted the trial Judge's observations on count 2 that the prosecution did not adduce any evidence of the supervisor of particularly A1 to tell court what duty A1 neglected to perform under the CDD guidelines. He also submitted that the trial Judge's conclusions on the investigating officer (PW9) regarding his knowledge of the duties of a CAO was misconceived.

The appellant's counsel further faulted the learned trial Judge for his observations while acquitting the accused persons of abuse of office in count 3, which observations were that no employer of the accused testified to say the Ministry was prejudiced when the accused did what they did, and that there being no employer prejudiced, the charges in count 3 collapse like the others in counts 1 and 2.

He submitted that the said trial Judge's observations and conclusions were erroneous because the respondents did not deny their duties relating to the management of CDD funds, as District Executive Officers and Head Finances. He contended that the respondents accepted every action and justified them as correct. He maintained that these actions included transferring CDD funds to the sub counties and directing the sub counties to sign Memorandums of Understanding, which eventually compelled them to further transfer their CDD funds back to Nakapiripirit Teachers SACCO chosen by the respondents.

Counsel argued that there was no need to summon the respondents' supervisors as witnesses, since their duties relating to safeguarding and management of public finances are recognised and provided for under the various laws and the CCD manual (exhibit **P26**). He also argued that, in fact, regulation 9 of the Local Government (Financial and Accounting) Regulations, 2007 (LGFAR 2007) declares that the mandate of the 1st and 3rd respondents as Chief Administrative Officer (CAO) and Deputy CAO respectively, is to ensure that financial procedures, regulations, accounting manual and instructions issued are followed. Further, that they are

mandated to ensure that public monies, property and resources for which they were responsible as accounting officers, are properly managed and safeguarded. He submitted that the said responsibilities required the respondents to know details of Nakapiripirit Teachers SACCO, like the managers, signatories to the account, the financial status, the years of existence, as well as all their credit worth, before committing public funds to the scheme.

He argued that similarly, regulation 11 of the LGFAR 2007 declares that the 2nd respondent is the head of finance, whereby he is supposed to manage the financial affairs of the council prudently, efficiently and effectively; and to ensure compliance with the regulations, the accounting manual and all instruction issued by the Minister among others.

Counsel submitted that the respondent admitted being in possession and knowing the contents of exhibit **P26** to the extent that once the funds were further transferred to the lower local government/sub-counties, it was the duty of the community development officers (CDOs) and the sub-county chiefs at that lower level to train the groups, advance funds through banks or micro finance deposit taking institutions (MDIs) of their choice, and supervise implementations of the projects.

Counsel submitted that under section 5 of CDD Manual, the funds from the ministry are transferred directly to the district then the sub-county for distribution through the opened bank accounts to the groups in the community. He contended that the 1st respondent also acknowledged that groups under the CDD funds were meant to open bank accounts either in the banks or MDI. He argued that the respondents knew that their duties to have the funds reach sub counties were well exercised at the district level, and in this case, the CDD funds had already reached the sub county level only awaiting remittance to the beneficiaries and accountability after that, and the project committees were already trained by PW1. Counsel argued that there was no justification to compel the sub-county leaders to sign a Memorandum of Understanding (MOU) with a SACCO whose details were unknown to them; and that proof of this did not need the employers of the respondents.

Counsel submitted that the directive to transfer the money received by the sub-counties back to a teachers' SACCO of their choice, was syndicate corruption because it meant the groups would account to the SACCO advancing them funds and not the sub county, contrary to the CDD manual and the LGFAR 2007 requirements. He argued that the respondent had no role to play the moment the funds reached the sub counties. He contended that this was further confirmed by the 2nd respondent who clearly stated that his involvement in the CDD is minimal, that is, that he just funds it, and his role stops when he sends funds to the sub counties and town council. He then waits for accountabilities from them, and the sub-county chiefs and town clerks are the accounting officers.

Counsel faulted the trial Judge for his conclusion that since there was no evidence from the accused persons' employer regarding their duties under the CDD guidelines or that they were prejudiced, the offence was not proved. He submitted that the offences of causing financial loss, neglect of duty and abuse of office did not require evidence from the employer to confirm the facts and allude to prejudice. He contended that the beneficiaries who missed the funds when the respondents caused the fund transfers to a fraudulent SACCO, were the right and proper persons to confirm to court. He argued that there was no need to bring witnesses from the ministry when the respondents' roles were provided for under the relevant laws, regulations and the CDD manual. He cited **Hudson Jackson Andua & Another V Uganda SCCA No. 17 of 2016** where the Supreme Court observed that prejudicial means something harmful or detrimental.

He prayed this Court to uphold ground 1 of the appeal.

The respondent's submissions on ground 1

The respondents' counsel submitted that the respondents were acquitted based on the appellant's failure to adduce evidence to support the offences brought against them. She contended that the trial Judge rightly analyzed the evidence adduced in court by the prosecution and found that it was largely an opinion and/or evidence adduced from the bar.

The respondents' counsel submitted that there are 3 counts that were supposed to be proved by the appellant before court. She contended that the grounds of appeal should have been in tandem with any of the said counts, but the appellant's submissions were however a fishing expedition, laying down a ground, arguing about it without exactly telling how his argument supports the ingredients of the offence with which the accused were charged.

She submitted on count 1 that the trial Judge rightly held that the particulars in count 1 tell a naked lie that the accused transferred money from the district account to the SACCO, yet money to the SACCO was not transferred directly from the district, but was through various sub-county and town council accounts contained in exhibit **P20**. She pointed out that the trial Judge observed that technically speaking, the particulars in count I are contradicted by the evidence adduced by the prosecution. She argued that in this case, the evidence was at variance with the particulars and the accused were not guilty on the indictment in count 1.

Counsel submitted that the SACCO received eight transfers from seven sub counties and one town council which operated eight different accounts, but it did not receive any money directly from account number 0140044602302 as indicated in count 1. According to the respondent's counsel, the learned trial Judge noted that the same error was repeated in count 3, and therefore counts 1 and 3 failed right from the indictment. She contended that, as a result, all the arguments on appeal are baseless as they are hanging in the air without any indictment to which they are attached.

The respondent's counsel contended that the appellant's argument that the CDD guidelines were not followed or that the upper and lower local government should not have signed a Memorandum of Understanding with the SACCO is meant to fault the trial Judge for not taking the unsupported and uncorroborated testimony of PW9 (the investigating officer) who duly failed to explain the flow of CDD funds and attach due responsibility correctly.

She submitted that PW9 never served in the Ministry of Local Government in Uganda before to be able to appreciate the functional roles of the

respondents. According to Counsel, PW9 failed to realize that the sub-counties and town councils were bodies autonomous from the District Local Government. He did not understand the entire CDD guidelines and had limited knowledge on the roles and responsibilities of A1, A2 and A3 in the management of CDD funds, and so, he misled the prosecution to portray A1, A2 and A3 as incompetent in that they did not fulfil the legal requirements set by the LGFAR 2007 during the management of the lost CDD funds.

The respondent's counsel submitted that the trial Judge rightly observed in his judgment that PW9 attempted to fault the accused but that his evidence was based more on his opinion because functionally he was not positioned to know how CDD funds are operationalized. Further, that indeed, he tendered excerpts of pages 14, 15, 16 and17 from the CDD guidelines which he downloaded them from the Ministry Website, and he did not interview the ministry officials who disburse the funds to get a clear picture of what went right or wrong.

The respondent's counsel submitted that exhibit **D5** gave mandate at each level which was clearly spelt out during the trial by A1, A2, A3 and A4. She argued that the learned trial Judge rightly observed that the insistence by the prosecution to fault the accused persons for having used a SACCO does not have any justification, since the evidence on record shows that they opted for a functional SACCO because there was no commercial bank or micro finance taking institutions within the district. She argued that this was the reason why the district used a Memorandum of Understanding to commit all stakeholders involved in the management of CDD funds. She added that if the financial intermediary was a bank or a micro finance taking institution, the use of a Memorandum of Understanding would have been irrelevant.

Counsel submitted that exhibit **D6** titled **CDD Financial Management of Projects** issued by the Ministry of Local Government summarized the process of transferring the CDD funds at various levels from the Higher Local Governments to the community groups. She maintained that the learned trial Judge correctly noted that the instruction to A4 to source a SACCO was logical and legal in view of exhibit **D6**. She pointed out that

Nakapiripirit district has no bank from which the groups could receive money, and therefore, insisting on the groups in that district to open accounts in order to access their funds would defeat the purpose of minimizing costs as required in the CDD guidelines.

The respondents' counsel contended that the appellant did not appreciate the roles of A1, A2 and A3 in the management and safeguard of the CDD funds, and overlooked the fact that the respondents were dealing with the SACCO and not a commercial bank or a micro finance taking institution. She argued that the respondents had no role to play the moment the funds had reached sub-counties, which was confirmed by A2 who clearly stated that his involvement in the CDD is minimal. He submitted that the evidence of the defence was disputed by the prosecution from the bar since there was no witness or evidence challenging what the defence submitted.

The respondent's counsel argued that the MOUs are in favour of the beneficiaries. They were signed by both the higher local government represented by the respondents and by the sub-county chiefs for each independent sub-county, and they set out the obligations of each party. She maintained that this is contrary to the submission from the bar that they were used as a tool to transfer money from the sub-counties to the SACCO. She contended that this made it possible for the Nakapiripirit Local Government to hold the SACCO liable if the money got lost. She further submitted that the appellant does not say what role the sub-counties that transferred this money had, and whether they fulfilled it before transferring the money from their CDD accounts to the SACCO.

She prayed court to uphold the finding of the trial Judge on Count 1 that there was no crime committed by the respondents.

The appellant's submissions on ground 2

The appellant's counsel faulted the trial Judge for justifying the respondents' use of SACCOs, and for his finding that the ingredient of knowledge that money would be lost has not been proved. He contended that the trial Judge's reasoning was wrong because the CDD manual (exhibit **P26**) under which the funds were remitted emphasises that communities whose projects are to be approved for funding will be

required to open bank accounts to which approved funds will be transferred. He argued that the accounts must be opened with banks or micro finance deposit taking institutions (MDI) nearest to their localities in order to minimise costs, and the MDIs must be those duly registered under the Public Finance Act (as amended).

He also submitted that if the said funds were sent directly to bank accounts held by the community groups, there would be no need to sign any MOU for mere saving with the banks. He maintained that according to PW9, Nakapiripirit Teachers SACCO was registered on 10/08/2010, three months after the instruction to verify viable MDIs was issued by the 1st respondent on 5/05/2010 (exhibit **P9**); and that A4, a Commercial Officer, who was a Technical Adviser in the district, became the sole signatory to the SACCO.

The appellant's counsel contended that the respondents were obliged to know both the financial, technical and human resource capacity of the SACCO prior to committing the sub-counties to dealing with them. He pointed out that whereas the 1st respondent claimed they did not know the persons behind the registration of Nakapiripirit Teachers SACCO, he admitted that he knew the chairperson as Inspector of Schools. Counsel also maintained that in fact, the 2nd respondent revealed that he inspected the SACCO offices and they were operational. He argued that the SACCO was supposed to write to the district giving them account details which they did not. The appellant's counsel wondered how the respondents eventually got the accounts they used.

The appellant's counsel submitted that whereas the trial Judge observed that the issue of sole signatory was an afterthought by A4, and that at the time of signing the MOU (exhibit **P12**) the sole signatory was not in place, the fact is the MOU which was signed on the 16th May 2011 clearly recognised that NDLG selected the SACCO using technical criteria. He submitted further that under the MOU, NDLG was mandated to approve the work plan and budget of the SACCO and assign the activities.

The appellant contended that the choice of the SACCO, which was registered 3 months after instruction to verify SACCO, was not made in

good faith because the respondents never bothered to ascertain the financial status through bank statements, yet the management team of the SACCO, according to exhibit **P13**, comprised of district officials known to them. He argued that by the time they signed the MOU, all the registered particulars of the SACCO must have been submitted to them.

Counsel submitted that the respondents signed the MOU without consulting the lower sub-counties affected by the MOU. He contended that the respondents did not even know the contents of the MOU, and that the mere fact that A4 who was mandated to verify was a secretary (according to PW3), was enough indicator to command more due diligence. He maintained that according to PW1 who distributed the MOU, it is the office of the Chief Administration Officer (CAO) that issued instructions to sign the MOU, and the respondents had already signed the MOU before distribution to the sub-county officials to sign. He contended that the details of the SACCO accounts were given by the SACCO and the office of the CAO, and when PW2 picked the MOU, the respondents had already signed.

Counsel submitted that PW3 (Mr. Raymond Korobe), the purported chairman of the SACCOs who signed the MOU as the SACCO representative, did not have any discussion with the district officials on the MOU. According to the appellant's counsel, PW3 did not go through the MOU because it had already been signed by the 2nd and 3rd respondents, and every resolution on the SACCO had his signatures forged. He contended that PW3 should have been consulted before the MOU was drawn; and that the 2nd respondent too confirmed he signed the MOU without reading it.

Counsel submitted that the respondents did not consult the chairman of the SACCO before execution of the MOU, which means they dealt with A4 whom they claimed was not known to be a member of the SACCO. He maintained that it was a syndicate that enabled A4 to register a SACCO, and they would pretend to deal with A4 to defraud the community. He submitted that it was wrong to deal with the SACCOs because the very instruction on exhibit **P9** given by the first respondent did not refer to SACCOs but rather existing Micro Finance Institutions.

Counsel referred Court to the evidence of PW5, PW6 and PW8 and submitted that other sinister motives of the MOU were that no one was permitted to retain any copy of the MOU because the respondents delivered one copy each, per sub county, while promising to bring back more copies.

The appellant's counsel submitted that even if the CDD manual permitted the respondents to utilise SACCOs for remittance of CDD funds, evidence from PW5 Nayoro Teddy and PW6 Sagal Ben Paul reveals that they did not even know the physical address of the Nakapiripirit Teachers SACCO they were forced to deal with. He submitted that there were already viable SACCOs like Namalu and Nabilatuk SACCOs operating in the area; and that Nakapiripirit Teachers' SACCO was purposely registered to swindle funds as acknowledged by the respondents. He argued that even if Nakapiripirit Teachers SACCO was the best choice for its experience and financial soundings, which was not the case, the certificate annexed to exhibit **P8** shows it had never been registered as a Micro Finance Deposit Taking Institution in the meaning of section 2 of the Micro Finance Deposit Taking Institutions Act, 2003.

Counsel argued that if the communities accessed their funds through banks, there would be no loss as confirmed by the 2nd respondent who on cross examination admitted that they have now engaged Centenary Bank Moroto which moved to Nakapiripirit and opened accounts, and that the groups are now happy. Counsel cited the case of **Kassim Mpanga V Uganda, Supreme Court Criminal Appeal No. 30 of 1994** (unreported), where the Supreme Court highlighted the three essential ingredients of the offence of causing financial loss.

Counsel prayed this Court to uphold ground 2 of the appeal.

The respondents' submissions on ground 2

The respondent's counsel submitted that exhibit **D6** permitted the respondents to use SACCOs where convenient since the district had no bank. She contended that, as rightly observed by the trial Judge, even where a bank is used, the money is transferred to the bank which then credits the accounts. She argued that the choice of the financial

intermediary is not the groups' choice as counsel for the state indicated, but that it was the duty of the district to identify it and contract it to disburse funds.

She submitted that the district leadership through the CAO had an obligation by virtue of their office to ensure that the funds are managed well up to the end users. She maintained that it would be irresponsible to merely transfer funds to the sub-counties and sit back to wait for field reports. Counsel wondered why the issue of prior registration was included in the indictment when exhibit **D10** shows that the SACCO was registered on 5th August, 2010, well before the funds to the SACCO were effected between June and August 2011. She maintained further, that by the time A1 wrote a letter dated 27th April 2011 (exhibit **P11**) to sub-counties to prepare to sign a Memorandum of Understanding, the SACCO had been long registered. She argued that besides, the defence adduced evidence that the registration was not a requirement for a SACCO to operate, and that in fact, if a SACCO does not operate to demonstrate its competency, the district cannot recommend its registration.

Counsel submitted that contrary to the submission from the bar that the MOU was used as a tool to transfer money from sub counties to the SACCO, a perusal of it shows that the accused persons were protecting the funds for the groups by requiring the SACCO to first submit a work plan and the accounts of each group before funds are disbursed. She contended that the MOU protected the groups from being cheated by the SACCO. It required the SACCO to use the funds received from CDD for the groups' activities only, and no loophole was made for the accused to fleece the money or cause its loss.

Counsel argued that the existence of the MOU made it possible for NDLG to hold the SACCO liable if money got lost. She contended that all parties had obligations in the MOU which included submission of group work plans and accounts of each group to the District Local Government before the funds would be transferred to the SACCO. She maintained that if all the stakeholders had followed the MOU, there would be no problem since the MOU was a clear, relevant and self-explanatory document where the SACCO was to act as a financial intermediary.

The respondent's counsel concluded that from the evidence on record, there was no evidence to show that the accused had knowledge or reason to believe that their acts or omissions would cause financial loss to the district, and sub-counties received their CDD grants. According to her, this showed that had the other stakeholders followed the district instructions and followed the MOU, there would have been no loss occasioned.

She prayed this court to uphold the decision of the trial Judge on ground 2.

The appellant's submissions on ground 3

The appellant's counsel submitted that the Judge's observations on the respondents' roles in managing the CDD funds was erroneous. He maintained that the 1st respondent acknowledged that as a CAO, he was to ensure that money reached the beneficiaries, that when money reached the sub county CDD accounts, it was supposed to go straight to the groups. Counsel wondered that if this was true and in line with the CDD guideline, why did the respondents direct further transfer the funds to a private entity? He contended that if due diligence was conducted and proper procurement followed, the respondents were bound to realise that A4 was furthering the interest of the SACCO and not her employer.

The appellant's counsel submitted that the respondents were mandated to ensure the public funds they managed reached the intended beneficiaries. He maintained that under the CDD manuals exhibit **P26**, the moment they disbursed the funds to the sub county CDD accounts, the respondents were mandated to ensure that the lower leaders submitted accountabilities in form of activity reports and proof that funds were delivered to the community groups. He argued that the respondents had no mandate to direct further transfer to a SACCO they confessed they did not know the particulars of. Counsel maintained that any directive which diverted funds back to the Teachers' SACCOs was not in good faith.

He relied on Article 164(2) of the Constitution and the case of **Wilson Nyanga Kizito V Uganda [1997] II KALR 11** to hold the respondents accountable. He faulted the trial Judge for his observations and conclusions that the appellant's submission cannot challenge evidence on oath on factual issues.

The respondents' submissions on ground 3

The respondents' counsel submitted that the respondents performed their duties fully and that is why money reached the financial intermediary. She maintained that, indeed, Kakomongole sub-county and Nakapiripirit Town Council received their funds. She argued that what happened to the rest of the funds was out of control of the respondents. She prayed that this Court upholds the decision of the High Court.

The appellant's submissions on ground 4

The appellant's counsel submitted that the evidence on record shows that indeed the respondents as the Chief Executive and Finance Officers of NDLG were mandated to safeguard public finances meant for the CDD groups. He contended that the 1st respondent indeed knew that community groups were to open accounts in banks or MDIs and thus instructed A4 to verify viable ones. He submitted that whereas the MOU (exhibit **P12**) mandated the SACCO to avail a work plan to the respondents, the evidence of A4 shows there was no such report or work plan made to the respondents prior to committing the sub counties to transfer funds. He argued that it was therefore premature and arbitrary to order the sub-counties to remit funds on the SACCO's account.

The appellant's counsel submitted that exhibits **P1** and **P7** showed that CDD funds were on the accounts of sub counties. According to counsel, the CDD funds had reached their points of utilisation. He questioned why the 2nd respondent signed the MOU further directing the sub counties to transfer the funds to the account to Nakapiripirit Teachers SACCO if his role regarding the funds is minimal as he testified before court.

Counsel submitted that whereas witnesses from PW4 to PW8 indicated that the SACCO account was given to them from the office of the respondents, there is no evidence to even indicate that A4 replied the first request on exhibit **P9** to get viable SACCOs, just like the respondents confessed that they did not know that the account had A4 as sole signatory. He argued further that whereas the district had two viable SACCOs in Namalu and Nabilatuk which were older than Nakapiripirit

Teachers SACCO, the respondents conveniently picked Nakapiripirit SACCO without any report or reason given for rejecting the rest.

The appellant's counsel argued that the respondent's directives to the sub-counties to immediately transfer funds to the SACCO accounts was not only illegal, it was also in total breach of the terms of the MOU (exhibit **P12**) which mandated the sub-county groups to first become members of a SACCO by opening accounts with the SACCO. He argued that this requirement would be in the best interest of the group because SACCOs are member owned. He maintained that, as such, the respondent's directive was prejudicial to the interest of the groups. He cited **Kassim Mpanga V Uganda, Criminal Appeal No. 30 of 1994** to support his position.

The appellant's counsel submitted that the respondents' acts of directing the signing of the MOU and transfer of funds to SACCOs they never verified did not only cause financial loss but also showed they neglected their duties. He argued that the said acts were arbitrary and prejudicial to the interests of their employers and the beneficiaries of the CDD funds who never received the funds to-date.

He prayed this court to allow the appeal and find the respondents guilty as charged under the Anti - Corruption Act, and to order refund of the funds lost.

The respondents' submissions on ground 4

The respondents' counsel submitted that the learned trial Judge rightly stated that exhibit **D5** reveals that the money's going from the sub-counties to the accounts of the groups in a bank or MDI nearest to their localities minimized the costs of operating those accounts. She submitted that A1 also knew that SACCOs were allowed, and exhibit **D6** permitted them to use them where convenient, since the nearest banks were miles outside the district.

Regarding the role of the 2nd respondent (A2), the respondent's counsel submitted that A2 had to sign the MOU because the financial intermediary was neither a bank nor an MDI, and dealing with the SACCO required additional measures to protect the funds. She contended that the defence

adduced evidence proving that the respondents committed the SACCO to a Memorandum of Understanding to protect the groups from loss, in that the SACCO would be liable for the loss and not A1, A2 and A3 (respondents). She argued that in any case it was the finding of the trial Judge that the knowledge on the part of respondents that money would be lost had not been proved.

On the respondents' picking Nakapiripirit Teachers SACCO without any report or reason given for rejecting the rest, the respondent's counsel submitted that this was explained by A4 on oath that the rest of the SACCOs in the district had collapsed or closed, and that on basis of exhibit **P9**, A4 identified the viable SACCOs from where the groups would get their money.

The respondent's counsel referred Court to the testimonies of PW1, PW5 and PW8 which made it clear that the respondents did not direct any sub-county to immediately transfer funds to the SACCO's account after the MOU was signed. Counsel maintained that instead, PW1, an officer of the user department, decided to coordinate the entire process claiming she had been delegated by the DCDO when in actual sense she was acting like an agent of A4.

The respondent's counsel concluded that the appellant's arguments are not supported by any evidence on oath, but rather evidence adduced from the bar by the prosecution counsel. She contended that this appeal, like the main case, is hanging in the air, and the prosecution evidence could not support, or contradicted, the charges brought against the respondents.

The respondent's counsel prayed this Court to uphold the trial Judge's findings and accordingly dismiss this appeal.

RESOLUTION OF THE APPEAL BY COURT

This is a first appeal. The role of a first appellate court is to review or rehear the evidence, consider all the materials which were before the trial court, and come to its own conclusion on the facts, while taking into account that it did not see or hear the witnesses. In that regard it should be guided by the observations of the trial court on the demeanour of

witnesses. See **Kifamunte Henry V Uganda, Supreme Court Criminal Appeal No. 10/1997**. This position is also reflected in rule 30(1)(a) of the Judicature (Court of Appeal Rules) Directions SI 13 – 10 2005 which requires this Court to reappraise the evidence and draw its own inferences of fact.

Ground 1

The record shows that the respondents, who were A1, A2 and A3 in the trial court, were acquitted of causing financial loss in count 1; neglect of duty in count 2; and abuse of office in count 3. This was based on the appellant's failure to adduce evidence to support the charges brought against them.

Regarding count 1, the ingredients of the offence of causing financial loss are that the accused are Government employees, which was not in dispute at the trial; and that in the performance of their duties, the respondents did an act knowing or believing that it will cause financial loss.

The appellant's submissions on ground 1 are essentially that the CDD guidelines were not followed by the respondents, and that the upper and lower local government should not have signed a Memorandum of Understanding with the SACCO.

The evidence of the defence (respondents) at the trial court was that the CDD Guidelines issued by the Ministry of Local Government (exhibit **D6**) permitted the use of a SACCO since CDD funds could not be paid directly to the groups by sub-counties. There was also evidence that there was no micro deposit taking institution (MDI) in Nakapiripirit; and that the CDD guidelines required the cost of operating the accounts by groups to be minimized by using a financial intermediary nearest to their localities.

The relevant paragraph in exhibit **D6** states as follows:-

> *"The Higher Local Governments and the Lower Local Governments are required to open up separate bank accounts for CDD grants. Similarly community groups whose projects are approved for funding must have bank accounts to which approved funds are transferred. The community groups can open accounts with duly*

registered Micro deposit taking institutions or savings and credit cooperatives as may be convenient to them. However, community groups should open accounts with SACCOs that have accounts with commercial banks."

In our opinion, in view of exhibit **D6**, and as correctly observed by the learned trial Judge at page 145 paragraph 1 of his judgment, the instruction to A4 to source a SACCO was logical and legal. The evidence on record reveals that Nakapiripirit district had no bank from which the groups could receive money. Indeed, CDD funds for Nakapiripirit were in Stanbic bank in Mbale town. We agree with the respondents' counsel that if the groups, who were mostly illiterate, were asked to travel to Mbale over 90 kilometres away to open accounts in order to access these funds which were less than two million Uganda Shillings for each group, such a requirement would defeat the purpose of minimizing costs as required in the CDD guidelines.

The appellant has adduced no evidence to support their contention that the respondents' directive to transfer the money received by the sub-counties back to a SACCO of their choice, or to sign MOUs with the SACCOs regarding management of CDD funds was syndicate corruption. If anything, on the basis of exhibits **D6** and **P26**, we find that the directives were proper management tools to ensure the money is accessed by the target groups through institutions recognised by the CDD guidelines, and also to ensure that such institutions are accountable.

The CDD guidelines gave mandate at each level. This was clearly spelt out by A1, A2, A3 and A4 during the trial. The evidence of PW9 the investigating officer, as correctly observed by the trial Judge, is not convincing. It is very clear from his testimony especially during cross examination that PW9 did not appreciate the functional roles of the respondents. He also failed to realize that sub-counties and town councils were bodies autonomous from the District Local Government.

There is no evidence on record to show that the respondents had knowledge or reason to believe that their act or omission would cause

financial loss to the district. There is evidence however that the MOUs cushioned the groups from loss.

We have also noted, in agreement with the learned trial Judge, that the particulars in count 1 that the accused transferred money from the district account to the SACCO is incorrect. The evidence on record shows the money to the SACCO was not transferred directly from the district's account number 0140044602302 as indicated in count 1. It was transferred through various sub-county and town council accounts contained in exhibit **P20.** The particulars in count I are therefore contradicted by the evidence adduced by the prosecution. We also note the same error was repeated in count 3.

We find no merit in ground 1 of this appeal and it therefore fails.

Ground 2

The appellant faulted the trial Judge's observation that it was not justified for the prosecution to criticise the accused for using SACCOs.

The record shows that the learned trial Judge relied on exhibit **D6** which permitted the appellants to use SACCOs where convenient. Exhibit **D6** is issued by the Ministry of Local Government as CDD Brochure Series 5. It requires Higher Local Governments and Lower Local Governments to open up separate bank accounts for CDD grants. It permits the community groups to open accounts with duly registered micro deposit taking institutions (MDI) or savings and credit cooperatives (SACCO) as may be convenient to them. It further states that community groups should open accounts with SACCOs that have accounts with commercial banks.

The evidence on record is that there was no bank or micro deposit taking financial institution in the district of Nakapiripirit other than a SACCO that would help the beneficiaries receive the CDD grants. In the given circumstances, it would only be logical to opt for the SACCO which was the only available option within the requirements of exhibit **D6**, in absence of banks or micro deposit taking financial institution in the district.

On the appellant's submissions that the SACCO was registered 3 months after the instructions to verify the SACCO, exhibit **D10** shows that the

SACCO was registered on 5th August, 2010. Both the prosecution and the defence witnesses testified that the Teachers SACCO was operating before the transfer; that registration was done in August 2010; and that the money was transferred to it almost a year later in 2011.

This would infer that by August 2011 when the funds were effected, registration of the SACCO was not an issue. The evidence on record is clear that by the time A1 wrote a letter dated 27th April 2011 (exhibit **P11**) to sub-counties to prepare to sign an MOU, the SACCO had been long registered. The evidence of PW5, PW6 and A4 also shows that apart from Nakapiripirit Teachers SACCO whose office was located at the district headquarters, NDLG had some rather non-functional SACCOs in the various sub counties such as Namalu and Nabilatuk. The Nakapiripirit SACCO was closed. Other places like Loregae did not have a SACCO.

Besides, A4 who supervised SACCOs testified during cross examination at page 106 of the record that registration was not a requirement for a SACCO to operate, and that the criteria was rather that the SACCO was operational and active. This was confirmed by PW3 whose testimony was that Nakapiripirit Teachers SACCO existed; that non registration did not stop it from operating; and that it was properly registered prior to transacting with the district and sub counties. PW3 said that he was the chairperson while A4 was the secretary; that the treasurer was Lolem Jenifer; that the SACCO was to act as a vehicle to deliver funds to the community; and that groups had been identified in sub-counties and were to access funds through the Teachers' SACCO. A3 also testified that the SACCO had been transacting business before, that they had a training of CAOs, sub-county chiefs and accountants, and that the obligation in the MOU with the SACCO were also part of the training.

On the appellant's submissions about the MOU, the evidence on record shows that the MOU set out the obligations of each party. It required the SACCO to first submit a work plan and the accounts of each group before funds are disbursed. Paragraphs 3.6; 2.1.2; and 2.1.3 of the MOU protects the groups from being cheated by the SACCO. It required the SACCO to use the funds received from CDD to the groups' activities only. This shows the respondents were protecting the funds for the groups. It, in a

way, made it possible for NDLG to hold the SACCO liable in the event of money being misused by the SACCO or getting lost.

This, in our opinion, was to make the SACCO, rather than the respondents, accountable and liable for the loss. We consider it prudent in the circumstances, as it cushioned the group from loss. It was well within the respondents' obligation by virtue of their offices as district leaders to ensure the funds are managed well. It would be irresponsible to merely transfer funds to the sub-counties and sit back to wait for field reports.

Thus, from the evidence on record, the respondents' directing the beneficiaries of the CDD funds to commit themselves to Nakapiripirit Teachers Savings & Credit Cooperative Society (SACCO), as opposed to other saving institutions in the district, was justified. We find no evidence on record to support the appellant's submissions that there was a syndicate to enable A4 register a SACCO.

We find no merit in this ground of appeal and it fails.

Ground 3

The appellant faulted the learned trial Judge's observations on a number of factors. These were the observations that no witness told court the fact of A4's sole signatory status was common knowledge to the three accused before signing the MOU; that A1's role was to task the relevant officers below him such as A4 to identify a SACCO that would manage the CDD funds; that A2's role was to sign off the funds and await accountability; and that A3's role was to deputise A1.

Article 164(2) of the Constitution declares that any person holding a political or public office who directs or concurs in the use of public funds contrary to existing instructions shall be accountable for any loss arising from that use and shall be required to make good the loss even if he or she has ceased to hold that office.

In **Wilson Nyanga Kizito V Uganda [1997] II KALR 11** this court held that knowledge by an accused employee that financial loss to his employer may result from his actions or omissions, may be express or implied.

We have already pointed out in ground 2 above that there is no evidence that the fact of A4's sole signatory status was common knowledge to the three accused. A1 and A4 testified on oath that the fact was known only to A4. PW3 testified that the fact of the sole signatory was an afterthought by A4. At the time of signing the MOU, the sole signatory was not in place. In that connection we agree with the learned trial Judge that Counsel's submissions tantamount to giving evidence from the Bar and cannot discredit evidence on oath on factual issues.

Consequently, it is our opinion that the respondents performed their duties fully. That is why money reached the financial intermediary in those areas like Kakomongole sub-county and Nakapiripirit Town Council where the MOU was followed. What happened to the rest of the funds in other areas was out of control of the respondents.

In that connection, ground 3 of this appeal fails.

Ground 4

The appellant's contention is that A1 knew that community groups were to open accounts in banks or MDIs. This was indeed alluded to by the trial Judge who referred to pages 22 and 23 of exhibit **D5** which requires money from the sub-counties to go to the accounts of the groups in a bank or MDI nearest to their localities in order to minimize the costs of operating those accounts. The evidence on record shows that A1 (1st respondent) also knew that SACCOs were allowed. He testified that in view of the fact that the district had no bank and the nearest banks were miles outside the district, they called in aid exhibit **D6** which permitted them to use SACCOs where convenient.

The appellant also wondered why A2 (2nd respondent), who said his involvement in the CDD is minimal, signed an MOU further directing the sub-counties to transfer the funds to the account of Nakapiripirit Teachers SACCO. We have already made a finding in ground 1 above that the MOU was put in place as a protective measure to safeguard or protect the CDD funds because the SACCO was not a bank or an MDI. It is in this light that A2's signing of the MOU should be appreciated.

This was also well alluded to by the learned trial Judge who at page 145 paragraph 3 of his judgement stated that the knowledge that money would be lost has not been proved, but that instead the defence has adduced evidence to prove they committed the SACCO to an MOU so that a contractual relationship is made to protect the groups from loss, and to make the SACCO rather than the respondents liable for the loss.

The appellant questioned why the respondents conveniently picked Nakapiripirit Teachers SACCO without any report or without giving any reason for rejecting the other two viable SACCOs in the district, that is, in Namalu and Nabilatuk, yet the said two SACCOs were operational and older than Nakapiripirit Teachers SACCO. This was explained clearly by A4 who testified on oath on pages 103 and 104 of the record that many SACCOs in the district had collapsed; and that the Nakapiripirit SACCO at the district was even closed. A4 explained that she carried out the instructions in exhibit **P9** by identifying the viable SACCOs from where the groups would get their money; that she recommended Nakapiripirit Teachers' SACCO because it was operational and organised. She stated during cross examination at page 108 (third paragraph) of the record that the only viable SACCO was that of the Teachers.

The appellant contended that the respondents' acts were arbitrary and prejudicial to the interests of their employers and the beneficiaries of the CDD funds who never received the funds to date.

The evidence on record shows that the respondents performed their duties fully. Indeed, in Kakomongole sub-county and Nakapiripirit Town Council where there was no foul play, money reached the financial intermediary and the groups received their funds. There is evidence on record that the respondents paid the CDD funds to a viable SACCO identified by a Supervision Officer (A4), including putting in place a structure (MOU) that would safeguard the funds from being misused by the SACCO. We agree with the respondent's submissions that what happened to the rest of the funds was out of the control of respondents.

We accordingly agree with the learned trial Judge that the use of the MOU which set out the obligations of each party was a tool to transfer money

from sub-counties to the SACCO. Paragraphs 3.6 and 2.2.2 & 3 of the MOU protects the groups from being cheated by the SACCO by requiring the SACCO to use the funds received from CDD to the groups' activities only. No loophole was left for the respondents to fleece the money or cause its loss. The existence of the MOU made it possible for NDLG to hold the SACCO liable if money got lost.

The testimonies of PW1, PW5, PW6, and PW8 on pages 59 to 69 of the record reveal that the respondents did not direct any sub-county to immediately transfer funds to the SACCO's account after the MOU was signed. Instead PW1, an officer of the user department, is revealed by the prosecution witnesses to have coordinated the entire process claiming that she had been delegated by the DCDO but working closely with A4 in the mysterious loss of the UGX 88,480,000/=.

In the given circumstances we agree that the respondents would have been useful prosecution witnesses against whoever stole the funds. We have also noted that the trial court ordered A4 to refund the stolen money.

On that basis ground 4 of this appeal fails.

In the result, based on the reasons given above, we find no merit in this appeal on all the four grounds raised. The appeal is accordingly dismissed. The decisions of the trial Judge are upheld.

Before we take leave of this matter, we have observed that the appellant did not raise the grounds of appeal according to the offences in the counts charged and according to proof of the ingredients of the offences the respondents were charged with, as should be the case in criminal matters. This is a criminal appeal, not a civil appeal. The proper way is that grounds of appeal should have been raised according to the offences in the counts charged, and according to proof of the ingredients of the offences the respondents were charged with.

Dated at Kampala this 8th day of July 2019.

Hon. Lady Justice Hellen A. Obura

Justice of Appeal

Hon. Mr. Justice Stephen Musota

Justice of Appeal

Hon. Lady Justice Percy Night Tuhaise

Justice of Appeal.

8/8/19. Respondents absent.
Mr. Ochieng Mutabbe for the Appellant.
Ms Nyakedo for the Resp.
Court - clerk.

CAV: Ruling delivered in the presence of the above.

8/8/19