THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Criminal Appeal No. 99 of 2013

Coram: Kiryabwire, Musota, & Tuhaise, JJA

Ocepa Geoffrey .....Appellant

Versus

Uganda.....Respondent

[Appeal arising from the judgment/orders of the Anti-Corruption Court of Uganda sitting at Lira before Paul K Mugamba, J (as he then was) in HCT-00-AC-SC-0052-2012 delivered on 25th June 2013]

Judgment of the Court

The appellant Ocepa Geoffrey, was convicted of embezzlement and sentenced to 5½ years' imprisonment on the 25th day of June 2013. He was also ordered to pay refund of Ug. Shs. 295,190,600/= (two hundred ninety five million, one hundred ninety thousand and six hundred) to Apac District Local Government, and disqualified from holding a public office for a period of 10 years from the date of conviction.

Background

The appellant was employed by Apac District Local Government as Senior Accounts Assistant deployed in the Health Department. As part of his job descriptions, he was an agent to Stanbic Bank Apac Branch in respect to Account No. 0140088514001, to withdraw money and disburse the same as and when the need arises.

The prosecution alleged that on various dates between 2009 and 2010, he did withdraw the monies but some remained un-accounted for, or there were lack of supporting documentations for them. An Audit was carried out by the Internal Audit team. It was discovered that funds to the tune of Ug. Shs. 295,190,600/= were missing or remained without adequate accountability.

The appellant and 2 others were arrested and charged with 52 counts relating to embezzlement, destruction of evidence, forgery and uttering false documents. The appellant maintained in his defence that the monies complained of were applied to and for the right purposes, save that the documents in support were misplaced by the external auditor who had taken them for routine auditing and, unfortunately, he died without returning the files to the District. The learned trial Judge rejected this evidence and convicted the appellant of embezzlement. He however acquitted him on all other offences. The other accused persons A2 and A3 were acquitted.

The appellant was aggrieved by the court's decision and he appealed to this court on the following grounds:-

1. The learned trial Judge erred in law and fact when he failed to administer proper plea taking eventually making the appellant take plea on counts he was not charged with, leading to a miscarriage of justice.
2. The learned trial Judge erred in law and fact when he failed to exhaustively consider and evaluate the evidence on record and eventually wrongly convicted the appellant.
3. The learned trial Judge erred in law and fact by misdirecting himself on the burden of proof and standard of proof when he shifted the burden onto the appellant and convicted the appellant which occasioned a miscarriage of justice.

4. The learned trial Judge erred in law when he imposed sentence and order or refund/compensation of Ug. Shs. 295,190,600/=.

Representation

The appellant was represented by Mr. Adoko Joe Fay. The respondent was represented by Mr. David Bisamunyu, Senior State Attorney. Both parties filed written submissions on the appeal.

Ground 1

Submissions for the Appellant

Counsel for the appellant submitted that plea taking is a matter of law, the basic start of fair trial, and it makes the accused to understand the nature and conduct of the trial and how to respond to them. He referred this Court to page 3 of the record of proceedings were the appellant was indicted with 52 counts namely, count 1 - embezzlement; count 2 - destroying evidence; count 3 to 28 - forgery; counts 29 to 52 - uttering false documents. He submitted that A2 and A3 were both charged with causing financial loss in counts 53 and 54 respectively, and an alternative charge of abuse of office in count 55; that there is ample evidence to indicate that the appellant took plea and court entered the plea on count 53 and 54 on causing financial loss, yet these charges were not preferred against the appellant and not consented to by the Director of Public Prosecutions (DPP).

The appellant's counsel also submitted that A2 and A3 were charged on count 53 and 54 respectively and alternatively both were jointly charged on count 55 for abuse of office; that A2 and A3 did not take plea on the substantive counts/charges they were indicted for but instead on the alternative count under 55; and that this left count 53 and 54 unattended to throughout the proceeding.

Counsel submitted that as a general rule, which has become law, an accused person must take plea on only charges he is facing or going to face, which

will help him to adequately prepare for his defence. He contended that where there is an alternative charge or count, the accused must first take plea on the substantive count or charge before taking plea on the alternative; that subsequently, where a finding is to be made on the substantive charge or count, the court must make no finding on the alternative charge, which is dismissed as such; and that the same is true for the reverse. Counsel submitted that in this case, the appellant took plea on behalf of A2 & A3 and that A2 &A3 did not enter plea on the substantive charges meant for them.

Counsel contended that whereas there was no finding on the charges the appellant took plea on, the effect of this was that the appellant looked confused and did not handle any issue being covered at the trial when he was called to defend himself.

Counsel submitted further that a conviction was returned on the case of embezzlement; that as such, the actions of A2 and A3 as Accounting Officers or the responsible officers in the crime chain would automatically and mathematically have caused the financial loss complained of; that unfortunately A2 and A3 did not take plea on those counts, and that subsequently influenced the judgment in their favour. He maintained that the consideration and finding of the learned trial Judge was a procedural error, irregularity, which occasioned miscarriage of justice.

Submissions for the Respondent

The respondent's counsel conceded that there was an error as to the record and capture of the plea taking on counts 53 and 54 as reflected on the record of proceedings. He however pointed out that it is clear both A2 and A3 knew the charges they were facing in the lower court and they took plea in that regard.

He referred to the testimony of A2 (DW2) who in his defence at page 134 of the record stated:-

> *"I was charged with causing financial loss by not verifying signature of Dr. Emer Mathew between July 2009 and March 2010."*

He contended that this is the gist of Count 54 of the amended indictment. He also referred to the testimony of A3 (DW3) who in his defence at page 136 of the record stated:-

> *"I am before this court on causing financial loss by not verifying the signature of Dr. Emer for cheques that passed through my hands while I worked as CFO from 1st April until 30th June 2010. Alternatively I was charged with Abuse office."*

Counsel submitted that this is what is essentially contained in Count 53 and the alternative count of the amended indictment. According to Counsel, the foregoing clearly shows that both A2 and A3 took plea to the amended indictment and knew exactly what they were charged with. He contended that it is therefore misconceived for the appellant to submit otherwise. He prayed this Court to disregard the appellant's counsel's argument.

Counsel referred this Court to pages 152, 153, 156, 157 and 158 of the record of appeal which, he submitted, show that, regarding the appellant, the learned trial judge only considered the offences the appellant was charged with when delivering his judgment. Counsel contended that the learned trial Judge's narration is in tandem with the amended indictment on record, in that he went on to consider all the counts in respect of each accused person in his judgment. Regarding A2 and A3, Counsel referred this Court to pages 160 and 161 of the record where the Judge clearly stated charges against A2 and A3 in line with the amended Indictment under which they were charged.

Counsel submitted that the learned trial Judge also considered each of the counts as per the amended indictment on record; that at no time was the appellant (AI then) tried or convicted for the offences contained in counts 53 and 54 for which he purportedly took plea; and that counts 53 and 54 were clearly analyzed by the learned trial Judge only in regard to A3 and A2 respectively. He maintained that considering all the above, this Court should take the recording of the plea taking at page 72 as an error which did not prejudice the appellant in any way. He cited **Wapokra V Uganda Criminal Appeal No. 204 of 2012 [2016] UGCA 33** to support his proposition. He contended that the prosecution only adduced

evidence in respect of Counts 1 to 52 of the amended indictment regarding the appellant. He concluded that there was no miscarriage of justice against the appellant.

Appellant's Submissions in Rejoinder

Counsel submitted that the respondents admit the error regarding plea taking on counts 53 and 54. He argued that once a plea is defective, then the whole proceeding is defective; that an irregular plea cannot be remedied at any latter stage of the proceedings and is a nullity. He also submitted that in **Wapokra V Uganda** which was cited by the respondent's counsel, the Supreme Court held that proceedings where an indictment is amended and the accused is convicted and sentenced based on an irregular plea taking process renders such a trial a nullity.

Ground 2

Submissions for the Appellant

Counsel submitted that the real crux of the prosecution case that led to the conviction of the appellant is premised on the audit reports, exhibits P.16 and P.17 which allegedly confirmed that accountability of Ug. Shs. 295,190,600= shillings were lacking. He referred this Court to pages 154-155 of the record of appeal and submitted that the said exhibits were taken as gospel truth with all its face value but, the devil was and is in the details. He contended that this was not an audit report worthy of credit and it should have been disregarded. He stated that a close look at the preamble of exhibit P.17 states that it was an audit report in respect to Account No. 0140088514001 belonging to Apac District Health Services Account. He submitted that the audit was conducted after examining the Bank statements on exhibit P24 and Quarterly Releases on exhibits P5 - P8.

Counsel contended that exhibit P17 was authored by A2 as the Principal Internal Auditor then; that it was incorporated, ratified and made part and parcel of exhibit P16 as shown in the evidence of PW1, PW2, PW5 and PW6.

He contended that exhibits P16 and P17 are one and the same document in their terms of reference, and he has treated them as such for purposes of the appeal.

Counsel also submitted that exhibits P16 and P17 include foreign figures whose origin is not known, making it suspicious and questionable. He argued that the said reports when compared with the Bank Statements (exhibit P24) stated to be the origin of the audit reports, there is no corresponding entry of incoming cash flows from UNICEF to reflect those figures for the year under review. He maintained that this was revealed by the evidence of PW1 and PW6 who in examination-in-chief did not talk about UNICEF funds as those coming through the account in question; and that the evidence further confirms that there are only three entities that were sending funds through this account, that is, NUMAT, NTD and Malaria Consortium. Counsel contended that this was further fortified in exhibits P5 – P8.

Counsel submitted that secondly, there is an expenditure on drugs amounting to Ug. Shs. 241,478,118/= which cannot be traced on the bank statements as an expense on the account in question in the year under review; that thirdly, the money released through that account on the year under review does not total to Ug. Shs. 1,489,950,100/= but rather Ug. Shs. 998,925,743 inclusive of bank balance brought forward as of 31st of June, 2009 (1st July 2009) as portrayed in exhibits P16 and P17.

Counsel submitted that fourthly, in the formulation of exhibits P17 and P16, 84 vouchers were recovered from the office of the appellant; that two of the vouchers recovered were not considered in the making of exhibits P17 and P16, that is, voucher no. 1158 and voucher no. 1449; that the lists of the vouchers recovered are contained in exhibit P27 but the final audit report (exhibits P16 and P17) omitted the two vouchers as seen at pages 519 - 521 and 667 - 669 record.

Counsel submitted further that there are also other additional vouchers added to the reports that were not recovered from the appellant; that their sources are not known; and that they are equally suspect but relate to the investigation of the alleged missing funds or their accountability. He contended that the said three vouchers (Nos. 3314, 3312 & 2289) are in exhibit P27; and that the vouchers were allegedly recovered from health Department.

Counsel submitted that there are other 11 vouchers, that is, Nos. 1109, 2249, 1403, 4176, 613, 3885, 2127, 1107, 2407, 2406 and 627 in exhibit P27; that the said new lists of vouchers were counter signed by PW6 (Head of Department and Supervisor of the appellant) who had earlier witnessed the listing and handing over of the 84 vouchers; that the sources of these vouchers which were used to originate exhibits P16 and P17 were not indicated or explained anywhere.

Counsel submitted that A2 acknowledged receipt of the Cheque Register Book on exhibit P27, signed on 17/9/2010; that this Cheque Register Book is the record where details of cheque, amount, name of the recipient, voucher number used and signature of the recipient, is to be found/or can be traced; and that this book was not available to court for examination whether as as an exhibit, nor was it considered in the audit report prepared by A2, yet it was in his possession at all material times.

Counsel submitted that it is possible to trace the recipients and verify whether the funds drawn from them ever reached. According to Counsel, that was not done or attempted to be done by the authors of exhibits P17 and P18, yet this was a special audit investigation vested with such mandate. Counsel maintained further that the record indicates no one was ever brought to testify, in particular, that 27 cheques drawn amounting to Ug. Shs. 295,190,600/= did not reach the recipients.

Counsel submitted that the baffling questions are where the other vouchers came from, when, and who brought them, why exclude other vouchers from

the audit, and why hide the Cheque Register Book. He maintained that the only probable answer available is that some of the records necessary for accountability were somewhere, others with PW6, others in Health Department Offices, and others with the External Auditor as stated by A1 (the appellant).

Counsel submitted that whereas he had submitted exhibits P16 and P17 to be considered as one document, they were conducted by two different professionals (Auditors); that the said audits talk about 2 different figures, that is, Ug. Shs. 307,565,000/= and Ug. Shs. 295,190,600/=, all based on examining exhibit P24 for the year under review; that the documents were prepared by people deemed experts in their respective fields and whose opinion guides Court as indeed it did, to arrive at a fair conclusion; that what is not explained is why there is a disparity and yet they studied the same document, used the same tool, and why the learned trial Judge chose to use the one of the Principal Internal Auditor (PIA) as opposed to the external Auditor.

Counsel submitted, fifthly, that under the International Standards for Auditors (ISA) and the Local Government Audit Manual 2007, Clauses 1130A 1 and 2.1.4 (c) respectively dictate against auditors conducting audit on works they previously participated in. He contended that the evidence of PW1, PW5, PW6 and A2, shows that A2, being at the time PIA, conducted a special investigation audit contained in exhibit P17 on 20th September 2010; that this was just four or five months when he was Acting Chief Finance Officer from July 2009 to March 2010, as stated by PWI; that A2 breached all the known rules, audit manuals and practice guidelines; and that the dangers of auditing own works are susceptible to trials, mistakes, personal feelings, personal knowledge and consideration of extrinsic materials which ordinarily would not form part of the audit.

Counsel contended for the appellant that considering the flaws highlighted, it would have left the prosecution case shaky, and thus, it cannot be said to

have proved its case beyond reasonable doubt. According to Counsel, the learned trial Judge erred by failing to exhaustively evaluate the said pieces of vital evidence and arrived at a wrong conclusion.

Counsel submitted, sixthly, that exhibit P16 was PID4 and exhibit P17 was PID3, and both were presented by PWl (Andrew Leru) during examination-in-chief, and he had only photocopies of the same; that the following day a certified copy of PID3 and PID4 were presented by PWI and admitted in evidence as prosecution exhibits P16 and P17; and that the two documents were authored by the office of the Auditor General and the PIA of the District (A2) respectively. Counsel contended that the presentation of the two exhibits was procedurally irregular and breached all known practices of courts in exhibiting and admission of exhibits.

Counsel contended that the proper procedure is that the author is, and should be, the one to present the same before court and not anybody else, but that the same can be tendered in by anyone as Prosecution Identification Document (PID). He argued that whereas it appears from exhibit PI as being agreed facts/documents, the same was called and brought and tendered in by PWI who neither participated in the audit as a member nor was any explanation given as to why the authors were not called to tender the same, or why it was tendered by PWI yet it was already an admitted as agreed documents.

counsel submitted that section 41 of the Evidence Act states that when court is to form an opinion on any set of facts, that part of facts should be given or presented by such persons who shall be called experts in the particular field of expertise. He cited the case of **Odindo V R (1969) EA 12** and submitted that the presentation of this evidence is breach of procedure and amounts to smuggling in exhibits P16 and P17 in evidence. He argued that the two documents should have remained as a PID, and that a PID remains a PID and cannot be relied upon to form part of evidence. He contended that the learned trial Judge's allowing the two documents the way they were

allowed amounted to justifying an illegality which should not be sanctioned and cannot form part of a fair trial.

Submissions for the Respondent

Counsel referred this Court to page 609 of the record and submitted that according to exhibit P17, the alleged suspicious and questionable UNICEF payments and expenditure on drugs for Ug. Shs. 241,478,118/= and Ug. Shs. 494,733,300/= were not disputed or questioned payments; that the payments were part of what was subtracted from the disbursements to arrive at the closing balance of Ug. Shs. 22,991,432/= as at 30th June 2010.

Regarding the 84 vouchers, Counsel referred to the testimony of PW6 and submitted that the 84 vouchers are not a subject of this case as they did not relate to the 24 cheques which the appellant used to move the money from the account in issue. He contended that the 84 vouchers were not in issue as they were used by the Internal Auditor to carry out the investigation. He submitted that the amount the appellant was convicted of embezzling, that is, Ug. Shs. 295,190,600/= had no vouching as the appellant did not produce any vouchers to cover the said amount.

On voucher numbers 3314, 3312, 2289, 1109, 2249, 1403, 4176, 613, 3885, 2127, 1107, 2407, 2406 and 627, Counsel submitted that the vouchers whether part of the initial 84 or not, are not disputed and do not impact on the fact that the appellant could not account for the monies he was convicted of embezzling, that is, Ug. Shs. 295,190,600/=.

On failure to submit the cheque register book in evidence, the respondent's counsel submitted that exhibit P17 does not mention that the Auditor relied on the cheque register book to come to his findings; that it should also be noted the auditor was A2 who had possession and custody of the said register and could not in the circumstances be expected to give evidence on behalf of the prosecution as he was also charged in the case.

On accountability records, Counsel submitted that according to the prosecution witnesses, particularly the testimony of PW1, it was the appellant who was the custodian of all the accountability documents for the Health department, and that they were having problems getting the documents from the appellant; that PW2, PW5 and PW6 confirmed this position which is also reflected in exhibit P16; that the appellant (DW1), in his defence, confirmed that he used to receive accountabilities and keep them in his office; and that further, the appellant in cross-examination at page 133 states that,

> "*For all the funds withdrawn by me there must be proof of me having paid the funds. I keep the documents.*"

Counsel concluded that the appellant was the custodian of all accountability documentation especially for the monies that he personally withdrew from the bank and did not account for.

On the issue of exhibits P16 and P17 having different figures, Counsel submitted that there were no contradictions if the exhibits in question are properly analyzed with the evidence of PW5 who clearly clarifies on how the two figures came about.

Counsel also referred to exhibit P17 which shows that payments totaling Ug. Shs. 295,190,600/= were made to the appellant without vouching, that cash drawn and any other relevant information regarding correctness and authorization was missing. He submitted that the appellant was indicted for, and convicted of, embezzlement of Ug. Shs. 259,190,600/= and that there was no contradiction. He cited the cases of **Mpagi Obedi V Uganda [2010] UGCA 49** and **Njuguna V Republic [2003] 1 E.A 206 (CAK)** to support his submissions.

On A2 having prepared exhibit P17, Counsel submitted that it is not disputed that A2 carried out the special audit contained in exhibit P17 on 20th September 2010 as Acting Principal Internal Auditor; that A2 was the Acting Chief Finance Officer from July 2009 to March 2010; and that A2 was assigned the duties of Acting Principal Internal Auditor between March and April 2010. According to Counsel, at the time A2 made the special audit in September 2010, he was acting

PIA and not acting CFO. He submitted that there was an external and independent special audit done by the OAG on 12th October 2011 in the form of exhibit P16. He submitted that the audit exercise was however confirmed by PW5 who carried it out with a team from the OAG Regional office of Gulu; and that the OAG team gave the initial report by A2 a second review and came out with an independent report that should be relied on by court.

On admissibility of exhibits P16 and P17, Counsel submitted that exhibit P16 was tendered as an exhibit at page 85 of the record; that both Mr. Onono and Mr Opyene who were counsel for the accused persons had no objection to this report being tendered as an exhibit. He further submitted that exhibit P16 was prepared by the Auditor General and addressed to the Director, Medicines and Health Service Delivery Monitoring unit; that the report was also copied to the Accounting Officer, Apac District; that the Accounting Officer was PW1 who in his testimony at page 74 stated that, *"As CAO I head Civil Service am accounting officer of the District"*; that the prosecution also brought PW5 Omoding Ismail an auditor with the OAG who identified exhibit P16 and owned the report. Counsel submitted that PW1 was a competent witness to tender the report as an exhibit since it was copied to him as one of the recipients, and the author of the document (PW5) was brought to testify as to the contents of the same.

On exhibit P17, Counsel submitted that it was prepared by A2 and addressed to the Chief Executive, Apac District, on 20th September 2010; that PW1 was the Chief Executive of Apac District to whom the report was addressed; that exhibit P17 was tendered as a prosecution exhibit at page 86; and that both Mr. Onono and Mr. Opyene, counsel for the accused persons had no objection when the application was made to tender the report. He submitted that PW1 was a competent witness to tender in exhibit P17 since it was addressed to him and the author (A2) was also charged in this case. He also submitted that both exhibits P16 and P17 were later tendered as exhibits and did not remain as identification documents. It was also his submission that section 41 of the Evidence Act is not relevant to this case as there were no judgments, orders or decrees relied on by the prosecution as exhibits during the trial.

On the case of **Karangwa Joseph V Kulanju Willy, Civil Appeal No. 03 of 2016** cited by the appellant's counsel, the respondent's counsel submitted that it was distinguishable from the instant case as the learned trial Judge did not consider or rely on any single identification (PID) documents in arriving at his decision or judgment.

On the appellant having been acquitted on Count 2 for destroying evidence, Counsel referred the learned trial Judge's statements at page 155 of the record where it is clear the conviction was based on the lack of accountability documents from the appellant regarding monies received by him. He submitted that no evidence was shown that the appellant destroyed any accountability documents therefore it would only be a contradiction if the appellant was convicted on count 2 for destroying the said documents. He concluded that the appellant was rightly convicted on count 1 of embezzlement and there was no contradiction with his acquittal on count 2 since that evidence of destroying the said documents was not produced in court.

Ground 3

Submissions for the Appellant

Counsel restated the principles laid out in the case of **Woolmington V DPP (1935) AC 462** regarding the burden of proof and standard of proof in criminal cases. He also expounded the principle enshrined in Article 28(3)(a) of the 1995 Constitution of Uganda as amended but more specifically in section 105 of the Evidence Act Cap 6.

Counsel submitted that during the trial there was no stealing or missing funds as alleged by the prosecution; that the only problem was the non-availability of accounting documents, namely the Cheque Register Book which was taken over by the state (A2), the vouchers which were recovered from different offices of the health department, and some documents which were with PW6 and some with the External Auditor. He submitted that the appellant maintained in his defence that he was not involved in the audit; and that all the prosecution evidence attests to this fact.

Counsel referred this Court to pages 155 to 156 of the judgment where the learned trial judge considered the evidence of A1 that an auditor had received exhibit P29 from him, yet according to PW5 and A1 any such documents had to be acknowledged by auditors and there was no such evidence of acknowledgement. Counsel questioned the Judge's analysis of evidence of PW5 since this particular witness did not mention anything relating to what the learned Judge referred to. He also wondered why the learned trial Judge concluded that A1 had the onus of producing the necessary documents of accountability yet the appellant had maintained in his defence amplified in exhibit P29 that he was not in possession of the accounting documents because of circumstances beyond his control.

Counsel contended that the accused person does not bear the burden to prove his innocence and that the appellant had explained that the CRB was taken by A2 and vouchers were taken for auditing; and that his evidence was not challenged. He maintained that it is the prosecution which should have led evidence that the documents in issue did not reach where it is being alleged to have been taken by the accused. He submitted that this is a classic definition of shifting the burden of proof on the accused, and an affront on the appellant's right as enshrined in Article 28(3)(a) of the 1995. He concluded that this was a misdirection of the law and fact which occasioned miscarriage of justice.

Submissions for the Respondent

Counsel submitted that contrary to the appellant's counsel's submissions, the non-availability of accountability documents was not the only problem in the trial; that the other issues were that payments without vouching were made to the appellant. He submitted that the testimony of PW5 at page 106 clearly shows the basis for the learned trial Judge's finding that the auditors had to acknowledge any documents they would have received for purposes of carrying out the audit. He submitted that in this case there was evidence from the prosecution that the appellant did not avail the documents to the auditors when they were required to account for Ug. Shs. 295,190,600/=.

Counsel also submitted that the learned trial Judge did not shift the burden of proof at all; that he simply based his findings on the fact that there was no documentation for accountability and if it had been available PW5 would have had acknowledgment of the same. Counsel contended that the prosecution discharged its burden of proof; that it is a misconception on the part of the appellant's counsel to state that the trial Judge's requiring the appellant to avail the documents for accountability of funds he received on behalf of his employer was to shift the burden of proof to him as an accused person.

Ground 4

Submissions for the Appellant

Counsel submitted that whereas the learned trial Judge has discretion regarding the way the sentence is to be imposed, no extraneous and extrinsic circumstances ought to be considered. He referred to page 163 of the record where the learned trial Judge stated that it was not the first time the appellant committed a similar offence.

Counsel referred this Court to section 32(1) to (4) of the Trial on Indictments Act which provides that there must be a certificate of conviction among others. He submitted that the record of proceedings contains no evidence of the appellant being a second offender. He submitted that the only sentence pertaining to the appellant as being a second offender was by the State; that this was akin to submitting evidence from the bar; that this particular consideration was illegal and irregular which aggravated the sentence imposed on the appellant. He submitted that it was a fatal incurable (mis)application of law and the sentence imposed was without any basis.

Lastly, Counsel submitted that, as extensively considered in ground 2, the order of compensation of Ug. Shs. 295,190,600/= has no basis, is not grounded on any credible facts, is fabricated, discredited and flawed. He contended that it would be an insult and a travesty of justice to make the appellant to pay for money on figures which are fabricated, tainted and discredited. He prayed that this Court finds merit in all the grounds of the

appeal and allows it, quash the conviction and sentence, and set aside the orders arising from the same.

Submissions for the Respondent

Counsel submitted that the provisions of section 32 of the Trial on Indictments Act are not mandatory and refer to "*in addition to any other mode provided by any law for the time being in force*". He also referred this Court to The Constitution (Sentencing guidelines for Courts of Judicature) (Practice) Directions, 2013 and submitted that it was a duty upon the prosecution to present to court the information regarding the appellant's antecedents and past criminal record. He contended that there was no irregularity or illegality whatsoever as the Practice Directions do not give a form in which the said information should be presented to the court.

On the compensation order to repay Ug. Shs. 295,190,600/=, Counsel referred this Court to section 126 (1) of the Trial on Indictments Act and page 163 of the record. He submitted that it was well within the learned trial Judge's discretion to order compensation of the said amount to Apac Local Government considering that they had suffered material loss as they did not benefit from the said monies that were stolen by the accused person. He prayed that this appeal be dismissed and that the orders and decision of the learned trial Judge be upheld.

Consideration of the Appeal by Court

This is a first appeal. This court is empowered under rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions 2005 to re appraise the evidence adduced at the trial court and draw inferences of fact. This Court will do so conscious of the fact that, unlike the trial court, it did not have the opportunity to observe the demeanour of witnesses as they testified. See **Kifamunte Henry V Uganda, SCCA No. 10/1997; Bogere Moses V Uganda, SCCA No. 1/1997**.

Ground 1

In this case, the record of appeal shows on pages 71 and 72 that the appellant (A1 then) took plea to the charges of causing financial loss contrary to section 20 (1) of the Anti-Corruption Act 2009. The said charges were contained in Counts 53 and 54 of the amended indictment, which shows the charge of causing financial loss in Counts 53 and 54 were preferred against Gapson Yeko Ogwal (A3) and Odwe Nelson (A2) respectively. A2 and A3 are not parties to this appeal. They will therefore not be the focus of this judgment except where it is relevant to the appellant's case.

It is clear from the record, as correctly submitted by the appellant's counsel, that the charges in Counts 53 and 54 of the indictment were not preferred against the appellant and were not consented to by the DPP yet the appellant was made to take plea on the same. The respondent's counsel conceded in his submissions in reply that there was an error as to the record and capture of the plea taking on Counts 53 and 54. It is not in dispute therefore that the appellant was made to plead to two charges which had not been preferred against him. The question however is whether this occasioned miscarriage of justice to the appellant.

The record shows on pages 58 to 71 that the appellant, other than erroneously taking plea on counts 53 and 54 as stated above, also took plea on counts 1 to 52 inclusive, all containing charges which had been preferred against him. The record also shows on page 152 that the learned trial Judge, in his judgment, stated as follows:-

> *"**The charges against Al are embezzlement, contrary to section 19 (a) and (d) (i) of the Anti-Corruption Act in Count 1, destroying evidence, contrary to section 102 of the Penal Code Act in count 2, forgery, contrary to sections 342 and 347 of the Penal Code Act in counts 3 to 28 (both inclusive) and uttering a false document, contrary to sections 351 and 347 of the Penal Code Act in counts 29 to 52 (both inclusive).** Against A2 one of the charges is causing financial loss, contrary to section 20 (1) of the Anti-Corruption Act which is contained in count 54. A3 is too charged with causing*

financial loss, contrary to section 20 (1) of the Anti-Corruption Act in count 53 of the indictment. Finally count 55 charges A2 and A3 jointly with abuse of office, contrary to section 11 (1) of the Anti-Corruption Act." (emphasis added).

This was clearly in line with the amended indictment on record. The learned trial judge went on to consider all the counts in respect of each accused person in his judgment. On page 153, the learned trial Judge stated, *"Count 1 charges A1 with embezzlement."* On page 156, he stated, *"In count 2 A1 is charged with destroying evidence."* On page 157 he further stated, *"In counts 3 to 28, both inclusive, A1 is charged with forgery of the cheques in exhibit P.10 and P.11."* On page 158 he stated:-

> *"Charges of uttering a false document are contained in counts 29 to 52, both inclusive. Where it is alleged that A1 with intent to defraud knowingly and fraudulently uttered each of the forged cheques related to therein."*

On page 160 the learned trial Judge stated:-

> *"In count 53 the charge preferred against A3 is causing financial loss, contrary to section 20(1) of the Anti-Corruption Act....The charge of financial loss features again in count 54. This time it is against A2 who at the time in issue was Acting Chief Financial Officer for Apac District Local Government."*

On page 161 the learned trial Judge noted:-

> *"A2 and A3 are jointly charged with abuse of office, contrary to section 11(1) of the Anti-Corruption Act in count 55."*

This clearly indicates that the learned trial Judge considered each of the counts according to the amended indictment on record. At no time was the appellant tried or convicted for the offences contained in counts 53 and 54 for which he erroneously took plea. Counts 53 and 54 were clearly analyzed by the learned trial Judge only in regard to A3 and A2 respectively.

Thus, despite the appellant being made to plead to charges that had not been preferred against him, it is clear the learned trial Judge only considered the offences that the appellant was charged with when delivering his judgment.

Those are the charges in respect of which the appellant defended himself.

Both counsel cited the case of **Wapokra V Uganda** to support their respective sides. We have carefully considered the circumstances of that case. In that case, the learned trial Judge allowed an amendment to the indictment. Court immediately proceeded to hear the prosecution evidence without calling on the accused (appellant in that case) to plead to the amended indictment. The amendment changed the dates when the offence is stated to have been committed. The appellate court also found that the court record of the trial court did not show that after that, the indictment was amended to the effect that at the time of the offence the appellant was infected with Human Immune Deficiency Virus (HIV). However, the learned trial Judge went on to convict the appellant of aggravated defilement though he never pleaded to it, including the added ingredient of his HIV status. This court, on appeal against conviction, held that the trial was a nullity by reason of the omission by the learned trial Judge to ask the appellant to plead to the amended indictment. This Court ordered a retrial.

In the instant case, unlike in **Wapokra V Uganda** cited above, the appellant pleaded to the charge of embezzlement which he was eventually convicted of, together with other charges of which he was acquitted. These charges were contained in an amended indictment which was allowed by the trial court. Though the appellant was also erroneously made to plead to charges of causing financial loss in Counts 53 and 54 of the indictment, the record shows he was not put on trial for the same and the learned trial Judge only considered the offences the appellant was charged with when delivering his judgment.

In **Ratilal Shahur V R [1958] EA 3** it was held that before ordering a retrial, court must first investigate whether the irregularity is reason enough to warrant an order of a retrial. The interests of justice should so require. Each case depends on its particular facts and circumstances. A retrial is not to be ordered merely because there was an irregularity. However where an accused was convicted of an offence other than the one with which he was either charged or ought to have been charged, a retrial will be ordered. Also see **Tamano V R [1964] EA 126.**

Thus, considering the evidence on record and the cited authorities, we are inclined to take the recording of the plea taking at pages 71 and 72 as an error. In our considered opinion, this error did not occasion miscarriage of justice on the appellant who, as the record indicates, was not put on trial for those offences he was erroneously made to plead to.

On that basis, ground 1 of this appeal fails.

Ground 2

The record shows that the conviction of the appellant of the offence of embezzlement is premised on exhibit P16 and P17. Exhibit P16 is titled "Detailed Health Sector Audit Report, Apac District". It was prepared by the Auditor General who is mandated to conduct audits under Article 163 (3) of the Constitution of the Republic of Uganda. Exhibit P17 is a Special Investigation of the Health Department conducted between 13th September and 20th September 2010. It covers the period 1st July 2009 to 30th June 2010. It was prepared in response to a complaint raised by PW6 to PW1 in form of exhibit P18 on 19th July 2010.

Exhibit P16 shows that Ug. Shs. 998,925,743/= (nine hundred ninety eight million, nine hundred twenty five thousand, seven hundred and forty three) was deposited on the Health Account for Apac District Local Government. Exhibit P16 shows that out of the Ug. Shs. 998,925,743/=, payment vouchers of only Ug. Shs. 703,735,143/= (seven hundred and three million, seven hundred thirty five thousand, one hundred and forty three) were availed for audit. This left a total sum of Ug. Shs. 295,190,600/= (two hundred ninety five million, one hundred ninety thousand, six hundred) unsupported by vouchers.

Exhibit P17 shows that A1 (appellant in this case) received cash in respect of 27 itemized cheques to the tune of Ug. Shs. 295,190,600/= (two hundred ninety five million, one hundred ninety thousand, six hundred). The appellant, in his defence, did not dispute receiving this money. The evidence on record shows that the appellant failed to avail accompanying documents like vouchers, cash

drawn or other such supporting documents to show the money was put to the purpose it had been requisitioned for.

The evidence of PW1 is that there were processes for requisition, verification and approval; that work plans should be attached to the several documents relating to the process of payment; and that A1 kept all accounting documents and was responsible for preparing all cheques used in the various transactions. At page 82 of the record of appeal, PW1 stated:-

> *"A1 Ocepa was agent for Apac District Health Service Account and he kept all accounting documents in that department. He was responsible for all cheques pointing to transaction. He handled the cash. He was to all books of accounts and generated accountability documents... Besides Ocepa there was no Senior Accounts Assistant that financial year. He kept cheque books, payment vouchers and other books".*

Thus, the prosecution evidence was that the appellant was the custodian of all the accountability documents for the Health department.

The appellant did not dispute this prosecution evidence. He gave evidence that as Senior Accounts Assistant and Bank agent he used to receive money in cash which he took back to his employer and ensured it was applied to the purposes it had been requisitioned for.

At pages 86 and 87 of the record of appeal, PW1 stated:-

> *"I get monthly reports from respective department and 1 consolidate them to make a full report. I have not been getting the same report from the Department of Health. As accounting officer I wrote to them to submit their reports. I wrote to the head of department Dr. Emer.... There was no reply in writing but he came and told me verbally that he was having problems in the department. He said the Senior Accounts Assistant (AI) was not cooperating with him..."*

PW2 states at page 93 of the record of appeal that:-

> *"The head of internal audit said he could not proceed because the lack of*

cooperation from the person alleged to have misappropriated the money. He mentioned Ocepa Geoffrey (A1)."

At page 105 of the record of appeal, PW5 stated that when they asked for documents, the documents had not been recovered; that they were hidden or kept away by Ocepa Geoffrey (appellant), and as such he was unable to establish whether funds were used for the intended purposes.

This evidence is further supported by exhibit P16 at page 651 of the record which shows that payment vouchers, books of account and the necessary requisitions were not availed to support the withdrawals contrary to the Local Government Financial and Accounting Regulations (LGFAR) 2007 and the Local Government Financial and Accounting Manual (LGFAM) 2007. PW6 at page 112 of the record of appeal stated that:-

"CAO instructed internal audit to do an emergency audit in the Health department. This did not happen because Ocepa did not avail the documents necessary."

The appellant (DW1) confirmed in his defence that he used to receive accountabilities and keep them in his office. He testified during cross-examination at page 133 of the record that:-

"For all the funds withdrawn by me there must be proof of me having paid the funds. I keep the documents."

The learned trial Judge's findings on page 155 of the record were to the following effect:-

"Evidence on record shows no documents were available to show how the shs. 295,190,600/= was expended at the time of auditing, as should have been the case ideally. It is not contested A1 received the money. Equally it is not disputed A1 had the onus to produce the necessary documents of accountability. He did not....A1 did not account for the shs. 295,190,600/= he received, in cash, intended for his employer, from the bank. The paper trail ends on him. The only explanation available is that he converted the money to

himself. The prosecution has proved beyond reasonable doubt that A1 stole the shs. 295,190,600/= in issue. I find A1 guilty on count 1."

Having analyzed the evidence afresh above, it is clear the conviction of the appellant was based on the lack of accountability documents from the appellant in regard to monies received by him. We therefore agree with the trial Judge that the appellant was guilty of embezzlement because all the ingredients of the offence of embezzlement were proved against him by the prosecution beyond reasonable doubt. The appellant was rightly convicted on count 1 of embezzlement.

On the appellant's counsel's submissions about failure to submit the cheque register book in evidence, we have carefully scrutinized exhibit P17. It is not mentioned anywhere in exhibit P17 that the auditor relied on the cheque register book to come to his findings. We have noted from the record that the Auditor was A2 who had possession and custody of the said register book. It would be too far -fetched, in our opinion, in the circumstances of this case where A2 was also charged, to expect A2 to give evidence on behalf of the prosecution.

The appellant's counsel faulted the learned trial Judge for relying on exhibits P16 and P17 in convicting the appellant yet they had different figures.

Exhibit P16, at page 651 of the record of appeal, shows that the Auditors found that Ug. Shs. 307,565,000/= paid out from the Health department account remained unaccounted for. At page 652 of the same record, the Auditor General's report for the Financial Year 2009/10 reported that a sum of Ug. Shs. 295,190,600/= was not supported with financial and accounting records. A review of the questioned expenditure in both reports revealed that Ug. Shs. 307,565,000 (Appendix II) was still unaccounted for.

The above discrepancies were brought out or explained in the testimony of PW5 at page 107 when he stated:-

"At first instance it was over 295m/=. At later report we noted that was over 300m/=. This is from page 5. At first we relied on bank statements where some

figures were not clear. In second audit we asked accounting officer to provide clearer bank statements. We compiled two additional over 12m/= in the in clearer statements."

Exhibit P17, at page 516 of the record of appeal, shows that payments totalling Ug. Shs. 295,190,600/= were made to the appellant without vouching; and that cash drawn and any other relevant information regarding correctness and authorization is missing.

The appellant's counsel questioned the UNICEF payments and expenditure on drugs for Ug. Shs. 241,478,118/=. However exhibit P17, on page 609 of the same record, shows that the payments for drugs and UNICEF activities for Ug. Shs. 241,478,118/= and Ug. Shs. 494,733,300/= were not disputed or questioned payments. The payments were part of what was subtracted from the disbursements to arrive at the closing balance of Ug. Shs. 22,991,432/=as at 30th June 2010.

Regarding the 84 Vouchers, PW6, at pages 115 and 116 of the record of appeal, stated:-

"There was a first search conducted in the office of AI. The police officer who conducted the search was called for Kilama. Eighty four vouchers were got. They were not related to the 24 cheques."

This explains the 84 vouchers were not a subject of this case as they did not relate to the 24 cheques the appellant used to move the money from the account in issue. The evidence on record shows the amount the appellant was convicted of embezzling was Ug. Shs. 295,190,600/= which had no vouching, since the appellant did not produce in evidence any vouchers to cover the said amount or account for it.

The other vouchers referred to by the appellant's counsel, that is voucher nos. 3314, 3312, 2289, 1109, 2249, 1403, 4176, 613, 3885, 2127, 1107, 2407, 2406 and 627, whether they were part of the initial 84 or not, were apparently not disputed. In our opinion, they do not impact on the finding that the appellant could not

account for the monies he was convicted of embezzling, that is, Ug. Shs. 295,190,600/=. We find no contradiction on that issue.

In **Mpagi Obedi V Uganda [2010] UGCA 49**, this Court held that "*Theft is theft. The amount stolen does not matter as long as the ingredient of theft is proved*".

In **Njuguna V Republic [2003] 1 E.A 206 (CAK),** it was held that:-

> "*stating in the charge sheet a lesser amount than the amount which was actually stolen was no more than an irregularity in the charge sheet and it did not render the charge defective. It was an irregularity curable under section 382 of the Criminal Procedure Code.... We are satisfied that the High court reached the correct decision in saying that the discrepancy between the amount stated in the charge sheet and the amount in evidence was immaterial and did not affect the validity of the conviction*".

Regarding the appellant's counsel's submissions about A2 having prepared exhibit P17, the record clearly shows that indeed A2 carried out the special audit contained in exhibit P17. This was done on 20th September 2010. A2 was Acting Principal Internal Auditor (PIA) then. This evidence is not disputed by the respondent. It is also not disputed that A2 was the Acting Chief Finance Officer (CFO) from July 2009 to March 2010. A2 was assigned the duties of Acting Principal Internal Auditor between March and April 2010. Therefore, at the time A2 made the special audit in September 2010, he was acting PIA and not acting CFO.

The evidence on record shows that there was an external and independent special audit done by the Office of the Auditor General (OAG) on 12th October 2011. This was tendered in evidence as exhibit P16. PW5 confirmed that the audit exercise was carried out with a team from the OAG Regional office Gulu. The other team members were Amos Ongwar and Byamukama Joshua. They were all supervised by Mr. Galiwango David James. Thus, in our opinion, the OAG team gave the initial report by A2 a second review and came out with an independent report.

We have also addressed the appellant's counsel's submissions challenging the credibility and admissibility of exhibits P16 and P17.

Regarding exhibit P16, we note from the record that it was tendered as an exhibit at pages 85 and 86 of the record of appeal. It was initially marked for identification as IDP.6. Both Mr. Onono and Mr Opyene who were counsel for the accused persons were in court when it was being tendered in evidence during the examination in chief of PW1. They are both on record as having indicated that they had no objection to IDP.6 being tendered in evidence as an exhibit.

The record further shows that exhibit P16 was prepared by the Auditor General. It was addressed to the Director Medicines and Health Service Delivery Monitoring Unit. It was copied to the Accounting Officer Apac District. The Accounting Officer was PW1, as is evident in his testimony at page 74 of the record of appeal, where PW1 stated that, "*As CAO I head Civil Service am accounting officer of the District*". In addition, PW5 Omoding Ismail, an auditor with the OAG, identified and owned exhibit P16 at pages 105 and 106 of the record of appeal.

In view of the foregoing, we find that PW1 was a competent witness to tender the report as an exhibit since the document was copied to him as one of the recipients. The author of the document (PW5) was called by the prosecution to testify as to the contents of the same.

Regarding exhibit P17, the adduced evidence shows it was prepared by A2 and was addressed to the Chief Executive of Apac on 20th September 2010. PW1 was the Chief Executive of Apac District at that time. The record shows that exhibit P17, which was initially marked for identification as IDP.3, was tendered as a prosecution exhibit, at page 86 of the record of appeal. Both Mr Onono and Mr. Opyene, counsel for the accused persons are on record as having indicated to court that they had no objection when the application was made to tender the report. It was tendered in evidence during the examination in chief of PW1 to whom the document was addressed.

PW1 was therefore a competent witness to tender in exhibit P17 since it was addressed to him. The author of exhibit P17 was A2 who was also the appellant's co accused. It would be too far-fetched therefore to expect that A2 would be the one to tender in the document.

We also do not agree with the appellant's counsels submissions that exhibits P16 and P17 remained as identification documents. The record clearly shows that both documents were initially marked as identification documents and were eventually admitted in evidence as prosecution's exhibits. We, in that connection agree with the respondent's counsel that the case of **Karangwa Joseph V Kulanju Willy Civil Appeal No. 03 of 2016** is distinguishable from the instant case since the learned trial Judge in the instant case did not consider or rely on any single identification (PID) documents in arriving at his decision or judgment. We also hold the opinion that section 41 of the Evidence Act is not relevant to this case as there were no Judgments, orders or decrees relied on by the prosecution as exhibits during the trial.

We have also carefully addressed the submissions of both sides regarding count 2 of the amended indictment where the appellant was charged with destroying evidence. There is no evidence on record that the appellant destroyed any accountability documents. We agree with the findings of the learned trial Judge who appropriately acquitted the appellant of charges of destroying evidence under count 2 of the amended indictment. Contrary to the appellant's counsel's submissions, there was no contradiction with his acquittal on count 2 since that evidence of destroying the said documents was not produced in the trial court.

Ground 2 of this appeal fails.

Ground 3

The appellant contended that there was no stealing or missing funds as alleged by the prosecution; that the only problem was the non-availability of accounting documents. The appellant's counsel referred this Court to page 156 of the record of appeal and submitted that the documents were the cheque register book which was taken over by the state (A2), the vouchers

which were recovered from different offices of the health department, and some documents which were with PW6 and some with External Auditor. Counsel submitted that the appellant was not involved in the audit and all the prosecution evidence attests to this fact.

The appellant's counsel questioned the learned trial Judge's analysis of evidence of PW5 since this particular witness did not mention anything relating to what the Judge referred to. He wondered why the learned trial Judge concluded that A1 had the onus of producing the necessary documents of accountability yet the appellant had maintained in his defence all through the trial that he was not in possession of the accounting documents because of circumstances beyond his control.

The appellant's counsel restated the cardinal rule that he who alleges must prove; that in criminal trial this burden is on the prosecution and does not shift in the entire trial except on crimes grounded on the statute; that the prosecution bears this burden and the standard of which is beyond reasonable doubt.

The law on burden and standard of proof in criminal matters is well laid out in **Woolmington V DPP (1935) AC 462** where Lord Sankey propounded it as follows:-

> *"Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoners' guilt. Subject to ... the defence of insanity and subject to statutory exception ... no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."*

This principle is enshrined in Article 28 (3) (a) of the 1995 Constitution of Uganda as amended, but more specifically in section 105 of the Evidence Act Cap 6.

In the instant case, contrary to the appellant's counsel's submissions, non-

availability of accountability documents was not the only problem in the trial. There were clearly other issues, notably, that payments without vouching were made. It was evident on the record that documents availed by the appellant for auditing were always receipted in acknowledgement. PW5, at page 106 of the record of appeal, testified that:-

> *"CFO should avail us the documents we need. We acknowledge receipt of documents we are availed".*

This testimony clearly shows the basis for the learned trial Judges finding, at page 156 of the record of appeal, that the Auditors had to acknowledge any documents they would have received for purposes of carrying out the audit. In the instant situation, there was evidence from the prosecution presented to the trial court that the appellant did not avail the documents to the auditors when they were required to account for the Ug. Shs 295,190,600/= the appellant received from the Bank on behalf of his employer.

This is reflected on pages 155 and 156 of the record of appeal where the learned trial Judge considered the evidence as follows:-

> *"This evidence was not disputed by A1 who claimed, as in exP29 that an auditor had received these items from him, yet according to PW5 and A1 any documents received by auditors have to be acknowledged by the auditors as received before they can be taken away. There is no evidence of such receipts let alone acknowledgement of receipts.*

In our considered opinion, the burden of proof was not shifted at all by the learned trial Judge. The learned trial Judge simply based his findings on the fact that there was no documentation for accountability, and if it had been available, PW5 would have had acknowledgment of the same.

The prosecution discharged its burden of proof the moment it adduced evidence that the appellant received the Ug. Shs. 295,190,600/= from the Bank on behalf of his employer and that he failed to produce documentation for accountability to the auditors when it was requested. Once this evidence was adduced against the appellant as an accused person he had the evidential burden to avail the

required documentation showing accountability for the money in question. He was the only one who knew what happened to the Ug. Shs. 295,190,600/= he received from the bank account. He had the evidential burden to prove any fact especially and exclusively within his own knowledge. The learned trial Judge clearly pointed this out when he said he had the onus to avail the documents.

It is a misconception on the part of the appellant's counsel to state that the trial Judge's requiring the appellant to avail the documents for accountability of funds he received on behalf of his employer was to shift the burden of proof to him as an accused person.

Ground 3 of the appeal fails.

Ground 4

The appellant faulted the learned trial Judge for imposing a sentence against him without any basis. We have considered the submissions of both Counsel on this matter, and carefully perused the record of proceedings where this matter was addressed.

A sentencing Judge is guided by the penal laws, case law and the sentencing guidelines in place, in this case, The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.

Paragraph 14, second schedule of the Sentencing Guidelines provides that when determining a sentence, the court shall take into account various factors, including the antecedents of the offender or habitual offender or first offender. Paragraph 55 of the same guidelines provides for general duties of the prosecution. It states that during sentencing, the prosecution shall present to court information relating to the offender including the offender's past criminal record. Section 32 of the Trial on Indictments Act provides that a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force, by an extract certified copy of the sentence or order, or, in the case of a conviction, a certificate signed by the officer in charge of the prison in which the punishment or part of it was inflicted, or by the production of the warrant of commitment under which the punishment was

suffered.

Having considered the provisions of the law on sentencing above, we agree with the respondent's counsel that the duty to present to court information regarding the appellant's past criminal record is on the prosecution. Secondly, on basis of the language used in section 32 of the Trial on Indictments Act, particularly the use of the word *"may"*, the mode of proving a previous conviction or acquittal set out in that section is not mandatory, and it may be used *"in addition to any other mode provided by any law for the time being in force."* We have also observed that the Practice Directions do not give a form in which the said information should be presented to the court.

This would in our opinion, infer that the discretion is left to the trial Judge to determine which mode should be used in presenting to court information regarding the antecedents of the offender.

In the instant situation, the record of appeal shows at page 163 that the learned trial Judge stated:-

> *"It's sad to note that this is not the 1st time the convict has committed a similar offence, an earlier occasion he was let off on a fine. The most he can get is a fine of 6,620,000/= under section 19 of the Anti-Corruption Act. A good expedition for a person who has made a career of embezzling public funds."*

We have failed to find the record of proceedings where the *allocutus* was recorded. However, it is discernible from the foregoing extract of the judgment, and the submissions of both counsel, that the learned trial Judge properly considered the antecedents of the offender before convicting him. The record shows the Judge based his sentence on the information obtained from the prosecution side as well as the defence side.

We also differ from the contention of the appellant's counsel that the information given by the prosecution side regarding the appellant's previous conviction was evidence from the bar because the nature of such information as seen from the laws stated above is that it is supposed to be availed to court by the prosecution.

It should be differentiated from the evidence adduced during trial which is normally given by witnesses. There was no irregularity or illegality whatsoever as the Practice Directions do not give a form in which the said information should be presented to the court.

Regarding the order for compensation, section 126 (1) of the Trial on Indictments Act provides that:-

> "*when any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable*"

The record shows at page 163 of the record of appeal that the learned trial Judge stated:-

> *"But I have also to consider the fact that the convict has embezzled shs. 295,190,600/= depriving the people of Apac who are rightfully entitled to its utilization."*

This shows that the learned trial Judge took into account the relevant laws on compensation when he made the compensation order. As correctly submitted by the respondent's counsel, it was well within the learned trial Judge's discretion to order compensation of the said amount to Apac Local Government, considering that, because of the appellant's acts or omissions which amounted to embezzlement, it had suffered material loss in that it did not benefit from the said monies that were stolen by the accused person (appellant).

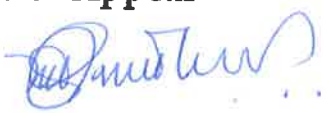
In that regard, we find no merit in this ground of appeal and it accordingly fails.

All in all we find that this appeal has no merit and it is hereby dismissed.

Dated at Kampala this...16th day of ...Dec...2019

Hon. Mr. Justice Geoffrey Kiryabwire

Justice of Appeal



Hon. Mr. Justice Stephen Musota

Justice of Appeal

Hon. Lady Justice Percy Night Tuhaise

Justice of Appeal