

**THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0290 OF 2017
(Arising from High Court (Anti-Corruption Division) Criminal Case
No. 0177 of 2014)**

MUBAALE PETER **APPELLANT**

VERSUS

UGANDA **RESPONDENT**

(An appeal from the decision of the High Court of Uganda at Kampala (Anti-Corruption Division) before Tibulya, J. delivered on 5th July, 2017 in Criminal Session Case No. 0177 of 2014)

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

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court sitting (Tibulya, J.), in which the appellant was convicted on thirteen counts of various offences, namely: embezzlement, theft and fraudulent false accounting and accordingly sentenced to 5 years imprisonment on each count to run concurrently. The appellant was also ordered to pay compensation to the victim (New Vision Printing and Publishing Company Limited), to the tune of Ug. Shs. 262,269,710 (Two Hundred Sixty Two Million, Two Hundred Sixty Nine Thousand, Seven Hundred and Ten Uganda Shillings Only), which he was found to have stolen from it and, additionally, he was disqualified from holding public office for a period of 10 years from the date of the sentence.

Brief Background

The appellant was duly charged, committed and tried before Tibulya, J. on an indictment for various offences as indicated earlier, and the facts as accepted by the learned trial Judge were that:

The appellant was an employee of M/S New Vision Printing and Publishing Corporation from 1989 to 2013. At the material time of the commission of the offences in question the appellant was employed in the said New Vision's Credit Control Section which inter alia was tasked with following up and collecting payments from its debtor clients. The learned trial Judge accepted the prosecution evidence that the appellant had during the course of his employment, orchestrated a scam intended to defraud his employer. In the said scam, the appellant had on several occasions collected cheques from advertising clients issuing them with top copy receipts reflecting their payments while retaining the relevant carbon copy receipts. Instead of inserting the advertising clients' names in the carbon copy receipts to mirror the top copy receipts the appellant would insert names of newspaper distributors. On the basis of the information received in the carbon copies, the relevant monies would be credited to the newspaper distributors' accounts. The appellant would then ask the said distributors to cash the money which had been fraudulently sent to their accounts and thereafter, would collect the money from those distributors after it had been cashed. The said New Vision lost 270, 763, 910/= from that scam. The learned trial Judge rejecting the appellant's defence believed the prosecution case and convicted the appellant on all counts in the relevant indictment save for count 7, sentencing him to concurrent terms of 5 years imprisonment on each count and imposing the orders referred to earlier. Being dissatisfied with the decision of the learned trial Judge, the appellants have lodged this appeal in this Court on grounds which were formulated as follows:

- "1. The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record and thus came to wrong findings when she held that;**
 - a. The appellant embezzled money belonging to his employer by issuing receipts to distributing clients for monies paid by advertising clients without any evidence to support the same.**
 - b. The appellant had falsified receipts from various newspaper distributors other than advertising clients who issued the cheques by issuing original receipts in names different from**

those in the duplicate copy without any evidence to support the same.

- c. The appellant stole money belonging to his employer by converting cheques of advertising clients to distributors without sufficient evidence to support the same.**
- 2. The learned Trial Judge erred in law and fact when she gave an excessive sentence of 5 years imprisonment, an order of compensation of UGX 262,269,710 (Two hundred sixty two million two hundred sixty nine thousand seven hundred ten shillings only) against the appellant and also barred the appellant from holding public office for ten years"**

In his submissions, the counsel for the appellants raised an additional ground of appeal proposing to argue the same with leave of this Court. The ground was as follows:

"The learned Trial Judge erred in law when she failed to follow the mandatory procedure relating to proceedings with assessors, when she, on several occasions, proceeded without assessors and after closure of the case only summed up to one assessor and relied on the opinion of only one assessor to convict the accused of the offences tried."

Representation

At the hearing of the appeal, Mr. Enock Bwesigye, learned Counsel represented the appellant, while, Ms. Kwezi Asiimwe, a State Attorney from the Inspectorate of Government, represented the respondent. This Court granted permission to the parties to file written submissions which were accordingly adopted.

Appellant's case

On ground 1 (a), counsel for the appellant complained that the learned trial Judge acted against the weight of the evidence on record in convicting the appellant for the offence of embezzlement. He pointed out that the learned trial Judge had overlooked the appellant's side of the story which had effectively challenged the prosecution's evidence. Counsel contended that the appellant had testified that contrary to the evidence adduced by the prosecution, the cheques in issue were collected by sales executives and

handed over to supervisors. The said supervisors would then bring the cheques to the appellant for receipting. Regarding distribution clients, the appellant had further testified that they would bring postdated cheques and hand them to concerned staff (which didn't include the appellant) who included Nabagala and Esther. The foregoing persons were not presented by the prosecution to explain their role with the prosecution opting to present PW3 Nicholas Mujuni, an Account with New Vision, who in counsel's view did not articulate the role played by Nabagala and Esther in handling the distributor's cheques in issue.

Counsel further submitted that the prosecution's failure to present invoices supporting the allegations that the appellant had fraudulently receipted money paid by the advertising clients to the distributors was fatal to their case. Moreover, the evidence tending to support the prosecution's case that the appellant had received money from PW8 Kiberu Rogers was evidence of accomplices. In further support of the foregoing contention, counsel pointed out that PW8 was a distributor with New Vision and PW9 Zahura Herbert was his employee and the two had received money which had been unlawfully diverted from New Vision's accounts. In his view, PW8 and PW9 were turned into state witnesses and yet they should have been charged as accomplices which should have drawn more caution from the learned trial Judge before he relied on their testimony.

Counsel further levied attacks on what he felt was evidence from dubious prosecution witnesses singling out the evidence of Mr. Gita Ronald for particular scrutiny. The said Gita Ronald, according to Counsel was a longtime customer of New Vision, who had claimed to be in possession of records evidencing all the payments from the illegally diverted money in issue, which he had made to the appellant for Newspapers. Counsel then wondered why a self-assured person like Mr. Gita could have agreed to refund a huge amount to the tune of Ug. Shs. 291,000,000/= (Two Hundred and Ninety One Million Shillings) to the victim. He doubted that New Vision could force such a reliable client to refund money which was indicated to have been taken by the appellant.

Counsel further faulted the learned trial Judge for failing to investigate the conduct of PW8 and New Vision entering an amicable resolution to refund the money in issue yet it was allegedly taken by the appellant. It was also contended for the appellant that PW8 had lied about being in constant communication with the appellant and was generally a dishonest witness whose evidence shouldn't have been relied on.

On ground 1 (b), counsel faulted the learned trial Judge for relying on the evidence of PW6 Opoi Francis, the Manager Internal Audit at New Vision and PW7 Ssebuwufu Erisa, a handwriting expert to convict the appellant on the counts of false accounting. He contended that while the testimonies of those two witnesses implicated the appellant in fraudulent dealings in issue, they were in contradiction with PW1 Zubair Musoke, (the Chief Finance Officer at New Vision)'s testimony that the appellant was never implicated in any wrongdoing in various audits conducted between 2000-2014 by the Auditor General. Counsel then alleged that the charges in the present case were a ploy by New Vision's credit department to use the appellant as a scape goat after he had resigned on 1st July, 2013 reasoning that it was strange that the prosecution chose to discard the earlier audits and rely on the audit by PW6 in this case.

Counsel further faulted the learned trial Judge for relying on P.Ex. 13 as evidence of payment of money from PW8 to the appellant contending that PW8 and PW9 could not spend huge amounts without official receipts. He also contended that PW7's handwriting opinion was a sham and should not have been relied on. However, he never substantiated on why they were a sham.

On ground 1 (c), counsel made submissions which repeated the contents of those made under ground 1 (a). He then further submitted that although the prosecution alleged that reversals had been made by New Vision with the intention of showing that the appellant had received money from distributors and put it to his personal use, there was evidence to show that some of those reversals originated in transactions which were not conducted by the appellant. In counsel's view, the foregoing was a grave contradiction which

was intended to hood wink court and should have been resolved in favour of the appellant.

In further impassioned submissions counsel contended that the bureaucracy attached to the banking of cheques for New Vision had checks and balances which not have left gross misconduct (like what is attributed to the appellant) to go undetected for months given that there were other offices which supervised the appellant's duties. In addition, counsel pointed out that there were annual audits up to the year 2013 which never implicated the appellant. In relation to the reversals in issue, counsel submitted that there ought to have been outstanding invoices indicating that the advertisers owed New Vision some money and that the reversals were intended to rectify the diversions. He maintained that PW4 had testified in cross examination that some of the reversals emanated from transactions which did not concern the appellant and that that testimony taken together with the failure of the prosecution to adduce evidence to prove reversals on the advertising client's accounts created doubt which should have been resolved in favour of the appellant. For the reasons advanced while submitting on the above grounds, counsel prayed for the acquittal of the appellant on all counts.

On ground 2, counsel faulted the learned trial Judge for imposing a sentence of 5 years imprisonment on each count of the indictment without giving reasons as to why the appellant, a first offender deserved such a sentence. In further support of his submissions, counsel submitted that the learned trial Judge had sentenced the appellant to a uniform sentence of 5 years on all counts without considering that the offences in the different counts carried sentences of various lengths. In counsel's view, it was essential for the learned trial Judge to state reasons under the various offences to justify the sentences she impose and that here failure in that regard was an error of law rendering the sentences illegal. He further contended that **rule 44 (c) of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013** require the learned trial Judge to take into consideration the fact that the appellant was working on orders from other officers in effecting the fraudulent receipting in issue.

Counsel further faulted the learned trial Judge for ordering the appellant to pay compensation and yet there was evidence showing that the victim had been compensated by some of the distributors who had received the money in issue. In counsel's view, ordering the appellant to pay to New Vision the sum of Ug. Shs. 262,269,710/= (Two Hundred and Sixty Two Million, Two Hundred and Sixty Nine, Seven Hundred and Ten Shillings) would mean double payment to New Vision. Counsel prayed to this Court to set aside the order of compensation of New Vision, since there was no evidence to show that there was still outstanding monies to be paid.

As to the order barring the appellant from holding public office as imposed by the learned trial Judge, the appellant prayed that it be set aside. He, however, never substantiated as to why the said order should be set aside.

On the additional ground relating to failure to follow the procedure of summing up to the assessors and relying on the evidence (sic) of one assessor to convict the appellant, counsel submitted as follows. Citing the authorities of **Sam Ekolu alias Obote vs. Uganda Supreme Court Criminal Appeal No. 15 of 1994** and **Byamukama Francis vs. Uganda, Court of Appeal Criminal Appeal No. 397 of 2015** which enunciated that the mandatory provisions of section 81 of the Trial on Indictments Act, Cap. 23 required that there is summing up to the assessors after the close of the case for the both the prosecution and the defence. He contended that both assessors should be in attendance during the summing up proceedings and pointed out that the learned trial Judge summed up to only one assessor whose opinion was relied on to convict the appellant. Counsel then asked this Court to declare the entire proceedings a nullity and set the appellant free.

All in all, counsel prayed that the appeal be allowed; the conviction, sentence and consequential orders relating to payment of compensation and the banning of the appellant from occupying public office be set aside; and the appellant be acquitted and released from prison.

Respondent's case.

Counsel for the respondent opposed the appeal and supported the findings of the trial Court. She opted to respond to the grounds as set out in the memorandum of appeal. On ground 1 (a), counsel disagreed with the appellant's submissions contending that it was false to allege that the appellant's supervisors brought the cheques to the appellants for receipting. She contended that the evidence adduced for the prosecution revealed that the appellant (in his role as a debt collector), used to collect cheques from advertising clients thereafter issuing them with receipts. The receipts used by the appellant were given to him by New Vision (his employer) for the purpose of receipting cheques he collected. She further contended that as it was an obligation of the debt collector to recover debts owing to New Vision, the appellant and not his supervisors, who used to go to the field to recover debts.

In further reply, it was submitted for the respondent that it was unnecessary to bring Nabagala or Esther to testify for the prosecution. She contended that the evidence of PW6, PW2, PW4 and PW1 had aptly proved that the appellant used to collect cheques from the advertising clients as alleged.

Replying to the appellant's contention that the prosecution had failed to adduce evidence by way of invoices to prove that money paid by advertisers was owing, and that it was that money which was instead receipted to distributors. It was submitted for the respondent that whereas the said invoices were not tendered in evidence, there were other pieces of evidence which implicated the appellant in the offences in issue as follows. First, was the evidence of PW6 who showed Court a number of receipts capturing the particulars of cheques which distributor clients had used to pay New Vision. These receipts showed that PW8 had made the payments using those cheques and yet the corresponding deposit slips showed that a different person/entity had issued the cheque for payment. Secondly, the evidence of PW8, one of the distributors, who had tendered in Court receipts registered in his name which were issued by the appellant.

Regarding the contention that the evidence of PW8 and PW9 should not have been relied upon as they were accomplices, counsel handle it as follows. She

contended that **section 132** of the **Evidence Act, Cap. 6** provides that an accomplice is a competent witness. While conceding that accomplice evidence required corroboration as a matter of judicial practice, counsel stated that the accomplice evidence in issue was corroborated by the evidence of PW6 which showed that several receipts were raised by the appellant to indicate payment to PW8 with the corresponding deposit slips showing that the cheques had been issued by different persons/ entities. Counsel further supported the reliance on the accomplice evidence in issue by the learned trial Judge arguing that by testifying as he did, PW8 had nothing to gain since he had already paid back the money which he had given to the appellant.

Counsel further disagreed with the contention by the appellant that PW8's secret agreement to pay back money to New Vision exonerated him of embezzlement. She pointed out that PW8 had informed court that he had paid back the money because he was told that he is the one who had given it away. Counsel further contended that PW8 had not received any reward for agreeing to testify against the appellant as he still had to pay money to New Vision. Moreover, according to counsel for the respondent, the appellant would not be found in the aftermath of discovering the embezzlement in question which rendered it impossible for the respondent to recover any money from him. She asked this court to disallow ground 1 (a) of the present appeal.

Regarding ground 1 (b) and the contentions made for the appellant in support thereof that PW6 and PW7's evidence contradicted the evidence of PW1 indicating that various audits conducted from 2000 to 2004 had not implicated the appellant in any wrong doing yet a later audit in 2015 implicated the appellant, it was contended for the respondent as follows:

There is no time frame for discovering a crime and action may be taken when such crime is discovered. Where the alleged crime is a white collar crime, such as embezzlement, the perpetrators may be discovered after a considerable period of time owing to the meticulous manner of orchestrating

such crimes. In counsel's view, this may explain why the earlier audits did not implicate the appellant.

In relation to PW7's evidence, counsel submitted that as a hand writing expert, PW7 had only examined documents put to his examination and that his evidence offered the much needed corroboration regarding the receipts in issue. Counsel concluded on this point that there was no contradiction between the evidence of PW6, PW7 and PW1.

Replying to the appellant's submissions in support of ground 1 (b) wherein it was suggested that the appellant was not responsible for the receipts in issue (Exh. PE 11), it was submitted for the respondent that the testimony of PW3 revealed that the appellant would take the duplicate receipt to the computer room for capturing in the online system. Counsel further contended that the totality of the prosecution evidence was to the effect that the appellant was responsible for the falsification of the receipts.

Counsel further pointed out that there was evidence of chits on which PW8 and PW9 used to record money which the appellant had collected from them. In counsel's view, that evidence pinned the appellant. She asked this court to disallow ground 1 (b) as well.

Replying to the submissions on ground 1 (c), it was contention for the respondent that the reversals alluded to by the appellant did not form the basis of the learned trial Judge's decision and neither did she attribute the money in the contested reversals to the appellant. Regarding the role played by PW2 and PW4, counsel submitted that the appellant had manipulated the payment system and stolen the money in issue. She asked court to disallow this ground too.

In reply to the submissions on ground 2, counsel opted to make a consolidated submission in respect to the sentences. She pointed out that the offences of embezzlement, theft and fraudulent false accounting attracted maximum custodial sentences for 14 years, 10 years and 7 years and or other fines. She further submitted that the sentence of 5 years as imposed was lenient.

In further reply, it was submitted that rule 44 (c) of the sentencing guidelines in issue was inapplicable in the present appeal as there was no evidence to show that the appellant was working under anyone's orders.

Counsel supported the order of compensation citing **Article 126 (2) (c)** of the **1995 Constitution** and **Section 126 (1)** of the **Trial on Indictments Act, Cap. 23** for the position that Courts could order compensation to victims of wrongs. She further cited section 46 of the Anti-Corruption Act, 2009 which allows for the disqualification of a person convicted of specific offences from public office. She then concluded that the trial Judge acted within her discretion to sentence the appellant as she did and asked this Court to disallow ground 2 as well.

On the additional ground, while conceding that the assessors were not in Court as alleged for the appellant, it was contended for the respondent that their absence was never mentioned during the trial and did not occasion a miscarriage of justice. She further contended that it was not open to the appellant to raise the objections to the assessors on appeal.

It was further submitted for the respondent that under section 139 (1) of the Trial on Indictment Act, Cap.23 a finding of Court cannot be altered or reversed unless it is established that a miscarriage of justice was occasioned. Furthermore, that contrary to the appellant's submission on the point, under section 82 (2) of the Trial on Indictment Act, Cap. 23 is not bound to conform to the opinion of assessors in reaching his /her decision. Counsel cited the authority of **Byaruhanga Fadori vs Uganda, Court of Appeal Criminal Appeal No. 24 of 1999** for the proposition that a trial would proceed with only one assessor. She concluded it was not fatal to proceed with one assessor and that the additional ground, too ought to be disallowed.

Resolution of Court

We have carefully considered the submissions of counsel for either side, the court record as well as the law and authorities cited and those not cited. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with its own inferences. **See**

Rule 30 (1) of the Rules of this Court and Kifamunte Henry v. Uganda Supreme Court Criminal Appeal No. 10 of 1997.

In determining this appeal, we shall handle grounds 1 (a), (b) and (c) together as set forth in the memorandum of appeal, as they all relate to the question of sufficiency of the evidence relied on by the learned trial Judge in convicting the appellant on the various counts.

It was the finding of the learned trial Judge that the appellant took advantage of a scam in committing the offences in question. The said scam according to the learned trial Judge saw the appellant collecting cheques from advertising clients of New Vision (the complainant/ victim) and thereafter issuing them with top copy receipts. The learned trial Judge further found that instead of entering the details of the cheque numbers and the advertising clients in the duplicate receipts, the appellant instead entered details of Newspaper Distributors with New Vision. On the basis of the altered entries in the duplicate receipts, the money in the said receipts would then be cashed to the said distributors. The learned trial Judge further made a finding that the appellant would then approach those distributors demanding that they cashed the money and hand it over to him. Apparently, the distributors handed over Ug. Shs. 262,269, 710 (Two Hundred and Sixty Two Million, Two Hundred and Sixty Nine Thousand, Seven Hundred and Ten Shillings) to the appellant upon him approaching them.

The crux of grounds 1 (a), (b) and (c) is that there was insufficient evidence to convict the appellant. We shall proceed to re-evaluate the evidence on record in order to determine those allegations.

PW1 Zubair Musoke, the Chief Finance Officer of New Vision while explaining the appellant's role testified at page 30 that New Vision had two categories of clients, namely distributors (who sell New Vision's publications in different parts of the country) and advertisers (who would place advertisements with New Vision). PW1 further testified that the appellant embezzled funds belonging to New Vision putting the amount embezzled at Ug. Shs. 270,763,910 (Two Hundred Seventy Million, Seven Hundred Sixty Three Thousand, Nine Hundred and Ten Shillings only). PW1 testified that in the

course of doing his work, the appellant would collect cheques from advertising clients, issuing them with a top copy receipt. The appellant would thereafter change the relevant carbon copy receipts inserting names of newspaper distributors creating a situation that those cheques were collected from newspaper distributions. PW1 also testified that the appellant would bring the said carbon copy receipts which were used as a basis for making entries in the New Vision Computer System where after the amounts in question would be posted/ credited on the said distributors' accounts.

PW1 further testified in cross examination that they had recovered about Ug. Shs. 90 Million (Ninety Million Shillings) from such errant distributors.

PW2 Nakibuule Daisy, then Chief Cashier at New Vision testified that she was responsible for banking the cheques and cash for New Vision and worked closely with the appellant. She testified that she used to receive cheques, cash and daily cash receipt summaries from the appellant. This witness' testimony was only useful in establishing that the appellant handed some cheques to the witness.

The testimony of PW3 Nicholas Mujuni an accountant with New Vision in explaining the appellant's role merely reiterated PW1's testimony. This witness testified that he was in charge of the computerized New Vision software system and that during the course of his employment the appellant would come to the computer room, hand over the cash/ cheques to the cashier for banking. PW3 also testified that the appellant would bring duplicate receipts in respect to cheques collected from the clients to the computer room for receipting. Our impression is that this witness' evidence albeit not elaborate established that the appellant had prepared the receipts in question.

The other evidence adduced against the appellant was the evidence of PW6 Opoi Francis, then Manager Internal Audit at New Vision. He testified that he conducted an audit following allegations that the appellant had embezzled money from New Vision. The audit report was exhibited as P Ex.8. In preparing the said audit report PW6:

- Reviewed payments posted on Distributors accounts and other documents.
- Interviewed the distributors whose accounts were credited with cheques drawn by advertising clients.
- Interviewed the Credit Control Manager.

The findings from the report in question are laid out at page 289 of the audit report and we reproduce them below:

"5. Internal Audit Findings

5.1 In the period 1st January 2008 to 30th November 2013 a sum of Ushs 628,604,821 (Six hundred twenty eight million six hundred and four thousand eight hundred twenty one) was not remitted by Newspaper Distributors to the company for Newspapers supplied to them. This was caused when cheques from advertisers were receipted by Credit control staff namely; Mr Kigoye Francis and Mr. Mubale Peter amounting to Ushs 628,604,821 in the names of the Newspaper Distributors. Refer to annex 1 for detailed list."

The report reveals that the appellant diverted monies to the accounts of these 5 distributors; Kiberu Rogers, Lamon Sharon, Giita Ronald, Ovon Michael and Ndyabarema David to the tunes illustrated in the table below.

Distributor	Period in question	Amount diverted to account.
1. Mr. Kiberu Rogers	1 st January 2008 to 31 st November 2013	Shs. 192,023,419/=
2. Giita Ronald	Same period above.	Shs. 61,026,759/=
3. Lamunu Sharon	17 th April 2013 to 21 st May 2013	Shs. 3,779,400/=
4. Ovon Michael	Not availed	Shs. 5,116,000/=
5. Ndyabarema David	Not availed	Shs. 1,139,000/=

TOTAL		263,084, 578/=
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The audit report had several supporting documents, namely copies of the carbon copy receipts in the names of the distributors and the cheques drawn by the advertising clients. Those documents reveal the details laid down in the table below:

Advertiser and Cheque No.	Amount	Carbon Copy Receipt with Distributor, Receipt No. and Cheque No.	Amount c receipt.
Moringa, Cheque No. 017921	2,902,800/=	-Distributor: Kibeeru Rogers -Receipt No: 102070 -Cheque No. 017921 reflected.	2,902,800/=
Water and Sanitation Development.	5,198,700/=	Not on record	Not on record
Uganda Allied Institute, Cheque No. 008792	6,550,000/=	Distributor: Kibeeru Rogers Receipt No: 102099 Cheque No: 008792	6,550,000/=
Techno Brain Uganda, Cheque No. 625581	3,280,800/=	Distributor: Kibeeru Rogers Receipt No: 87112 Cheque No: 625581	3,280,800/=

Moringa, Cheque No. 003186	4,159,040/=	Distributor: Kibeeru Rogers Receipt No: 87239 Cheque No: 003186	4,159,040/=
National-Water, Cheque No. 0031	1,640,400/=	Distributor: Kibeeru Rogers Receipt No: 87241 Cheque No: 0031	1,640,000/=
Moringa, Cheque No. 013942	3,600,000/=	Distributor: Kibeeru Rogers Receipt No: 88108 Cheque No: 013942	3,600,000/=
Moringa, Cheque No. 014352	6,000,000/=	Distributor: Kibeeru Rogers Receipt No: 88493 Cheque No: 014352	6,000,000/=
National-Water, Cheque No. 010895	3,020,600/=	Distributor: Kibeeru Rogers Receipt No: 88843 Cheque No: 010895	3,020,600/=
National-Water, Cheque No. 011164	4,701,000/=	Distributor: Kibeeru Rogers Receipt No: 89536 Cheque No: 011164	4,701,000/=

National-water, Cheque No. 013233	1,057,500/=	Distributor: Kibeeru Rogers Receipt No: 89541 Cheque No:013233	1,057,500/=
Moringa, Cheque No. 014770	2,616,000/=	Distributor: Kibeeru Rogers Receipt No: 90068 Cheque No: 014770	2,616,000/=
Moringa, Cheque No. 014771	1,200,000/=	Distributor: Kibeeru Rogers Receipt No: 90069 Cheque No: 014771	1,200,000/=
Moringa, Cheque No. 014925	5,900,000/=	Distributor: Kibeeru Rogers Receipt No: 90083 Cheque No: 014925	5,900,000/=
Mulago Pharmaceutical School, Cheque No. 008408	5,320,440/=	Distributor: Kibeeru Rogers Receipt No: 91372 Cheque No: 008408	5,320,440/=
National-Water, Cheque No. 011628	3,846,000/=	Distributor: Kibeeru Rogers Receipt No: 91533 Cheque No: 011628	3,846,000/=

Moringa, Cheque No. 015237	3,540,000/=	Distributor: Kibeeru Rogers Receipt No: 92105 Cheque No: 015237	3,540,000/=
Moringa, Cheque No. 015538	2,616,000/=	Distributor: Kibeeru Rogers Receipt No: 93440 Cheque No: 015538	2,616,000/=
Moringa, Cheque No. 015540	1,200,000/=	Distributor: Kibeeru Rogers Receipt No: 93441 Cheque No: 015440	1,200,000/=
Diamond Trust Bank, Cheque No. 012033	1,814,400/=	Distributor: Lamon Caroline Receipt No: 94734 Cheque No: 012033	1,814,400/=
Moringa, Cheque No. 017101	7,400,000/=	Distributor: Lamon Caroline Receipt No: 94740 Cheque No: 017101	7,400,000/=
Moringa, Cheque No. 017788	6,591,915/=	Distributor: Kibeeru Rogers Receipt No: 102057 Cheque No: 017788	6,591,915/=

Intergrated-Com, Cheque No. 000900	1,965,000/=	Distributor: Kibeeru Rogers Receipt No: 94750 Cheque No: 00900	1,965,000/=
Moringa, Cheque No. 016599	2,625,500/=	Distributor: Kibeeru Rogers Receipt No: 95142 Cheque No: 016599	2,625,500/=
Speedag, Cheque No. 987989	3,593,699/=	Distributor: Kibeeru Rogers Receipt No: 97351 Cheque No: 987989	3,593,699/=
Cementers-Uganda, Cheque No. 000684	3,050,400/=	Distributor: Kibeeru Rogers Receipt No: 91028 Cheque No: 000684	3,050,400/=
RACE, cheque No. 127760	1,965,000/=	Distributor: Kibeeru Rogers Receipt No: 91029 Cheque No: 127760	1,965,000/=
Cementers, Cheque No. 012182	1,965,000/=	Credited to Cementers account for advertisements.	1,965,000/=
Moringa, Cheque No. 011492	8,287,119/=	Distributor: Giita Ronald Receipt No: 74548	8,287,119/=

		Cheque No: 011492	
Scanad Uganda, Cheque No. 016639	11,621,000/=	Distributor: Giita Ronald Receipt No: 79149 Cheque No: 016639	11,621,000/=
Scanad Uganda, Cheque No. 016732	12,223,700/=	Distributor: Giita Ronald Receipt No: 79934 Cheque No: 016732	12,223,700/=
Moringa Ltd, Cheque No. 80787	17,500,000/=	Distributor: Giita Ronald Receipt No: 80787 Cheque No: 080787	17,500,000/=
Scanad Uganda Ltd, Cheque No. 017045	11,394,940/=	Distributor: Giita Ronald Receipt No: 81754 Cheque No: 01705	11,394,940/=
Water & Sanitation, Cheque No. 000108	3,501,300/=	Distributor: Kibeeru Rogers Receipt No: 72846 Cheque No: 000108	3,501,300/=
Moringa Ltd, Cheque No. 011397	2,360,000/=	Distributor: Kibeeru Rogers Receipt No: 74912 Cheque No: 001397	2,360,000/=
Multitech, Cheque No. 0001137	4,550,000/=	Distributor: Kibeeru Rogers Receipt No: 75662	4,550,000/=

		Cheque No: 0001137	
Moringa Ltd, Cheque No. 011579	4,124,000/=	Distributor: Kibeeru Rogers Receipt No: 75398 Cheque No: 011579	4,124,000/=
Moringa Ltd, Cheque No. 011753	2,400,000/=	Distributor: Kibeeru Rogers Receipt No: 77241 Cheque No: 011753	2,400,000/=
Moringa Ltd, Cheque No. 011858	2,400,000/=	Distributor: Kibeeru Rogers Receipt No: 77488 Cheque No: 011858	2,400,000/=
Moringa Ltd, Cheque No. 011998	3,000,000/=	Distributor: Kibeeru Rogers Receipt No: 78715 Cheque No: 011998	3,000,000/=
National Council for Higher Education, Cheque No. 008962	1,804,400/=	Distributor: Kibeeru Rogers Receipt No: 78722 Cheque No: 008962	1,804,400/=
National Water, Cheque No. 009669	5,662,280/=	Distributor: Kibeeru Rogers Receipt No: 78915 Cheque No: 001579	5,662,280/=

Deniva, Cheque No. 005072	4,617,800/=	Distributor: Kibeeru Rogers Receipt No: 78448 Cheque No: 005072	4,617,800/=
Moringa Ltd, Cheque No. 012172	2,360,000/=	Distributor: Kibeeru Rogers Receipt No: 79570 Cheque No: 012172	2,360,000/=
Scanad-Uganda, Cheque No. 016883	1,557,600/=	Distributor: Kibeeru Rogers Receipt No: 89646 Cheque No: 016883	1,557,600/=
National-Water, Cheque No. 003106	2,500,000/=	Distributor: Kibeeru Rogers Receipt No: 80788 Cheque No: 003106	2,500,000/=
Moringa Ltd, Cheque No. 013132	2,400,000/=	Distributor: Kibeeru Rogers Receipt No: 82735 Cheque No: 013132	2,400,000/=
PACE, Cheque No. 0126444	2,359,000/=	Distributor: Kibeeru Rogers Receipt No: 86962 Cheque No: 0126444	2,359,000/=

Moringa Ltd, Cheque No. 013312	1,200,000/=	Distributor: Kibeeru Rogers Receipt No: 86922 Cheque No: 013312	1,200,000/=
Moringa Ltd, Cheque No. 013310	1,200,000/=	Distributor: Kibeeru Rogers Receipt No: 86921 Cheque No: 013310	1,200,000/=
Jinja Nile Resort, Cheque No. 0979243	1,800,000/=	Distributor: Kibeeru Rogers Receipt No: 58430 Cheque No: 0979243	1,800,000/=
Moringa Ltd, Cheque No. 009978	2,140,000/=	Distributor: Kibeeru Rogers Receipt No: 009978 Cheque No: 011579	2,140,000/=
Moringa Ltd, Cheque No. 0010092	6,000,000/=	Distributor: Kibeeru Rogers Receipt No: 61093 Cheque No: 010092	6,000,000/=
Moringa Ltd, Cheque No. 002689	4,000,000/=	Distributor: Kibeeru Rogers Receipt No: 66048 Cheque No: 002689	4,000,000/=

ZK Advertising, Cheque No. 0014828	1,461,864/=	Distributor: Kibeeru Rogers Receipt No: 67163 Cheque No: 0014828	1,461,864/=
Moringa Ltd, Cheque No. 0010950	2,000,000/=	Distributor: Kibeeru Rogers Receipt No: 70151 Cheque No: 0010950	2,000,000/=
Human Rights Network, Cheque No.701685	1,000,000/=	Distributor: Kibeeru Rogers Receipt No: 70159 Cheque No: 0701685	1,000,000/=
National Council of Higher Education, Cheque No. 0005636	1,804,440/=	Distributor: Kibeeru Rogers Receipt No: 70959 Cheque No: 005636	1,804,440/=
Low Scanad Uganda, Cheque No. 014956	8,494,200/=	Distributor: Giita Ronald Receipt No: 58443 Cheque No: 014956	8,494,200/=
Straight Talk Foundation, Cheque No. 0704128	18,294,000=	Distributor: Giita Ronald Receipt No: 61380 Cheque No: 0704128	18,294,000/=
ZK Advertising, Cheque No. 0010821	2,478,000/=	Distributor: Kibeeru Rogers	2,478,000/=

		Receipt No: 343898 Cheque No: 0010821	
ZK Advertising, Cheque No. 0010967	2,478,000/=	Distributor: Kibeeru Rogers Receipt No: 343887 Cheque No: 0010967	2,478,000/=
Steel Rolling Mills, Cheque No. 0100175	2,813,580/=	Distributor: Kibeeru Rogers Receipt No: 35754 Cheque No: 0100175	2,813,580/=
Stanbic Bank, Cheque No. 004109	3,000,000/=	Distributor: Kibeeru Rogers Receipt No: 40858 Cheque No: 004109	3,000,000/=
Human Rights Network, Cheque No. 0701294	2,918,300/=	Distributor: Kibeeru Rogers Receipt No: 50859 Cheque No: 0701294	2,918,300/=
Kakira Sugar Works, Cheque No. 006206	1,394,340/=	Distributor: Kibeeru Rogers Receipt No: 51652 Cheque No: 006206	1,394,340/=
Tecno Brain, Cheque No. 0521530	2,598,288/=	Distributor: Kibeeru Rogers Receipt No: 52170	2,598,288/=

		Cheque No: 0521530	
UN Obsr Mission, Cheque No. 005613	2,734,000/=	Distributor: Kibeeru Rogers Receipt No: 53962 Cheque No: 005613	2,734,000/=
Techno Brain, Cheque No. 0521574	3,464,384/=	Distributor: Kibeeru Rogers Receipt No: 53788 Cheque No: 0521574	3,464,384/=
No drawer, Cheque No. 0259244 (Appellant exonerated)	3,916,000/=	Distributor: Ovon Michael Receipt No: 38824 Cheque No: 0259244	3,916,000/=
ZK Advertising, Cheque No. 011078	1,200,000/=	Distributor: Ovon Michael Receipt No: 36513 Cheque No: 011078	1,200,000/=
Busoga University, Cheque No. 000015	1,139,600/=	Distributor: Ndyabarema David Receipt No: 35770 Cheque No: 000015	1,139,600/=
Techno Brain, Cheque No. 0479375	2,354,176	Distributor: Kibeeru Rogers Receipt No: 46163 Cheque No: 0479375	2,354,176/=

Uga Sung Electronica, Cheque No. 000211	3,000,000/=	Distributor: Kibeeru Rogers Receipt No: 343303 Cheque No: 000211	3,000,000/=
Total	281,711,805=		281,711,805=

The above table summarizes the contents of documents which were exhibited as P.EX 9, revealing that several receipts were made by the appellant showing that certain newspaper distributors had paid for newspapers using cheques. The relevant bank documents showed that the same cheques were not drawn by those distributors but by several advertising clients. Having reappraised the evidence, it is clear that money was diverted from the complainant when certain receipts made by the appellant represented that distributors had paid money whereas not as the cheque numbers indicated on those receipts were for advertising clients of the complainant.

The evidence of PW7 Ssebuwufu Erisa, a handwriting expert showed that the signature on the receipts in issue belonged to the appellant. This evidence was not challenged. Furthermore, the evidence of PW5 Nalumagga Doreen revealed that the appellant had signed for and received the receipt books on which the fraudulent entries relating to the distributors were made. We pause here for a moment to reiterate that under **section 133** of the **Evidence Act, Cap.6** no particular number of witnesses are required to prove a fact. In our view, the above witnesses clearly established that the appellant had made the receipts which formed the basis of transferring money to the distributors in issue.

Having found as above, we shall consider the offences for which the appellant was convicted. The first was embezzlement which is criminalized

under **section 19 of the Anti-Corruption Act, 2009**, which provides as follows:

"19. Embezzlement.

A person who being—

(a) an employee, a servant or an officer of the Government or a public body;

(b) ...

(c) ...

(d) steals a chattel, money or valuable security—

(i) ...

(ii) received or taken into possession by him or her for or on account of his or her employer, association, company, corporation, person or religious organization or other organisation; or

(iii) to which he or she has access by virtue of his or her office;

commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or a fine not exceeding three hundred and thirty six currency points or both."

The ingredients of the offence of embezzlement (which the prosecution had to prove), in our view are as follows:

- 1. The accused was an employee of the New Vision**
- 2. He stole the money in issue.**
- 3. The money was the property of his employer.**
- 4. The money came into his possession by virtue of his office."**

Having reappraised the evidence, we find that the appellant had access to cheques in the course of his employment. Those cheques had been drawn in favour of New Vision by advertising clients and were therefore the property of New Vision. The appellant possessed those cheques by virtue of his employment with New Vision and he manipulated receipts to show that those cheques had been drawn by distributors. We agree with the finding of the learned trial Judge at page 164 of the record that the appellant moved that money under the circumstances amounting to theft. We also agree with

the following findings by the learned trial Judge at pages 168 to 169 of the record:

"I believed PW8's evidence that he gave the accused equivalent amounts of money to the value in the various cheques and later took receipts to the company which credited his account. The accused by issuing the receipts must be taken to have intended that Kiberu uses them in the manner he used them. This was against the background that he knew that he had taken money from Kiberu. In addition to this, there was evidence that the accused used to issue original copy of the receipts in names which were different from those in the duplicate copy which he would submit to the company for crediting customer accounts. All this evidence of an intent to permanently deprive the company of the money he had taken from Kiberu."

The above excerpt would prompt us to re-appraise the evidence of PW8 Kiberu Rogers which was the subject of attack from the appellant's counsel. Counsel contended that it was accomplice evidence which should not have been relied on. PW8 testified at page 85 of the record as follows:

"I have an account with New Vision, in my names. It is C01179. Accused called me on my phone number in 2009, he said that he wanted me to assist him. He said that he had received a payment in the form of a cheque in new vision names and he did not have an account with the New Vision. He requested me to have the cheque deposited to my account with New Vision so that he may access his money. I was hesitant about it and because I didn't have anything to do with wrong monies on my account. Later on I accepted to help him on condition that he provided a genuine receipt for that cheque which he did."

PW8 further testified that the appellant deposited money on his account, on each occasion asking him to withdraw it and hand it over to the appellant. PW8's evidence was re-iterated by PW9 Zahura Herbert who said that they handed over money (which the appellant had deposited on PW8's account) to the appellant on several occasions. We note that, "a person called as witness for the prosecution was to be treated as an accomplice if he was particeps criminis in respect of the actual crime charged in the case of a felony." **See: Davis vs Director of Public Prosecutions [1954] 1**

ALLER 507 cited with approval in **Nasolo vs Uganda Supreme Court Criminal Appeal No. 14 of 2000**. In the latter case it was observed that:

"In the circumstances, Fina should have been treated as an accomplice witness at the appellant's trial. However, the learned Judge did not do so. Nor did he warn himself of the danger of acting on her evidence without corroboration. In the event, however, the failure of the learned trial Judge to warn himself of the necessity for corroboration was not fatal to the appellant's conviction because the learned Judge made a finding with which we agree, that Fina's evidence was corroborated."

In reaching a determination on whether PW8 and/or PW9 were accomplices, we are guided by section 19 of the Penal Code Act, Cap. 120 which provides that:

"19. Principal offenders.

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it—

(a) ...

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence."

The Penal Code Act, Cap. 120 does not define "aiding and abetting" but the **Black's Law Dictionary (8th ed.) at page 214** states that to "aid and abet" is to assist or facilitate the commission of a crime, or to promote its accomplishment. In our judgment, PW8 and PW9 facilitated the theft of New Vision's money by concealing the appellant's suspicious acts which they ought to have reported to the police and were therefore accomplices. We therefore accept the submission by counsel for the appellant that the learned trial Judge erred not to treat their evidence as accomplice evidence and further erred not to caution himself about the dangers of relying on such evidence without corroboration. However, the foregoing omission was not fatal to the prosecution case because the testimony of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 tended to support the prosecution case that the

appellant fraudulently diverted the complainant's money and having taken it account the appellant's defence where he testified at page 111 that:

"It is alleged that I received money from Newspaper distributors. It is not true. No distributor gave me money. There is no acknowledgement whatsoever that I ever received the money from any distributor."

The appellant's defence appears to be a flat denial in light of the prosecution evidence and the learned trial Judge was right to disbelieve it. In view of the above analysis, we are convinced that there was sufficient evidence on record to support the learned trial Judge's decision to convict the appellant on all the offences as she did and we uphold all the relevant convictions. In the result, grounds 1 (a), (b) and (c) must fail and are hereby dismissed.

Ground 2

Under this ground, counsel for the appellant complained that the sentence and orders imposed against the appellant by the learned trial Judge were not supported by the evidence on record. Counsel further complained that the judge had imposed uniform sentences for all offences without giving reasons. We observe that the learned trial Judge took into consideration the aggravating factors that the appellant breached the complainant's trust; the number of Newspaper distributors who were made to indemnify New Vision. She, however, did not take into account the mitigating factors in the circumstances namely, that he was a first offender, had an exemplary work record, and was the sole bread winner for his family.

The above notwithstanding, in **Kizito Senkula vs. Uganda, Supreme Court Criminal Appeal No. 024 of 2001** court observed that:

"...in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that the appellate court will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in James versus R (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."

Taking all factors into consideration, we are inclined to accept the submissions of counsel for the respondent that despite the failure by the learned trial Judge to consider the mitigating factors, the sentences she imposed were neither harsh nor excessive. The offences in issue, namely, embezzlement, theft and fraudulent false accounting attract maximum sentences of 14 years, 10 year and 7 years and in our view, the concurrent sentences of 5 years imposed on each count were neither harsh nor excessive. We would uphold them.

As regards the compensation, we observe that the learned trial Judge ordered the appellant to pay compensation in the sum of Ug. Shs. 262,269,710/= to the complainant. She did not indicate why the compensation amount was reduced from Ug. Shs. 270,763,910/= which was indicated in the indictment. We have found upon reappraising the evidence that the amount taken was more than that ordered for repayment by the learned trial Judge. However, we shall not enhance the compensation order as there was no cross appeal. Instead, we shall deduct the amounts which were recovered from the various distributors. PW8 testified at page 88 that he had paid off Ug. Shs. 153,000,000/=. After deducting the foregoing amount from the amount ordered in compensation, the appellant shall therefore pay Ug. Shs. 109,269,710/= to New Vision as compensation.

We also uphold the order of disqualification from public office because **section 46** of the **Anti-Corruption Act, 2009** makes it mandatory to disqualify any person convicted of interalia, embezzlement, as the appellant was in this case.

In relation to the additional ground, we summarily dismiss it, as neither the appellant nor his counsel raised the irregularities concerning the assessors before the trial Court. In **Byaruhanga Fadori vs Uganda, Court of Appeal Criminal Appeal No. 24 of 1999**, it was observed that:

"It is now established that a trial can proceed with the assistance of a single assessor if the other one fails to turn up during the trial or for any reason absents himself and misses part of the trial. It is not clear however, what happens when a trial judge uses one assessor and offers

no explanation why at least two were not appointed at the beginning of the trial...

Regarding Mr. Emesu's first submission on this matter that the appellant was not given opportunity to object or challenge the assessors, it was held in similar circumstances in Ndirangu s/o Nyagi vs, R (1959) E.A 875, that though there is no express provision in the law that an accused be given opportunity to object to any assessor, to do so was sound practice which should be followed. However in the instant case, the appellant who was represented by counsel did not request for opportunity to make such objection. in our view, his failure to object did not occasion to him any prejudice and since it was not mandatory that opportunity must be given, we find no reason to disturb the judgment of the learned trial Judge on that account alone."

In our judgment, the failure by the appellant's counsel to object to the irregularities regarding the assessors means that no prejudice was occasioned to the appellant on that account, even if it may be investigated now and found to have some merit.

The long and the short of our judgment is that we find no merit in this appeal which must fail. We uphold the conviction, sentences and orders of the learned trial Judge, save for an adjustment on the compensation orders. The appellant shall pay **Ug. Shs. 109,269,710/= (One Hundred and Nine Million, Two Hundred and Sixty Nine Thousand, Seven Hundred and Ten Shillings)** to New Vision (the complainant/victim).

We so order.

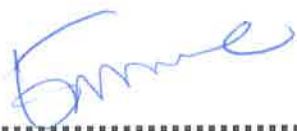
Dated at Kampala this day of 2020.

Dated at Kampala this 18th day of February 2020.



Alfonse Owiny-Dollo, DCJ

Justice of Appeal



Elizabeth Musoke

Justice of Appeal



Percy Night Tuhaise

Justice of Appeal