THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0221 OF 2014

NIXON BALIKOOWA :::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA :: RESPONDENT

CORAM: HON. MR. JUSTICE ALPHONSE OWINY-DOLLO, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF THE COURT

This is a second appeal from the decision of the High Court of Uganda (Gidudu, J.), which, in exercise of its appellate jurisdiction dismissed the appellant's appeal against his conviction for the offences of Transacting Financial Institutions Business without a Licence contrary to Sections 4 (1) and 4 (11) of the Financial Institutions Act, 2004 (count 1) and Embezzlement contrary to Section 268 (b) and (g) of the Penal Code Act, Cap.120 (count 2) by the learned trial Chief Magistrate.

Brief Background

The appellant was tried on an amended charge containing the above mentioned offences before Her Worship Irene Akankwasa, a Chief Magistrate attached to the Anti-Corruption Division of the High Court. The prosecution case was that the appellant was a shareholder, secretary and one of the Directors of a Company called Dutch International Company Limited which was used as a vessel to defraud members of the public of their monies. The Appellant and others, as officers of the said company would entice members of the public into signing up with the company with the promise of earning several benefits. The members would fill a membership form, pay a

membership fee and also pay or make a contribution of the Full of Surprise package (FOS) ranging from 100-500 US Dollars.

After making the requisite contributions, the members would be issued with receipts which they would show at the end of a given period to get their benefits. At the beginning of the venture, the company would duly pay its members but subsequently it stopped honouring its obligations to those who had contributed. Thereafter the company officials switched off their phones and locked their offices permanently. Investigations were concluded and the appellant, and others not material to this appeal were arrested and prosecuted.

The appellant denied any wrong doing insisting that the Company honoured all its obligations which were soft loans without interest to the members. Despite the fore going defence, the learned trial Chief Magistrate convicted the appellant as charged. Being dissatisfied with the decision of the trial Court the appellant lodged a first appeal to the High Court on the following grounds:

"1. **The Learned Trial Chief Magistrate demonstrated bias against the 1st appellant throughout the trial thereby depriving him of a level ground to ably defend himself the charges.**

2. **The Learned Trial Chief Magistrate's holding that the 1st Appellant transacted a Financial Institution Business without a valid licence and the order disqualifying him from acquiring such a licence under the Act or any other law authorizing the taking of deposits was not based on factual or legal findings.**

3. **The Learned Chief Magistrate erred in law and fact when she convicted the Appellants on Acts/ omissions of the Company.**

4. **The Learned trial Magistrate failed to evaluate the evidence and to properly construe he law in respect to the charge of embezzlement thereby arriving at wrong conclusions which caused injustice to the 1st Appellant.**

5. **The Learned Chief Magistrate misdirected herself on the burden and standard of proof applicable to cases of embezzlement.**

6. **The order to refund shs.2,525,194,794/= (Two billion five hundred twenty five million one hundred ninety four thousand seven hundred ninety four) to Dutch International Limited victims was ungrounded, without justification and lacked concrete proof of loss by the alleged victims.**

7. **The sentence of seven years imprisonment for the offence of embezzlement was excessive given the attendant facts."**

The High Court dismissed that Appeal, upholding the appellant's conviction by the learned trial Chief Magistrate as well as the relevant orders of compensation and disqualification which had been made against him by the trial Court. The Appellant was dissatisfied with the decision of the High Court and lodged a second appeal in this Court on grounds which are set forth in his supplementary memorandum of appeal dated 12th June 2019 as follows:

"1. **The learned appellant (sic) judge erred in law when he upheld the conviction sentence and orders of the lower court which were arrived at after a trail (sic) marred with irregularities thereby occasioning a miscarriage of justice.**

2. **The learned appellate judge erred in law when he upheld the conviction and sentence of the appellant for embezzlement after the appellant was made to take plea on the amended charge sheet that charges the appellant under a repealed law thereby occasioning a miscarriage of justice.**

3. **The Learned appellate judge erred in law when he upheld the conviction of the appellant for transacting a financial institutions business without a valid licence without the appellant having taken plea on the 'verbally' amended charge sheet thereby occasioning a miscarriage of justice.**

4. **The learned appellant (sic) judge erred in law when he upheld the conviction of the appellant for transacting a financial institutions' business without a valid licence basing on activities carried out by Dutch International Ltd which activities did not constitute financial institutions business thereby occasioning a miscarriage of justice.**

5. **The Learned Appellant Judge erred in law when he failed to re-evaluate the evidence on record and upheld the conviction of the**

appellant without evidence that the appellant converted Dutch International's money to himself thereby occasioning a miscarriage of justice.

In the alternative and without prejudice;

6. **The learned appellant (sic) judge erred in law when he upheld the harsh, excessive and severe sentence and orders of the trial magistrates (sic) after wrongly applying the principle of deduction of sentence served on remand and erroneously considering the appellant a habitual offender thereby occasioning a miscarriage of justice."**

Representation

At the hearing of the appeal, the appellant was self-represented, while, Ms. Caroline Marion Acio, learned Senior State Attorney from the Office of the Director of Public Prosecutions represented the respondent. The parties had earlier filed written submissions which were accordingly adopted with leave of this Court.

Before we proceed to the merits of this appeal, we find it necessary to make some comments about the supplementary memorandum of record which was filed belatedly on 12th June 2019. The appellant initially filed a memorandum dated 15th October, 2014 which appears on the Court record. There is no indication that the appellant sought leave or obtained any from this Court to file the said supplementary memorandum which is in violation of **Rule 67 (1)** of the **Judicature (Court of Appeal) Rules S.I 13-10**. Counsel for the respondent, however, did not complain about the aforementioned anomaly and in fact responded to the appellant's submissions which were based on the supplementary memorandum. We take it that the respondent consented to the appellant's reliance on the memorandum in issue and, accordingly, we shall maintain it on the record.

Resolution of the appeal

We have carefully studied the Court record, considered the submissions for either side, and the laws and authorities cited and those not cited. In second

appeals like the present one, the duty of this Court is now well defined. Under **section 45 (1)** of the **Criminal Procedure Code Act, Cap. 116**:

> **"Either party to an appeal from a magistrate's court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law."**

A second appellate Court is only concerned with matters of law and not matters of fact or mixed law and fact. In **Areet Sam vs. Uganda, Supreme Court Criminal Appeal No. 20 of 2005** the Court observed that:

> **"...it is trite law that as a second appellate court we are not expected to reevaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or reevaluate the evidence or where they are proved manifestly wrong on findings of fact, this court is obliged to do so and ensure that justice is properly and truly served."**

In view of the above it is a well settled principle that the second appellate Court shall not question the concurrent findings of fact reached by the lower Courts. It is also an accepted principle that a failure to reappraise the evidence is an error of law which would justify the intervention of the second appellate Court. In **Tito Buhingiro vs. Uganda, Supreme Court Criminal Appeal No. 08 of 2014,** it was held that a failure by the first appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial Court and make up its own mind amounts to an error of law.

We shall keep the above principles in mind as we determine this appeal. In view of those principles, we shall not question the following concurrent findings of fact reached by both the lower Courts:

> **"1. The appellant was a key official and shareholder in Dutch International Ltd which collected contributions from members of the public. Those contributions were a form of deposit taking (a business only reserved for duly licensed financial institutions) and the said Company was not licensed to conduct the said business.**

2. **Dutch International Limited had taken deposits from the General Public assuring them of interest after a given period. Many of the depositors were not paid thereby losing both the principal contribution and the accrued interest thereon.**

3. **The veil of incorporation of the said Dutch International Ltd could be lifted to charge the appellant, who was a Director, General Secretary and Shareholder of the Company which was involved in embezzlement of the depositor's monies.**

4. **The substantial amount of monies fleeced from the relevant depositors would be payable as compensation by the appellant. The two lower Courts put the amount of money at 2,525,194,794/= (Two Billion, Five Hundred Twenty Five Million, One Hundred Ninety Four Thousand, Seven Hundred Ninety Four).**

We also find it necessary to comment on ground one as framed in the supplementary memorandum as follows:

> **"The learned appellant (sic) judge erred in law when he upheld the conviction sentence and orders of the lower court which were arrived at after a trail (sic) marred with irregularities thereby occasioning a miscarriage of justice.**

The above ground violates **rule 66 (2)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10** which makes it a mandatory requirement that each ground of appeal specifies:

> **"...in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided..."**

Ground one, does not specify the irregularities complained of. As a result, it contravenes the requirements of the law as discussed above. It is therefore hereby struck out. This appeal shall proceed in respect of only grounds 2, 3, 4, 5 and 6.

We shall proceed to determine those grounds in the order appearing below.

Grounds 2 and 5

We shall consider grounds 2 and 5 jointly as they relate to the conviction of the appellant for embezzlement. In ground 5, the appellant complained that

he was convicted of the offence of embezzlement in the absence of evidence that he converted money belonging to Dutch International Ltd. He was adamant that this was erroneous on the part of the learned trial Judge.

In reply, counsel for the respondent contended, first that ground 5 requires this Court to reevaluate the evidence on record and as such raises only matters of fact. In counsel's view this Court should only concern itself with matters of law. She therefore urged Court to have the impugned ground 5 struck out.

It is trite law that a failure by the first appellate Court to properly reappraise the evidence on record and come up with its own inferences is an error of law. We have discussed several authorities on the subject earlier and need not repeat the principles articulated therein. In ground 5, the appellant alleges that the findings of the learned first appellate Judge relating to a key ingredient of the relevant offence of Embezzlement were erroneous. This is a matter of law, in our view, as it requires the examination of the relevant offence as criminalized in the Laws of this Country.

The appellant was charged alongside one other person for the offence of **Embezzlement** contrary to Section **268 (b) and (g) of the Penal Code Act, Cap. 120**. The foregoing provision is to the effect that:

> **"Any person who being a director, officer or employee of a company or corporation; steals any chattel, money or valuable security to which he or she has access by virtue of his or her office commits the offence of embezzlement and shall on conviction be sentenced to imprisonment for not less than three years and not more than fourteen years."**

The **Black's Law Dictionary, 8th Edition** says the following about the offence of embezzlement:

> **"Embezzlement is the fraudulent taking of personal property with which one has been entrusted, esp. as a fiduciary.**
>
> **...**
>
> **Embezzlement can be defined as the fraudulent conversion of the property of another by one who has lawful possession of the property**

and whose fraudulent conversion has been made punishable by the statute." Arnold H. Loewy, Criminal Law in a Nutshell 94 (2d ed. 1987)."

In our view the offence of embezzlement is intended to deal with corrupt employees who steal from their employers. It could not have been intended that any corrupt employee who fleeces persons not being his/her employer would be charged with embezzlement. It is the employer who must have entrusted the monies to the employee, and the said monies are subsequently stolen by the employee.

In the present case, for the offence of embezzlement to be proved, the prosecution had to show that the appellant stole monies belonging to the company (his employer or fiduciary). This was not the case. Instead it was the company, an artificial person which stole money from the unsuspecting members of the public through the natural persons who ran it. The company did not complain.

We could further put it this way; the person who should suffer any detriment from the acts of embezzlement is the employer of the corrupt person. If not, the offence of embezzlement which was originally provided for in the Penal Code Act, Cap. 120 and now in the Anti-Corruption Act, 2009 cannot be said to have been committed. At page 74 of the record, the learned first appellate Judge properly addressed himself on the law on embezzlement. He also correctly observed that the appellant was involved in running the relevant company and that he had access to its monies. Thereafter, the learned trial Judge observed (in agreement with the learned trial Chief Magistrate) at the same page that:

"The chief magistrate resolved at pages 8 to 10 of her judgment that the appellant was a General Secretary and therefore an officer of the Company and that from that evidence, people who contributed money to the scheme were given membership receipts. That money received by the company belonged to the members and the company was a special owner within the meaning of section 254 of the Penal Code Act. She found that the appellant accessed this money by virtue of his position in the company.

Unlike ordinary theft where the thief has no authority to access the property, embezzlement is committed by the person who accesses the property legally by virtue of office but later converts it to his/her own use. A relationship of trust exists between the thief and the owner in a case of embezzlement."

The judgment of the two lower Courts was based on a notion that upon payment of the relevant contributions, the persons from whom the appellant took the deposits became members of the relevant company. They did not. Payment of subscription does not make a person a member of a company. It is only upon being put on the company register after buying shares that one becomes a member of a company. With respect, the learned first appellate Judge erred when he upheld the faulty analysis by the learned trial Chief Magistrate.

In view of the above analysis, we are unable to uphold the conviction of the appellant for the offence of Embezzlement by the learned trial Chief Magistrate. Accordingly, Ground 5 is entitled to succeed. Our conclusion on ground 5 makes it unnecessary to delve into a discussion of ground 2 is rendered wholly academic.

Ground 3

In this ground, the appellant complained that the procedure adopted for the amendment of count 1 of the relevant charge was erroneous. The respondent disagreed, submitting first that this ground was not raised before the first appellate Court. On that basis alone, counsel contended that this ground of appeal ought to be struck out by this Court.

It is true that this ground was raised for the first time in this Court. In **Nalongo Naziwa Josephine vs Uganda, Supreme Court Criminal Appeal No. 35 of 2014**, the following observations were made:

"...in a second appeal such as the instant one, an appellant is not at liberty to raise matters that were not raised and considered by the trial Court and the first appellate court."

The Court held that an appeal that raises new matters is incompetent and should be dismissed. We are bound by the decision of that Court, Ground 3, must therefore be dismissed.

Ground 4

In this ground the appellant complained about the concurrent findings of fact by the two lower Courts that Dutch International Limited was indeed involved in financial institutions business without a valid licence. As we already found earlier, we cannot question the concurrent findings of fact by the two lower Courts. Therefore, the conviction of the appellant for the offence of Transacting Financial Business without a Licence contrary to section 4 (1) and 4 (11) of the Financial Institutions Act, 2004 is upheld. It must observed that at the time of sentencing in the trial Court, the appellant had been on remand for 4 ½ years and had therefore served the maximum sentence for the offence he was charged with in count 1, which is 2 years imprisonment. The trial Chief Magistrate, however, made an order disqualifying the appellant from acquiring a licence under the Financial Institutions Act, 2004 and any other law authorizing the taking of deposits. We too, like the first appellate Court shall uphold that order.`

Accordingly, Ground 4, too, must fail.

Ground 6

Our conclusions on ground 5 would partially dispose of this ground. In view of the foregoing, the conviction of the appellant relative to the offence of **Embezzlement** contrary to Section **268 (b) and (g) of the Penal Code Act, Cap. 120** would be quashed and the sentence and orders arising therefrom must be set aside. This makes it unnecessary to get into a discussion of the harshness or otherwise of the sentence.

However, ground 6 in as far as it relates to Count 1 of the relevant charge is very imprecise. We cannot determine the precise point of law which the appellant seems to be dissatisfied with. Doubtless that ground contravenes **rule 66 (2)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10** as it is imprecise, vague and in concise. We shall not consider it.

This appeal would be disposed of in the terms proposed above as follows; ground 5 succeeds. Grounds 1 and 6 are struck out for being incompetent. Ground 4 has no merit and is dismissed. Our resolution of ground 5 rendered analysis of ground 2 wholly academic and unnecessary.

In view of the above findings, we shall make the following orders:

a) The conviction of the appellant for the offence of Transacting Financial Institutions Business without a licence contrary to Section 4 (1) and (11) of the Financial Institutions Act, 2004 (Count 1) is upheld. We earlier observed that at the time of sentencing in the trial Court, the appellant had been on remand for 4 ½ years and had therefore served the maximum sentence for the offence he was charged with in count 1, which is 2 years imprisonment. Therefore, the appellant has no sentence to serve for the aforementioned conviction.

b) The trial Chief Magistrate's order disqualifying the appellant from acquiring a licence under the Financial Institutions Act, 2004 and any other law authorizing the taking of deposits is upheld.

c) The conviction of the appellant for the offence of Embezzlement contrary to Section 268 (b) and (g) of the Penal Code Act, Cap.120 (Count 2) is hereby quashed. The learned trial Chief Magistrate's sentence and orders arising from the said conviction, which were upheld by the first appellate Court, are set aside. The appellant shall be set free unless he is being held on other lawful charges. His bail conditions shall be handled appropriately.

We so order.

Dated at Kampala this ..... day of ..... 2020.

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Alfonse Owiny-Dollo, DCJ

Justice of Appeal

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Elizabeth Musoke

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal