THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0015 OF 2017
(Arising from High Court (Anti-Corruption Division) Criminal Case No. 003 of 2015)

1. OKORI HENRY OKUMU
2. KASANGAKI ASTON KYOMYA :::::::::::::::::::::::::: APPELLANTS
3. OKOT PETER

VERSUS

UGANDA :::::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala (Anti-Corruption Division) before Gidudu, J. delivered on 6th January, 2017 in Criminal Session Case 003 of 2015)

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

Introduction

This is an appeal from the decision of the High Court (Gidudu, J.), in which the appellants were convicted of various offences under the Anti-Corruption Act, 2009, and sentenced accordingly, as follows: The 1st appellant for Abuse of Office contrary to Section 11 of the said Act and sentenced to serve a term of imprisonment of 2 years. He was also ordered to pay compensation of Ug. Shs. 30,000,000/= (Shillings Thirty Million) to the state. The 2nd Appellant for Embezzlement contrary to Section 19 (a) (iii), and Fraudulent False Accounting contrary to Section 23 (b) of the said Act, and sentenced to serve terms of imprisonment of 2 years and 4 years on each count, respectively, to run concurrently. He was also ordered to pay compensation of Ug. Shs. 150,000,000/= (Shillings One Hundred and Fifty Million). The 3rd

Appellant for Abuse of Office contrary to Section 11, and Embezzlement contrary to Section 19 (a) (iii) of the said Act, and sentenced to serve terms of imprisonment of 2 years and 3 years on each count, respectively, to run concurrently. He was also ordered to pay compensation of Ug. Shs. 20,000,000/= (Shillings Twenty Million) to the state.

Brief Background

The three appellants, who, at the material time were accountants at Mubende Regional Referral Hospital, were duly charged, committed and tried before Gidudu, J. on an indictment that contained several corruption related offences. At the trial, the prosecution case was that the appellants had on several occasions, during the course of their employment as bank agents to the said Hospital altered figures and words on payment instruments, including cheques, and had thereby inflating the liabilities of the Hospital, and in the process had stolen money belonging to the Hospital. It was further the prosecution case that the appellants had forged the signature of the relevant accounting officer to enable them to cash cheques and/or transfer money for their own benefit. In their respective defences, the appellants gave unsworn statements denying any wrong doing. However, at the close of the trial, the learned trial Judge largely believed the prosecution case and convicted the appellants for various offences, and thereafter imposed the sentences and orders as indicated earlier. The appellants were dissatisfied with the decision of the High Court, hence this appeal.

Representation

At the hearing of the appeal, Mr. Gilbert Nuwagaba, learned Counsel represented the 1st appellant; Mr. Wycliffe Tumwesigye, learned Counsel represented the 2nd and 3rd appellants; while, Mr. David Bisamunyu, a Senior State Attorney from the Office of the Director of Public Prosecutions, represented the respondent. This Court granted permission to the parties to file written submissions, which were filed and accordingly adopted. This Court considered them in the determination of the appeal.

We shall proceed to determine this appeal and in doing so we shall handle the 1st appellant's appeal separately, and then the 2nd and 3rd appellants' appeals jointly.

The 1st appellant's appeal

The grounds of appeal in the 1st appellant's memorandum of appeal were formulated as follows:

> "1. **The learned trial Judge erred in law and fact when he convicted the appellant on (sic) offence of Abuse of Office when the prosecution had failed to prove the appellant's commission of an arbitrary act in Abuse of the authority of his Office.**
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> 2. **The learned trial Judge erred in law and fact when he convicted the appellant for Abuse of Office after finding that the inter account transfers were forged and the money paid to Credo Oil was stolen from the account of Mubende Regional Referral Hospital held with Stanbic Bank, Mubende Branch.**
>
> 3. **The learned trial Judge erred in law and fact when he engaged in speculation hiding behind the notion of circumstantial evidence instead of relying on record or lack of it whilst he was convicting the appellant on the Count of abuse of office."**

Resolution of the 1st appellant's appeal

We carefully studied the court record, considered the submissions of counsel for either side, the law applicable, the authorities cited, and those not cited which are relevant to the determination of this appeal. 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 vs. Uganda Supreme Court Criminal Appeal No. 10 of 1997.**

In his submissions, counsel for the 1st appellant faulted the learned trial Judge for reaching the decision to convict the 1st appellant against the weight of the evidence on record. He stated the key ingredients of the offence of abuse of office as follows:

"(a) **Accused is employed in a Public body or Company in which the Government has shares.**

(b) **The accused did or directed to be done an Arbitrary Act.**

(c) **The act was done in abuse of the authority of the accused's office.**

(d) **That the Arbitrary Act was prejudicial to the interests of his employer or other person."**

Counsel for the 1st appellant then maintained that no evidence was led for the prosecution to show that the 1st appellant did an act or directed to be done an act, which would be characterized as arbitrary. Counsel pointed out that PW1 Dr. Nkurunziza Edward, then Hospital Director at the relevant hospital had testified that the 1st appellant was tasked with being, "overall in charge of account, preparing financial reports, ensuring staff are paid in time, making payments in a timely manner and giving advice to the accounting officer on the availability of funds. Counsel further pointed out that PW1 had testified that the 1st appellant was not a signatory to the account, and could not, therefore, direct payments to be done. In relation to the payment in question which was made to Credo Oil, counsel contended that it was effected due to PW1's forged signature and as there was no evidence showing that the 1st appellant had forged the said signature, he could not be said to have participated as cocluded by the learned trial Judge.

Counsel further faulted the learned trial Judge for the erroneous reliance on circumstantial evidence which did not satisfy the legal standard for such evidence. In support of the foregoing criticism, counsel pointed out that the learned trial Judge considered the fact that the 1st appellant was a director in Credo Oils Ltd, a company which was the alleged beneficiary of illegal payments from the relevant Hospital as circumstantial evidence that the 1st appellant caused the payments to the said company. Counsel was adamant that the 1st appellant had not caused payments to Credo Oils (U) Ltd, as it was not part of his schedule of duties to do so. He further submitted that the learned trial Judge had not mentioned the "arbitrary act" which the 1st appellant had done meaning that an essential ingredient of the offence of Abuse of Office had not been proven. Moreover, according to counsel, the

2nd appellant had admitted signing the Inter Account Transfer together with PW1. Even if it were true that PW1's signature had been forged, there was no evidence even remotely suggesting that the 1st appellant had forged PW1's signature. Instead the learned trial Judge resorted to speculation stating that the 1st appellant must have supplied details of his company name and account details to have payment effected. Counsel then theorized that it was unlikely for the Mubende Staff to process payment for a Company they had never had official dealings with, which created doubt in the prosecution case. He then asked this Court to resolve the foregoing doubt in the 1st appellant's favour, to allow the appeal, and quash the relevant conviction and set aside the sentence and orders imposed on the 1st appellant.

In reply, counsel for the respondent supported the decision of the learned trial Judge against the 1st appellant, and contended that he had properly analysed the evidence on record. He submitted that the prosecution had sufficiently proven the relevant ingredients of Abuse of Office as follows. First, it was proved that the 1st appellant was employed in a public body, namely Mubende Regional Referral Hospital. Secondly, that the prosecution had proved that the 1st appellant did or directed to be done an arbitrary. In support of the fore going, counsel relied on the **Oxford Learner's Dictionary** which defines arbitrary to mean, **"...based on random choice or personal whim rather than any reason or system or unstrained and autocratic use of authority."** He then submitted that the learned trial Judge was right to make a finding that the 1st appellant, who was a signatory to the Mubende Hospital account had caused payment to the Credo Oil Ltd, a company in which he was the director, and the same company which had not provided services to Mubende Hospital.

Counsel further submitted that although there was no direct evidence that the 1st appellant caused the payment of any monies into the Credo Oil account, the surrounding circumstances could only lead to a conclusion that he did so. He relied on the authority of **Hon. Akbar Hussein Godi vs Uganda, Court of Appeal Criminal Appeal No. 62 of 2011** where the

following observations were made about the nature of circumstantial evidence:

> **"...we appreciate this evidence (circumstantial evidence) to be in the nature of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing the existence of facts required to prove, is admissible as making the facts in issue probable by reason of its connection with or in relation to them. It is evidence, at times, regarded to be of a higher probative value than direct evidence, which may be perjured or mistaken. A Kenyan court has noted that: "circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial." See: High Court of Kenya at Nairobi Criminal Case No. 55 of 2006: Republic vs Thomas Gilbert Chocmo Ndeley. Though a decision of the High Court of Kenya, we find the enunciation of the principle as regards the application of circumstantial evidence in the words of the above quotation very appropriate and as representing the position of circumstantial evidence even in Uganda."**

Counsel submitted that on the basis of the circumstances surrounding the payment of monies to the account of Credo Oil Ltd, where the 1st appellant was a Director, the learned trial Judge had rightly convicted him of the offence of Abuse of Office. Moreover, according to counsel, as the 2nd appellant who admitted to having signed the inter account transfers to Credo Oil Ltd was under the supervision of the 1st appellant, it could be inferred that the latter directed the former to effect the payment to Credo Oil Ltd. All in all, Counsel maintained that the 1st appellant's conviction was justified and asked this Court to uphold it.

The 1st appellant's appeal boils down to one question, namely, was the circumstantial evidence relied on by the learned trial Judge to convict him tenable? We note that in convicting the 1st appellant, the learned trial Judge had this to say at pages 234 to 235:

> **"It is not in dispute that A1 is a director of Credo Oil Company (see exhibit P3). It is not in dispute that Credo Oil was paid a total of**

37,645,628/= from Mubende Hospital account 0140071328601 on various dates i.e 4,440,000= on 5/12/11; 6,072,000= on 1/11/11; 12,415,214= on 8/11/11; 2,573,200/= on 29/11/11; 6,072,607=on 24/10/11; and 6,072,607= on 25/10/11 (see exhibits P4 and P20)

It is not in dispute that Credo Oil had no frame work contract to supply any goods or services to the hospital. It received this money for no purpose on various dates between October and December 2011. It is not in dispute that A1 operated Credo Oil bank account in Stanbic Bank Soroti Branch. He has personally deposited and withdrawn money from that account on 1st August and 3rd September, 2011. It would be incredible to say that A1 was not aware of these payments. There must have been a motivation to have these payments sent to his company account.

The prosecution contends that A1 was aware of this transaction and benefitted from it while the defence argues that it has not been proved that A1 caused this payment to go to Credo Oil.

In a case where the prosecution relies on circumstantial evidence, the inculpatory facts must be incapable of any explanation other than the guilt of the accused. There should be no hypothesis that would weaken the inference of guilt.

Was it a coincidence that a company where A1 is a director should receive money for no work done from an entity where A1 is the head of accounts? Was it possible that someone else other than A1 provided details of his company name and account number to Mubende staff to pay it money for no reason? Was it a coincidence that when investigations start about this case that A1 disappears after recording his statement?

As head of accounts, A1 was privy to all legal payments-Of course if someone stole money from the account; A1 would not be obliged to know unless he is part of the scheme. (sic) (Appears contradictory)

In this case A2 admits he signed the transfer of the money to Credo Oil Company, Exhibit P4 reveals that the account number was in Stanbic Soroti Branch. Of all staff in Mubende Hospital only A1 was an operator of Credo Oil company account. It is irresistible to conclude that A1 caused payment to be sent to his company for purposes of stealing money from his employer. These were not blind payments. They were

repeated over time and it would be naïve to say A1 was not aware. He need not have signed the transfer forms to be culpable. In his position as heads of accounts, it is no speculation to say that he caused the payment to his company. This act is prejudicial to his employer who lost that money. This is an act of Abuse of Office within the meaning of section 11 of the ACA, 2009.

It was no coincidence that money is sent to his company and soon after he has recorded a police statement about it he absconds from duty until he appeared in court. As a senior accountant his conduct betrayed his claimed innocence. A1 must have supplied details of his company name and account details to have the payment effected. This is because it would be strange short of magic for Mubende staff to process payment for a company they have no official dealings with. A1 was part and parcel of the payment plan for his benefit. It would be naïve to think otherwise. The inculpatory facts of receipt of money on his company account betrays his defence of innocence."

We have found it necessary to quote at length from the judgment of the learned trial Judge to bring out the full extent of his reasoning in respect to the 1st appellant, which in our view brings into sharp focus the distinction in the laws of this country, between circumstantial evidence, speculation and suspicion in judicial decision making. While circumstantial evidence is generally acceptable in unique circumstances, speculation and suspicion are frowned upon as they run counter to the cardinal principles of criminal law relating to the burden and standard of proof.

We note that the theme of the learned trial Judge's judgment was in keeping with the particulars of the offence of abuse of office as alleged against the 1st appellant in the relevant indictment that:

"The 1st appellant while working as Senior Accountant/Head Accounts Department at Mubende Regional Referral Hospital did an act which is prejudicial to their employer in that he caused payment of specified amounts of money from the Hospital' bank account onto the account of Credo Oils Ltd without any supporting expenditure or activity to the transactions."

The outcome of the learned trial Judge's analysis of the relevant evidence was that indeed the 1st appellant had caused the payment of monies from the relevant Hospital's account to the said Credo Oil Ltd. The learned trial Judge reasoned, chiefly, that since the 1st appellant was a director in Credo Oil Ltd, he must have caused the relevant payments to it. We observe that PW1 Dr. Nkurunziza Edward, then Hospital Director failed to define the 1st appellant's schedule of duties at the relevant Hospital with any precision. PW1 however confirmed that the 1st appellant did not participate in authorizing the payments to Credo Oil Ltd (that function having been carried out by the 2nd appellant and PW1). Generally, on the basis of the evidence adduced for the prosecution, it could not be concluded (not to the requisite standard at least) that the 1st appellant caused payment of monies to Credo Oils Ltd. The learned trial Judge elected to rely on what he termed circumstantial evidence to prove the 1st appellant's culpability. In **Simoni Musoke vs Republic [1958] 1 EA 715**, the Court said of circumstantial evidence that:

> **"...in case depending exclusively upon circumstantial evidence, he (the learned trial Judge) must find before deciding upon conviction that the inculpatory facts were incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.**
>
> **...**
>
> **As it is put in Taylor on Evidence (11th Edn.), p. 74–**
>
> **"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."**
>
> **...**
>
> **And as was stated in the judgment of the Privy Council in Teper v. R. (2), [1952] A.C. 480 at p. 489 as follows:**
>
> **"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."**

The following definitions are rendered of circumstantial evidence in the **Black's Law Dictionary, 8th Edition:**

> **"Circumstantial evidence. 1. Evidence based on inference and not on personal knowledge or observation. — Also termed indirect evidence; oblique evidence.**

According to the Halsbury's Laws of England, Volume 11 (2) (2006 Reissue):

> **"Circumstantial evidence is evidence of one or more facts (such as motive, opportunity, or fingerprints left at or near the scene of the crime) from which other facts (which may be the facts in issue, or secondary or collateral facts) may then be inferred or deduced."**

Further, before placing reliance on circumstantial evidence, the Court must consider the rule which was laid down in **Hodge's Case (1838), 2 Lewin 227, 168 E.R. 1136** that:

> **"Before convicting an accused on the basis of circumstantial evidence, the jury must be satisfied not only that the evidence is consistent with the guilt of the accused, but is inconsistent with any other rational inference."**

We shall refer to the above legal principles, later. For now it is pertinent to note that the offence of Abuse of Office for which the 1st appellant was convicted is criminalized under **Section 11** of the **Anti-Corruption Act, 2009** provides that:

> **"11. Abuse of office.**
>
> **(1) A person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both."**

In our view, the ingredients which ought to be proved against the accused person which are discernable from the above provision are that:

"1. **The accused person was employed by the government.**

2. **The accused person did or directed to be done an arbitrary act in abuse of his office.**

3. **The said arbitrary act was prejudicial to the interests of his employer or any other person."**

There was no dispute concerning the first ingredient above. The sticking point was with regards the second ingredient. However, even with respect to that ingredient, it was clear that there was no direct evidence which confirmed that the 1st appellant was capable of causing payment to Credo Oil Ltd, as he was not a signatory to the relevant Hospital's account. In proving the second ingredient, the learned trial Judge made an inference that as money was paid, via an inter account transfer from the relevant Hospital account to Credo Oil Ltd, a company where the 1st appellant was a director, it could be inferred that it was the 1st appellant who directed such payment. Bearing the foregoing in mind, it would be observed that speculation and suspicion are defined as follows according to the Oxford Learner's Dictionary:

> **"Speculation means the act of forming opinions about what has happened or what might happen without knowing all the facts."**
>
> ...
>
> **"Suspicion means a feeling that somebody has done something wrong, illegal or dishonest even though you have no proof."**

In our view, the learned trial Judge's conclusion that the 1st appellant caused payment to Credo Oils Ltd was a product of speculation, which absolved the prosecution of the requirement to prove all the ingredients of the relevant offence beyond reasonable doubt.

In **Her Majesty the Queen vs. William Lifchus [1993] 3 S.C.R 320**, the Supreme Court of Canada observed that:

> **"A jury must be provided with an explanation of the expression a reasonable doubt. This expression, which is composed of words commonly used in everyday speech, has a specific meaning in the legal**

context. The trial judge must explain to the jury that the standard of proof beyond a reasonable doubt is inextricably intertwined with the presumption of innocence, the basic premise which is fundamental to all criminal trials, and that the burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The jury should be instructed that a reasonable doubt is not an imaginary or frivolous doubt, nor is it based upon sympathy or prejudice. A reasonable doubt is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence." (Emphasis Added)

From the above authority proof beyond reasonable doubt, which is inextricably linked with the most fundamental of all principles in criminal law, that is presumption of innocence, is a doubt based on reason and common sense which must logically be derived from the evidence or absence of evidence. In the present case, the prosecution failed to prove beyond reasonable doubt that it was the 1st appellant who directed monies to be paid to Credo Oils Ltd, which created doubt in favour of the 1st appellant. It is trite law that any doubt as to the guilt or otherwise of the accused person must be resolved in his or her favour. Accordingly, we find that the prosecution failed to sufficiently show that the 1st appellant did an arbitrary act, namely to cause payment of monies belonging to the Hospital to Credo Oils Ltd. Therefore, an essential ingredient of the offence of Abuse of Office had not been proved and the relevant conviction cannot be sustained. We therefore quash the 1st appellant's conviction for the offence of Abuse of Office and set aside the sentence and orders that arose therefrom, and order that the 1st appellant be set free unless he is being held on other lawful charges.

2nd and 3rd appellants' appeals

The 2nd and 3rd appellants' joint memorandum of appeal set forth the following grounds of appeal:

> "1. **The learned Judge erred in law and fact when he admitted and relied on the prosecution's evidence tainted with inconsistences (sic).**

2. **The learned Judge erred in law and in fact when he failed to properly evaluate the prosecution's evidence thereby arriving at a wrong decision.**

3. **The learned trial Judge erred in law and fact when he held that the prosecution had proved its case beyond reasonable doubt.**

4. **The learned Judge erred in law and fact when he held that the Appellants had orchestrated or participated in forgery.**

5. **The learned Judge erred in law and fact when he held that the supporting vouchers to the questioned checks (sic) had never existed.**

6. **The learned Judge erred in law and fact when sentenced the Appellants to 2 & 3 years and 2 & 4 years imprisonment concurrently and a refund of UGX 20 million and UGX 150 million respectively which sentences are harsh and excessive in the circumstances."**

The 2nd and 3rd appellants' case

The first, second, third, fourth and fifth grounds of appeal are rather imprecise, however, counsel argued them as follows: ground 1 separately; grounds 2, 3, 4 & 5 jointly; and ground 6 separately, respectively.

Ground 1

Counsel faulted the learned trial Judge for convicting the appellants in reliance on unreliable and contradictory prosecution evidence, especially relative to the recovery of key documents, which were allegedly taken from the Hospital premises. He submitted that the evidence of PW4 the complainant, PW4 the Investigating Officer with the State House Health Monitoring Unit (HMU), and PW9 who also participated in the investigations appeared to be contradictory. While PW1 testified that he delivered the key documents to the HMU in Kampala, which was confirmed by PW9, PW4 contradicted them and stated that the key documents in this case were recovered from the Hospital Premises. Counsel relied on Section 154 (c) of the Evidence Act, Cap. 6 on the implications of contradictions in a party's

evidence, and further submitted that the above mentioned witnesses, who were the principal witnesses in this case had given contradictory evidence, which created doubt in the prosecution case, and the said doubt should have been resolved in favour of the appellants.

Grounds 2, 3, 4 & 5

Counsel faulted the learned trial Judge for a failure to subject the evidence on record to appropriate scrutiny, and contended that he had erred to base the conviction of the 2nd and 3rd appellants of the relevant offences on the testimony of PW1, who testified that he had not sanctioned the payments in issue, and his signatures on the questioned cheques had been forged.

Counsel further submitted that PW1 denied having signed the cheques in issue because of his motivation to witch hunt the 2nd appellant, by fabricating charges against him. He contended that the witch hunt was evident when PW1 interdicted the appellant in a unilateral and arbitrary manner, without following the proper processes laid down in the Government Standing Orders. Counsel further contended that the manner of the said interdiction betrayed PW1's motivation to deny the 2nd appellant a peaceful happy retirement.

Counsel further faulted the learned trial Judge for having relied on the testimony of PW10 to corroborate PW1's testimony of forgery, wherein PW10 had alleged that he had been dismissed from the employment of the bank which effected the payments on the cheques in issue. Counsel contended that the said dismissal allegation was not properly substantiated, and yet it was relied on by the trial Court. Moreover, it was further the contention of counsel that if PW10 had been dismissed as he alleged, at the very basic minimum, one would have expected him to before the police for questioning on the complaint by the bank in issue or be charged in Court, but none of those things happened. He submitted that the learned trial Judge had erred to rely on the testimony of PW10, and if he had rejected it, he would have found that the payments in issue were sanctioned by PW1 and the same were processed by the 2nd appellant, in the normal course of execution of his duties.

Counsel further submitted that the circumstantial evidence relied on by the learned trial Judge to convict the 2nd and 3rd appellants was of the weakest kind and should not have been so relied on. The said circumstantial evidence, was the evidence which showed that the 2nd appellant had signed a questioned payment to Credo Oils, yet PW1, the other signatory on the payment documents in issue had denied signing the same, and the evidence which proved that the signature on the cheque in issue was a forgery. Counsel contended that there was no evidence linking either the 2nd and 3rd appellants to the said forgery. Counsel maintained that the payments which were effected by the 2nd appellant had been approved by PW1, and that it was not up to him to question the same.

Regarding the 3rd appellant, counsel submitted that he had properly accounted for the monies given to him by his supervisors, which were based on existent vouchers. He contended that the 3rd appellant may have adduced those vouchers in evidence, but their offices had been ransacked by the Investigating Officers in this case, without giving them a chance to salvage the vouchers and present them in Court. Moreover, the prosecution had not produced any acknowledgment by the 3rd appellant, in handing over his office or a search certificate to show that all the documents in their offices were recovered and produced in Court. Given those circumstances, counsel submitted that the learned trial Judge had erred when he found that the 3rd appellant was culpable because he had failed to present the vouchers in question.

He concluded, by asking this Court to make a finding that there was insufficient evidence to support the convictions of the appellant for the offence in question, and to acquit the 2nd and 3rd appellants, and set aside the orders of the learned trial Judge.

Ground 6

Counsel submitted that the learned trial Judge had erred when he imposed a custodial sentence and an order of compensation on the 2nd and 3rd appellants, for Ug. Shs. 150 Million, and Ug. Shs. 20 Million, respectively without any justification. He contended that there was no proof that the 2nd

appellant, a person of an advanced age had amassed wealth because of those monies. He proposed that a custodial sentence with an option of a fine would have been sufficient, given that the said offences were not committed with violence or intimidation.

Counsel contended that the learned trial Judge had failed to consider some factors in mitigation of the sentences such as: the 2nd and 3rd appellants were both first offenders; the 2nd appellant was a long time servant of the Government with a good record. He submitted that had those factors been taken into account, the trial Court would have imposed more lenient sentences, and prayed that if this Court maintains the convictions, it be pleased to impose more lenient sentences.

Respondent's Case

Counsel for the respondent disagreed with the 2nd and 3rd appellant's submissions, and supported the decision of the learned trial Judge to convict the 2nd and 3rd appellants, arguing that the sum of the evidence as adduced for the prosecution squarely proved that the 2nd and 3rd appellants had participated in the commission of the offences for which they were convicted. Counsel responded to the appellant's submissions in the manner they were argued.

Ground 1

Counsel submitted that there were no contradictions in the testimonies of PW1, PW4 and PW9 as alleged by the appellants, and that all the witnesses had testified that PW1 handed over the key documents in the case to either PW4 or PW9, both officers of the Health Monitoring Unit. He contended that there were no search certificates produced by the prosecution witnesses, and it was not clear which certificates the 2nd and 3rd appellants referred to, and that Section 154 of the Evidence Act, Cap. 6, which was referred to by the 2nd and 3rd appellants was irrelevant to this matter.

However, he further submitted that without prejudice to his earlier submissions, any contradictions in the prosecution evidence, were minor and did not go to the root of the case. He relied on **Baluku Samuel & another**

vs. Uganda, Supreme Court Criminal Appeal No. 21 of 2014, where the Court held that in assessing the evidence of a witness and the reliance to be placed upon it, his or her consistency is a relevant consideration. In that case, the Court also referred to **Sarapio Tinkamalirwe vs. Uganda, Supreme Court Criminal Appeal No. 27 of 1989**, where it was held as follows:

> **"It is not every inconsistency that will result in a witness' testimony being rejected. It is only a grave inconsistency, unless satisfactorily explained, which will usually but not necessarily result in the evidence of a witness being rejected. Minor inconsistencies will not usually have the effect unless court thinks that they point to deliberate untruthfulness."**

Grounds 2, 3, 4 & 5

Counsel submitted that it was not correct as asserted by the 2nd and 3rd appellants, that their conviction for embezzlement had been solely based on the fact that PW1 had denied his signature on the bank payments in issue, because in addition, the evidence of PW6 and P Ex. 16 had further strengthened the prosecution case. He referred to page 237 of the record, where the learned trial Judge stated that:

> **"The words and figures would be altered to read a higher amount which the two (2nd and 3rd appellants) would steal. It is for this reason that cheques started bouncing because the account was overdrawn which led PW1 to start the investigations that led to the arrest of the accused...The common method according to the testimony of PW1 was changing the letter "O" into "I". This was achieved by writing 'O' halfway on the word 'one' so that after the cheque is signed, the half "O" would be altered to "I" and "N" introduced at the beginning so that the word reads "Nine".**

Counsel referred to the next paragraph at the same page where it was stated that:

> **"Another method used was writing so carelessly that PW1 as an accounting officer would be tempted to correct either a word or a figure by countersigning to authenticate the correction. This would be a**

blessing for the payees to authenticate the correction. This would be a blessing for the payees to add other words and figures to achieve a bigger amount that they would steal. It was easy because A2 was a co-signatory."

Further still, counsel referred to an excerpt of the judgment of the trial Court at page 238 of the record that:

"The evidence contained in exhibit P16, links A2 and A3 to the forgeries or alterations on the disputed cheques. PW6 compared the handwritings of A2 and A3 from their official communications with the handwriting on the disputed cheques and concluded that the two were the authors of the alterations. He observed that letter designs, backward slant, handwriting skill, fluency, line quality, pen pressure, relative sizes and spacing of the characters were similar. I accept his evidence on this aspect...The conclusion drawn from PW6's evidence is that both A2 and A3 are privy to the alterations to inflate the money that was stolen."

Counsel submitted that it was clear from the above extracts that the learned trial Judge considered several pieces of evidence, and concluded that the 2nd appellant had participated in the offence of Embezzlement. He further submitted that the prosecution evidence established that the 2nd appellant was a co-signatory of the relevant Hospital bank accounts, and that the cheques in question contained his handwriting. He referred to the observations of the learned trial Judge at page 242 of the record that:

"All evidence points to A2 and A3 as the culprits. A2 admits signing the cheques. His defence is that all payments were valid and all that is required is collecting accountability from the imprest holders. The issue here is inflating the amounts in the cheques to create higher values. He had no authority to do so."

Further still, counsel submitted that the allegations of witch hunt of the 2nd appellant by PW1 were an afterthought, raised for the first time on appeal before this Honourable Court, and the same should be disregarded. He contended that the 2nd appellant had not brought up the issue of a witch-hunt in his testimony in the trial Court. He relied on James **Sawo-Abiri & another vs. Uganda, Supreme Court Criminal Appeal No. 005 of**

1990, where it was held that an omission or neglect to challenge the evidence in chief on a material or essential point by cross examination

Counsel further submitted that the dismissal of PW10, by Stanbic Bank over the cheques in issue, corroborated the fact that the same were forged or altered, which went to prove the guilt of the 2nd and 3rd appellants. He also contended that it was not incumbent on the learned trial Judge to consider why PW10 was not charged in Court, because that was the Constitutional mandate of the Office of the Director of Public Prosecutions.

Further, it was the submission of counsel for the respondent that there was overwhelming circumstantial evidence, to prove that the 2nd and 3rd appellants forged the cheques in issue. He relied on **Hon. Akbar Hussein Godi vs. Uganda, Court of Appeal Criminal Appeal No. 0062 of 2011**, where it was held that:

> **"...we appreciate this evidence to be in the nature of a series of circumstances leading to the inference or conclusion of guilt when direct evidence is not available. It is evidence which although not directly establishing the existence of facts required to be proved, is admissible as making the facts in issue probable by reason of its connection with or in relation to them. It is evidence, at times, regarded to be of a higher probative value than direct evidence, which may be perjured or mistaken. A Kenyan court has noted that: "Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that evidence is circumstantial."** He submitted that there was sufficient circumstantial evidence to prove the guilt of the 2nd and 3rd appellants, and asked the Court to dismiss grounds 2, 3, 4 and 5 and confirm the relevant convictions of the appellants.

Ground 6

On the issue of sentences and other relevant orders, counsel for the respondent submitted that the custodial sentences imposed on the 2nd and 3rd appellants were lenient, given the maximum sentences they could have attracted. He submitted that sentencing was a decision within the learned

trial Judge's discretion, and he was under no obligation to sentence the appellants to a fine instead of a sentence. He relied on **Hudson Jackson Andrua vs. Uganda, Supreme Court Criminal Appeal No. 0017 of 2016** where it was held:

> **"It is an established principle that an appellate Court is not to interfere with the sentence imposed by a trial Court which has exercised its discretion on sentence unless the exercise of discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial Court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence or where the sentence imposed is wrong in principle."**

On the compensation orders, counsel submitted that the learned trial Judge acted within the law, and it was permissible under **Article 126 (2) (C) of the 1995 Constitution**, **Section 11 (2) of the Anti-Corruption Act, 2009** and **Section 126 of the Trial on Indictments Act, Cap. 23** to make orders for compensation against victims of wrongs. He further submitted that there was no requirement under the law, that prior to a compensation order being made, the persons it would be made against must have amassed wealth. He further submitted that all the mitigating factors were considered in the circumstances, such as the fact that the 2nd and 3rd appellants being first offenders, being caregivers to their families and the advanced age of the 2nd appellant.

Counsel prayed that this Court dismisses all the 6 grounds of appeal, and upholds the convictions and sentences imposed on the 2nd and 3rd appellants, and maintains the relevant compensation orders against them.

Resolution of the 2nd and 3rd appellants' appeal

We carefully perused the record, considered the submissions of counsel for either side, the law applicable, the authorities cited, and those not cited which are relevant to this appeal.

We earlier stated the duty of this Court as a first appellate Court, while resolving the 1st appellant's appeal and we shall not go over it at length. We

shall, however, emphasize that a first appellate Court ought to consider all the material presented before the trial Court, and come up with its decision, either to agree with the learned trial Judge or otherwise.

Essentially, the 2nd and 3rd appellants complained about errors relating to their convictions (ground 1, 2, 3, 4, and 5), and errors relating to their sentences and compensation orders (ground 6).

Complaints against their convictions

The 2nd and 3rd appellants contended that their convictions were entered, without sufficient evidence; while it was contended for the respondent, that on the whole of the prosecution case, there was sufficient evidence to pin the 2nd and 3rd appellants to the commission of the offences for which they were convicted.

The 2nd appellant was convicted of Abuse of Office contrary to section 11 and Embezzlement contrary to section 19 (a) (iii) of the Anti-Corruption Act, 2009; while the 3rd appellant was convicted of the offences of Embezzlement contrary to Section 19 (a) (iii) and Fraudulent False Accounting contrary to Section 23 (b) of the Anti-Corruption Act, 2009.

By his own admission, the 2nd Appellant was at all material times, the Principal Accounts Assistant at Mubende Hospital, and was ordinarily responsible for "opening up the accounts of the Hospital". The 3rd appellant was a Senior Accounts Assistant at Mubende Hospital, and was ordinarily assigned, to among other things: ***"...update cash book, monthly reconciliations, make financial reports, and he was also a bank agent."***

The evidence adduced by the prosecution established that the 2nd and 3rd appellants had withdrawn monies from the Hospital Account, and spent the same. The said withdrawals, which were effected on cheques, were drawn against the Hospital's accounts, and were signed by PW1 Dr. Nkurunzinza (the Accounting Officer) and the 2nd appellant as signatories. If things had ended there, there would be no wrong doing and the 2nd and 3rd appellants would walk free.

However, the prosecution established that PW1 did not authorize the withdrawal of some of the said monies from the Hospital account, and that PW1's signatures on some of the cheques in issue had been forged (See evidence of PW6, Ssebuwufu Erisa, who examined the Cheques in issue, and compared the signature there with that of PW1.) It was further established that, where the payments were authorized by PW1, the figures thereon would be altered to make additions and inflate the monies which were payable. It was established that these forgeries were made by the 2nd and 3rd appellants, as their handwritings had been used to make the illegal additions. (See: PW6's evidence).

The extent of the monies which were drawn by the fraud of the 2nd and 3rd appellants, was estimated at Uganda Shs. 266.9 Million, according to the report on the matter by the Office of the Auditor General (See. Ex. P.17). However, the amount which was proven to have been stolen, was significantly less than the aforementioned.

The key witness for the prosecution was PW1, then the Accounting Officer of Mubende Hospital, who testified that around December 2011 or January 2012, he went to inspect the Hospital Bank accounts and found Shs. 41,000/= instead of about Shs. 70,000,000/= which he expected to find there. He then went to the Bank Manager at the Hospital's Banker who gave him a financial statement of the relevant account. PW1 found suspicious transactions because they involved huge amounts of money, and yet he believed that the Hospital only made small transactions. He further found that the Hospital had made payments to certain business entities with which they had no prior dealings. Apparently he asked the appellants for explanations and no satisfactory ones were given.

PW1 then reported to a Health Monitoring Unit in State House. Meanwhile he asked askaris to guard the accounts office. Shortly thereafter, police from the said Health Monitoring Unit went to the Hospital and, "opened the office (Accounts Office) and started their investigation." He testified that the Police Officers uncovered cashbooks and cheque books which had been altered fraudulently. PW1 was adamant that there were no supporting documents

for the payments. The fraudulent alterations apparently benefitted the 3 appellants and no other person. PW1 explained the wrong doing in these words at page 65 of the record:

> **"Figures and words would be added on the left side (on the cheques). Even where there was no space to add words, they would put it on top on a different lines, and without countersigning the bank would pay.**
>
> **Most cheques carried my genuine signatures. Only the inter account transfers had forged signatures and a few cheques also had forged signatures"**

PW1 further testified that in some instances, there were actually supporting documents for the altered amounts. He said at page 68 of the record that, *"...there were fictitious vouchers numbers which were used as accountability for the altered amounts on the cheques."* The foregoing testimony established a second dimension to the prosecution case, namely, that the appellants had created fictitious vouchers to vouch for their "alterations". Apparently, this was the case for all the one hundred or so cheques which were exhibited.

In cross examination, PW1 was asked to produce the cheques which had allegedly bounced, he could not do so. PW1 said that when he rang the head of the Health Monitoring Unit in State House and asked them to investigate the alleged wrong doing at the hospital, he was advised to secure the Accounts Office. PW1 said that he asked Dr. Wanga to secure the relevant Office. However, Dr. Wanga denied having received any such instructions from PW1.

Furthermore, PW1 revealed in cross-examination that the team from the said Health Monitoring Unit in State House accessed the Accounts Office and took mainly vouchers, cash books, vote control books, contract documents etc from the Hospital. Apparently, Okolong a police officer signed for the documents. There was however no search warrant or certificate. Later, PW1 forwarded some vouchers to the Health Monitoring Unit.

The Auditor General's report (Exhibit P.17) noted that there were instances of poor management at Mubende Hospital. For example, the books of account were handled in a lax manner, there was no internal audit system in place and there were weak internal controls and processes at the Hospital. In his conclusion at page 10 of the report, the Auditor General stated that:

> **"Because of the significance of the issues highlighted above, I am unable to confirm that the funds were utilized for the intended purpose and properly accounted for."**

Indeed, from the above evidence adduced for the prosecution, there remained a probability that the money alleged to have been stolen and or misused was actually utilized for its purpose. The 2nd appellant testified at page 188 of the record that the money was actually spent on Hospital activities. It was argued for the 2nd and 3rd appellants that there were vouchers that could prove that the money in issue was properly spent.

In our view, the prosecution's case turned on whether or not there were supporting vouchers to the alleged altered payments. PW1 testified that there were fictitious vouchers which supported the queried expenditure. However, these were not produced as exhibits by the prosecution. The appellants are adamant that those vouchers may have been destroyed by the investigators from the Health Monitoring Unit from State House. On the preceding point, we noted that the Accounts Office was searched by either PW4 Detective Sergeant Okorom Charles or PW9 SSP Taremwa Moses who were at all material times working with the Health Monitoring Unit from State House.

We observe that the 2nd and 3rd appellants submitted in this appeal that there were supporting vouchers to all the payments which they made, which they left in the offices at Mubende. We further observe, on a related subject, that the 2nd and 3rd appellants' offices had not been searched in accordance with the law by the Investigating Officer. This in our view, left some doubt in the prosecution case, as to whether the story by the 2nd and 3rd appellants, that they left supporting documentation in their offices was actually true.

However, the above mentioned doubt was resolved by prosecution evidence which showed that the 2nd and 3rd appellants had participated in certain fraudulent payments, which were based on cheques. The said fraudulent cheques could be clustered into two groups which were these: Cheques in Exhibits M9 to M58, which were altered by making additions and modifications to inflate the authorized monies therein. Secondly, cheques clustered in MB1 to MB36, where the signatures of PW1, the Accounting Officer were drawn.

The 2nd appellant was implicated in both categories, whereas the 3rd appellant was implicated in the fraud comprised in Exhibits MB6 to MB36, and the total sums which were lost by their conduct, was Shs. 193,794,494/=, and Shs. 29,300,000/=, for the 2nd and 3rd appellants respectively. Given that the cheques were found to contain forgeries, it was impossible that they could have supporting documents, not least genuine supporting documents.

As we stated earlier, the 2nd appellant was convicted on one count of Abuse of Office, and one count of Embezzlement. On his part, the 3rd appellant was convicted of one count of Embezzlement and one Count of Fraudulent False Accounting. Embezzlement is provided for under **Section 19** of the Anti-Corruption Act, 2009 which provides:

> **"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) being the property of his or her employer...;**

(ii) received or taken into possession by him or her for or on account of his or her employer...

(iii)...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."

In our view, the ingredients of the offence of embezzlement, relevant to this appeal are these:

"(i) The accused was an employee of the government.

(ii) The accused stole money, being the property of his employer."

According to the **Black's Law, 8th Edition**, theft is defined as the felonious taking and removing of another's personal property with the intent of depriving the true owner of it.

We find that it was not disputed that the 2nd and 3rd appellants were employees of the Government, in Mubende Hospital. As indicated above, the prosecution established that the 2nd and 3rd appellants, stole money which was the property of their employer, Mubende Hospital. For that reason, they were rightly convicted of Embezzlement contrary to Section 19 (a) (iii) of the Anti-Corruption Act, 2009.

On the 3rd appellant's conviction of Fraudulent False Accounting. We observe that the said offence is provided for under Section 23 (b) of the Anti-Corruption Act, 2009 which provides:

"Fraudulent false accounting.

A person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the following acts with intent to defraud—

(a) ...

(b) ...makes, or is privy to making, any false entry in any book, document or account; or

(c)...commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both."

The ingredients of the offence of Fraudulent False Accounting are the following:

"(i) The accused was employed as a clerk or servant.

(ii) The accused made, or was privy to the making of a false entry in any book, document, or account."

It was not in dispute that the 3rd appellant was the Principal Accounts Assistant, and therefore a servant of Mubende Hospital, and as we found earlier, he was privy to fraudulent entries on cheques. Therefore, the ingredients of the Offence of Fraudulent False Accounting were proven against him, and he was rightly convicted.

Complaints against their sentences and orders

We observe that upon conviction, the 2nd and 3rd appellants were sentenced as follows:

The 2nd appellant was sentenced to 4 years imprisonment, on one count of Embezzlement, and to 2 years imprisonment, on one count of Fraudulent False Accounting. The sentences were to run concurrently.

The 3rd appellant was sentenced to 2 years imprisonment, on one count of Embezzlement, and to 2 years imprisonment, on one count of Abuse of Office. The sentences were to run concurrently.

The trial Court also made an order of compensation against the 2nd and 3rd appellants, to pay Shs. 20 Million, and Shs. 150 Million, to their victim (government) whose money was deemed to have been stolen by the duo.

In their submissions, the 2nd and 3rd appellants, said firstly, that the orders of compensation were without any justification. However, such contentions are clearly unjustifiable, because we have found, just as the trial Court did, that the two stole money from their employer, Mubende Hospital. There is

enough authority under the laws of Uganda which empowers Courts to order the payment of compensation to victims of wrongs. **(See: Article 126 (2) (c) of the 1995 Constitution and Section 126 of the Trial on Indictments Act, Cap. 23.)**

Secondly, the 2nd and 3rd appellants complained about the severity of the sentences imposed against them. We note that an appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. **See: Ogalo s/o Owoura v. R (1954) 21 E.A.C.A. 270.**

The 2nd and 3rd appellants submitted that the learned trial Judge had not taken into account their mitigation factors prior to sentencing. This is not true. At page 245 of the record, the learned trial Judge considered that they were first offenders, that they were family men and care givers, and specifically that the 3rd appellant was of the advanced age of 60 years at the time. The learned trial Judge, therefore, considered the mitigating factors as well as the aggravating factors and did not overlook any material factor. The resultant sentences were therefore, an exercise of his discretion which we shall not interfere with.

We must also observe that the learned trial Judge made a compensation order against the 2nd and 3rd appellants, to pay much less than they were found to have stolen. Indeed the estimation of this Court puts that figure at Shs. 193,794,494/= and Shs. 29,300,000/=, respectively, for the 2nd and 3rd appellants. It is unclear why the learned trial Judge rounded off those figures to Shs. 150 Million and Shs. 20 Million, but since the respondents did not cross appeal on the quantum of compensation, we shall maintain the learned trial Judge's orders. All in all, the 2nd and 3rd appellants' appeals are dismissed.

Therefore, in view of the above analysis and findings, it is ordered as follows:

a) The 1st appellant's appeal is allowed. His conviction by the trial Court of the offence of Abuse of Office is quashed, and the relevant sentences and

orders arising therefrom are set aside. The 1st appellant shall be set free unless he is being held on other lawful charges, or if on bail, he shall be released from the relevant bail conditions.

b) The 2nd and 3rd appellant's appeals are dismissed, and their relevant convictions, sentences and compensation orders are maintained.

We so order.

Dated at Kampala this 20th day of February 2020.

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Alfonse Owiny-Dollo, DCJ

Justice of Appeal

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Elizabeth Musoke

Justice of Appeal

.....

Percy Night Tuhaise

Justice of Appeal