THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 50 OF 2019

CORAM: {Egonda-Ntende, Bamugemereire, Madrama JJA}

1. JEFF LAWRENCE KIWANUKA
2. JAMAL KITANDWE
3. BERNARD KAMUGISHA ::: APPPELANTS

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of High Court of Uganda at Anti Corruption Division before Hon: Justice Lawrence Gidudu dated 13th of December 2018, in Criminal session No. 2 of 2017)

JUDGMENT OF THE COURT

The appellants; Jeff Lawrence Kiwanuka, Jamal Kitandwe and Bernard Kamugisha were indicted on a count of Embezzlement contrary to section 19 (b) (iii) of the Anti Corruption Act.

They pleaded not guilty during arraignment and went through a full hearing before Lawrence Gidudu J. They were convicted and sentenced to 7 years imprisonment and ordered to pay compensation worth UGX 2.5 Billion (Uganda Shillings Two Billion) jointly and severally.

Back ground

Between the years 1993 to 1995, over 500 ISO employees were retired from service and were paid some benefits by government. The retired employees were dissatisfied with the benefits on grounds that they were inadequate and as result, the former ISO employees instituted **High Court Civil Suit No. 164 of 2004** against the Government of Uganda through the Attorney General claiming for; pension, gratuity, medical allowance, payment in lieu of notice of termination, breach of employment contract and terminal benefits. The case was determined in favour of the former ISO employees and in addition awarded them damages of UGX 500,000/= each with interest at a rate of 10% from the date of filing the suit till payment in full. The Attorney General appealed against the decision but the appeal was dismissed for want of prosecution.

The former employees filed an application for ***Mandamus*** against the Secretary to treasury seeking to compel him to exercise and perform his constitutional and public duty by paying the UGX 72,434,466,660/=owed to them by government as per computations under SI No. 80 of 2008. Negotiations were subsequently held between government and the appellants, who were representatives of the former ISO employees, with a view of arriving at an acceptable way of paying the terminal benefits.

That after the negotiations, a compromise was reached that the former employees be paid UGX 39,189,499,715/= as full and final settlement of their claim of gratuity/terminal benefits and allowances. The agreed

issues were reduced into a memorandum of understanding that was signed by the representatives of government on one part and by Jeff Kiwanuka, the 1st appellant together with Matovu & Matovu Advocates on behalf of the former employees of ISO on the other part. The issues agreed upon were later reduced into a consent order that was filed in court by the parties and on that basis, the Ministry of Finance, Planning and Economic Development paid the first instalment of UGX 10,000,000,000/= on the 18.06.2014. The remaining balance of UGX 29,189,499,715/= was to be paid in two instalments during the financial years 2015/2016 and 2017/2018 as agreed in the MOU. The first instalment of 10 Billion shillings was paid through Crane Bank Account No. 0145034204600 in the names of UVETISO Association Ltd at the request of the appellants' lawyers. The Association is a private ltd Liability company that was incorporated by the appellants and 10 other former ISO employees for purposes of receiving the impugned terminal benefits from government.

However, investigations established that majority of the former ISO employees entitled to these benefits never consented to its formation and were never aware of the existence of the company, which received their benefits. The appellants were also the signatories to the company's account with crane bank where the terminal benefits were paid and it was in that capacity that they accessed and stole the impugned terminal benefits for the former ISO employees. Before the money was paid to the UVETISO account, the appellants called the former employees to the National Theatre grounds for a meeting

during which they requested the former employees to buy a form of 1000 each and fill in the details of their account numbers that the beneficiaries however waited in vain until they learnt later that their leaders had received the first instalment through their private company known as UVETISO and only a fraction of it had been paid to a few employees/beneficiaries. Despite several promises by the appellants, the beneficiaries never received any payments through their accounts.

Police investigations established that out of UGX 10 billion credited on the account of UVETISO on 18th June 2014, on the same day, the appellants withdrew a total of 2.5 billion in cash and they never remitted any of the said money to the intended beneficiaries. The following day of 19th June 2014, UGX 2 billion of the questioned funds were wired from UVETISO bank account to the account of Matovu & Matovu Advocates on joint instructions of the appellants. The complainants who were beneficiaries never consented to payment of the said money to the lawyers. On 25th June 2014, the appellants instructed crane bank to make payment of UGX 3,030,705,000/= to 117 of the intended beneficiaries which was paid through their respective banks and apart from the said money and the 2 billion shillings paid to the lawyers, the rest of the money amounting to 4,969,295,000/= was withdrawn by the appellants in cash to pay to the beneficiaries. However, investigations established that none of the beneficiaries was paid in cash and besides the 117 who received money on their accounts, no other money was received.

Consequently, the Appellants were indicted for the offence of Embezzlement and were convicted and sentenced to 7 years imprisonment each and a joint compensation of 2.5 billion shillings.

Dissatisfied with the conviction and sentence, the Appellants appealed to this court.

This appeal is premised on five grounds;

1. **The learned trial Judge erred in law and fact when he failed to evaluate the whole evidence on court record and came to a wrong conclusion that the appellants were guilty of embezzlement.**
2. **The learned trial Judge erred in law and fact when held that the appellants were accountable to the treasury for money received under a memorandum of understanding arising out of a Civil Suit.**
3. **The learned trial Judge erred in law and fact when without proof of any fraud whatsoever, lifted the veil of incorporation and came to a wrong conclusion that the appellants were guilty of the offence of embezzlement.**
4. **The learned trial Judge erred in law and fact when he held that PW1 and PW2 & PW3 were members of UVETISO and were therefore entitled to complain about the money received by UVETISO yet they denied being members of UVETISO.**
5. **The learned trial Judge erred in law and fact when he sentenced the accused persons (appellants). To harsh and excessive sentence in the circumstances.**

Representations

The appellants were represented by Alexander Muhimbise of Mssr Tuhimbise & Co. Advocates while the respondent was represented by Stanley Baine Chief State Attorney from the Office of the Director of Public Prosecutions. This Court admitted the written submissions of

both counsel and relied on them as the full submissions for both parties.

Legal Arguments

The Appellants' Case: Ground No. 1

Counsel for the appellants submitted that in criminal cases the burden of proof rests upon the prosecution to prove each and every ingredient of the offence beyond reasonable doubt. (**See Woolmington v DPP (1935) AC 462**) and **Section 101 of the Evidence** Act. It was counsel's submission that there was no contention about the 1st and 2nd ingredients however, the 3rd ingredient was never proved against the appellants individually beyond reasonable doubt.

Counsel for the Appellant contended that criminal liability is personal and must be proved as against an individual. He referred to the case of **Arvind Patel v Uganda Supreme Court Criminal Appeal No. 36 of 2002**. Where it was held that *"criminal responsibility is personal to an individual, even in cases of conspiracy."*

Counsel contended that the evidence adduced by prosecution left doubt and the learned trial judge engaged in speculation when he convicted the appellants on grounds that they never provided explanation to their actions. This he asserted is contrary to the burden of proof, citing **Arvind Patel Supra**.

Counsel also argued that the prosecution evidence was marred with numerous contradictions and inconsistencies which the trial judge would have considered had he properly evaluated the evidence on

record. He pointed to the evidence of PW1 in cross examination when he contradicts himself and is not consistent as to whether he knows UVETISO or its purpose. Counsel for the Appellants concluded that PW1, PW2 and the PW3 were not members of UVETISO and neither would they sustain a claim against the appellants.

Counsel prayed that court upholds this ground of appeal.

The respondent's case

Counsel for the respondent noted that the appellants' counsel based his argument on the trial judges finding that *"except for the 5.1 billion/= which is traced to the 117 beneficiaries and counsel Matovu John, the rest of the money cannot be traced to anyone except the appellants who withdrew it in cash..."*

Counsel submitted that the trial judge made comments in his sentencing notes that he was not sure if the convicts had the 4.9 billion or its worth in cash or assets...the trial judge further noted that he was persuaded that the convicts did not take all the 4.9billion to their home, and he ordered the three convicts (appellants) to compensate the victims to the tune of 2.5 billion.

Counsel for the respondent observed that from the learned trial judge's comments there was a clear indication that prosecution evidence left doubt and he criticized the trial judge for engaging in speculation when he convicted the appellants in absence of any evidence pointing to their criminal liability.

Counsel for the respondent invited this court to note that the trial judge's comments on which the appellants' counsel's arguments are hinged were made on 13th December 2018 during the sentencing of the appellants. This was after he had found the appellants guilty of embezzlement of the 4.9 billion on the 10th December 2018. Counsel added that the fact that court directed the appellants to refund a lesser amount to the victims did not in any way lessen their guilt neither can it be construed to be a weakness in the prosecution case, which the trial court had already rightly found to have been proved beyond reasonable doubt in its judgment. It was counsel's submission that the learned trial judge gave his reasons of not directing the appellants to repay the entire sum to the victims.

Counsel further submitted that the appellants received 10 billion through UVETISO's account in crane bank and the trial court rightly found that out of 10 billion, only 5.1 billion was paid out to the beneficiaries and Mr. Matovu, their Counsel. The balance of UGX 4.9 billion was jointly withdrawn by the appellants as shown by the withdrawal instructions collectively admitted in evidence as **Ex.P.11.** The appellants could not explain what they did with this money which was meant for the former ISO employees.

Counsel for the Respondent contended that the appellants were requested by several government offices for accountability but they declined to provide the same. During trial the appellants opted to remain silent. The only explanation available were the banking slips which proved that the appellants received UGX 4.9 billion in cash.

Counsel referred to the case of **Teddy Ssezi Cheeye v Uganda CACA No. 105 of 2009** where this honourable court held that;

"In the instant case, the prosecution proved beyond reasonable doubt that the appellant withdrew the money in question from his Company's account. It is incumbent upon him to tell us where the money went since the matter is especially within his knowledge."

Counsel added that the same position was upheld by the Supreme Court in **Teddy Ssezi Cheeye v Uganda SCCr. Appeal No. 32 of 2010**.

Counsel argued that in the instant matter, the appellants received all the questioned funds shown on the withdrawal slips and collectively marked exhibit P.11. The evidence of PW1, PW2, PW4, PW6 and PW10 was that the money was never received by the intended beneficiaries. Counsel for the

Counsel for the Respondent contended that the learned trial judge was justified when he considered the evidence of the lawyers who had remuneration agreements with the appellants but were not paid. Counsel noted that the trial judge did not err when he found that the money was paid to the company. Counsel agreed with the trial judge when he questioned why no accountability was made to the PS/ST when the Treasury had a binding contract with UVETISO through its directors? These benefits qualified as public funds for which the Secretary to the Treasury rightly demanded an explanation from the appellants. Counsel for the responded submitted that the trial judge was right to conclude that the appellant had stolen this money.

Counsel concluded that the trial judge was therefore justified in finding that the appellants had embezzled the UGX 4.9 billion which they received for onward transmission to the former ISO employees but never remitted it to them and never explained what they did with the money.

It was counsel for the appellants contended that the prosecution evidence was marred with contradictions and inconsistencies and he referred to the evidence of PW1 and PW2. Counsel for the responded replied that there was however no contradiction in the evidence of the stated witnesses and the purported discrepancy is so minor and does not go to the root of the prosecution evidence, neither does it point to any deliberate falsehoods.

Ground 2

The Appellants Case

Counsel for the appellants submitted that the appellants as directors in UVETISO fulfilled their duties imposed on them by the constitution of UVETISO which lays out the functions and powers of the executive council. Counsel contended that the duty to account to the treasury is nowhere in the above provisions thus the trial judge erred and wrongly convicted the appellants when he based his reasoning on the fact that the appellants were accountable to the treasury.

The Respondent's Case

Counsel for the respondent submitted that the appellant's contention that their duty to account to the treasury was nowhere in the

provisions is misleading and does not take into context the trail that the money took from the onset. Counsel contended that PW4 told court that the appellants through their lawyers entered into a memorandum of understanding with the government; **exhibit P.8** to pay the claimants following an order of mandamus in **HCCS No. 164 of 2004 H. Waibale & 5 ors v Attorney General.** Counsel added that the appellants through their lawyers in the minutes of that meeting **P.21** instructed the money to be paid to UVETISO and not their advocates account. Counsel contended that the said money was statutory and was supposed to be charged on the consolidated fund thus PW4 was mandated to ask for accountability of funds paid from under the public purse.

Counsel submitted that the trial judge in his evaluation of evidence agreed that this money was paid to a stranger, UVETISO whose directors were the appellants thus they were liable to account to the treasury for the money received under the MOU they signed. Further, that the treasury had a contract with UVETISO to pay the said beneficiaries thus he had every right to demand accountability under **S. 6 of the Public Finance accountability Act 2003** since this was public money.

Counsel further argued that the appellants were convicted solely on the evidence presented by the prosecution in fulfilment of the ingredients of embezzlement and the evidence on absence of accountability to the PS/ST was only received as circumstantial evidence which necessitated inference of the appellants' guilt. Counsel

prayed that this ground should be found without merit and be disallowed.

Appellants' Rejoinder

In rejoinder counsel for the appellants submitted that the government in paying money to UVETISO was discharging a debt and/or satisfying a decree. They did not have to account to their debtor. Counsel reiterated his earlier submissions that the appellants exercised their duties under UVETISO articles of occupation.

Ground 3

The Appellants' Case

Counsel for the Appellants submitted that law on lifting the corporate veil is guided by **Section 20 of the Companies Act, 2012** and re-echoed by the learned trial judge to the effect that the corporate veil ought to have been lifted in case of fraud by the directors of the company. Counsel contended that it is evident from the testimony of PW8 that the 1st and 2nd appellants were appointed by court as representatives. He added that PW1 shows that he and others attended 5 meetings which reveals that UVETISO was known to the beneficiaries and the formation of the same was based on guidance by the attorney general. It was Counsel's further submission that the formation was in the interest of the beneficiaries and not personal gain of the appellants. Counsel argued that the trial judge turning around and lifting the veil of incorporation was erroneous and he prayed that court upholds this ground of appeal.

The Respondent's Case

Counsel for the respondent quoted **Section 20 of the Companies Act 2012** which envisages that courts may lift the corporate veil in instances where it becomes clear that the corporate personality is being used by the directors to conceal the fraud perpetuated by the directors of the company. Counsel also cited **S. 19 (b) of the Anti-Corruption Act 2009** which states that a person who is a director of a company or a corporation is a liable person for embezzlement. Counsel argued that it was not the company that was indicted but rather its directors.

It was counsel's contention that the appellants were charged for the actions they did as persons and the company which has no hands and brains could not be liable. Counsel argued that the sole purpose of the company as indicated in the objects clause of the MOA was to act as an administrative franchise to effectively disburse the transferred funds to the intended beneficiaries of the judgment in HCCS No. 164 of 2004. Counsel added that the claimants and aggrieved parties lodged a complaint and upon investigation, it was revealed that 10bn shillings had been received by the appellants' yet 4.969, 295,000/=was found to have been withdrawn by the appellants in cash and the money vanished without accountability.

In further contention, Counsel submitted that with such overwhelming evidence of fraudulent conduct adduced by the prosecution against the appellants and the appellants presumably shielding themselves with a corporate veil and offering no reasonable

explanation for the strange occurrences, the learned trial judge was justified to lift the corporate veil.

Counsel added that the trial judge canvassed the law on corporate personality and related it to the facts made the inevitable finding that once allegations of fraud have been substantiated the court will always lift the corporate veil and hold the directors liable for their actions.

Appellants' rejoinder

Counsel for the appellants submitted that it was premature for the trial court to lift the corporate veil because there was a balance of 29 Billion shillings unpaid by the government.

Ground 4

The appellants' case

Counsel for the appellant submitted that it is trite law that claims against the company or its directors can only be brought by members of the company and no other. He referred to **Section 248 (1) of the Companies' Act 2012**. Counsel argued that the trial judge erred in law and fact to hold that PW1, PW2 and PW3 were members of UVETISO which they personally denied being members.

The respondent's case

Counsel for the respondent submitted that the money belonged to the former employees of ISO and UVETISO was just the structure put in place to act as a conduit through which they would access the funds after providing their account details. Counsel submitted that the trial

judge properly evaluated the evidence to make the finding that the former employees of ISO were automatically members of UVETISO.

The appellants' rejoinder

Counsel for the appellants reiterated his earlier submissions on appeal.

Ground 5

The Appellants' case

Counsel for the appellants submitted that the learned trial judge erred in law and fact when after failing to know whether all the appellants stole the money or whether one of them stole the money and where the trial judge could not ascertain how much was allegedly stolen by who, went ahead and sentenced all the appellants and ordered each of them to pay 2.5 billion which was omnibus, harsh and excessive. Counsel referred to the case of **Arvind Patel v Uganda SCCA Criminal Appeal No. 36 of 2002** where court held that criminal responsibility is personal to an individual even in the case of conspiracy. Counsel argued that an omnibus sentence is unlawful and that for every count on which there is a conviction, there must be a separate sentence. Counsel contended that the learned trial judge erred when he gave an omnibus conviction and sentence and compensation without showing how much was to be paid by each appellant.

Counsel prayed that this court allows the appeal set aside conviction and sentence of the trial judge.

The Respondent's Case

Counsel submitted that **S. 1 of the Trial on Indictments Act** provides that the high court may pass any sentence authorised by law. Further he referred to **S. 19 (b) (iii) of the Anti Corruption Act 2009** where the offence of embezzlement carries a maximum sentence of up to 14 years imprisonment or a fine or both. Counsel submitted that the appellants were each sentenced to 7 years and ordered to jointly and severally pay compensation of 2.5 bn. Counsel argued that the sentences were not harsh and omnibus but rather personal and the compensation was commensurate to the loss suffered by victims.

Counsel submitted that both the sentences and compensation orders made against the appellants were just fair and reasonable. The respondent prayed that court disallows ground 5 of the appeal. Counsel concluded and prayed that all the 5 grounds raised by counsel for the appellants should be dismissed, the appellants' conviction confirmed, the sentence and orders made there under upheld.

In rejoinder, counsel for the appellants reiterated his earlier submissions.

Consideration of the Appeal

As a first appellate court, we are required under Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions, S.13-10 to re-appraise the evidence and all the materials that were before the trial Judge and make its inferences and arrive and its own findings on issues of law and fact. See **Bogere Moses and another v Uganda, Supreme Court**

Criminal Appeal No.01 of 1997. We are cognisant of the facts that we did not see the witnesses first hand.

Bearing the above duty in mind, we now proceed to determine this case based on the grounds as argued by both the Learned Counsel for the Appellants and Respondent.

Ground 1

The question before this court is whether the trial judge failed to evaluate the whole evidence on court record and came to a wrong conclusion that the appellants were guilty of embezzlement.

We thank both Counsel for the authorities cited. We have taken into account those authorities by both counsel for the Appellants and respondent.

The offence of embezzlement is provided under **Section 19 of the Anti -Corruption Act** and prosecution in this case was required to prove that;

1. The appellants were directors of UVETISO.
2. The appellants accessed money by virtue of their offices.
3. The appellants stole that money.

It is trite that each of the above ingredients should be proved by prosecution beyond reasonable doubt.

It was conceded by both counsel for the appellants and respondent that the appellants were directors of a company (UVETISO) and received money by virtue of their office. The first two ingredients were

proved beyond reasonable doubt. The issue in contention was the 3rd ingredient; whether the appellants stole the money in issue?

The trial judge noted that *'by introducing a company to receive benefits of members when it was not a party to the suit an attempt was being made to hide under the veil of incorporation.'* Further, the trial judge noted that the amount in issue was paid to UVETISO held in trust for members and it was not company money. The trial judge concluded that in absence of any explanation from the appellants as to where the money was leaves no other conclusion but that the appellants stole it.

We have noted from the company's Articles of association marked as exhibit **P.3,** that membership of the company under Article 4 included, all former employees of ISO retrenched between 1992 and 1993 and all other former employees of ISO.

Further among the objectives of the company were; under paragraph 3 (d) *'to lobby for and advocate for payment of salaries, pensions, terminal benefits and any other emoluments due to the members of the association.'*

We have also looked at **annexure P7** the consent order where it was agreed that the Attorney General (respondent) pays the applicants 39,189,499,715/= as final settlement of applicants claim for gratuity/terminal benefits and allowances. This order was secured after a court dispute between the former employees of ISO, being represented by the appellants and the Attorney General on the other hand.

The company, UVETISO was therefore formed as a vehicle and conduit to receive and pay out terminal benefits to the former ISO employees received from government pursuant to the Memorandum of understanding dated 21st May 2014. It was a company under the stewardship of the appellants formed purportedly to pay the said former employees/beneficiaries as per the court order mentioned above.

From the evidence on the lower court record, the trial judge rightly noted that not all the beneficiaries were paid and no accountability was made for the 4.9 billion shillings received by the appellants on crane bank account to which only the appellants were signatories. It was conceded that the appellants received this money as directors of UVETISO. This is evidenced by the bank statements, waste cheques and instructions to pay collectively marked as exhibits p10, p11 and p12. The appellants chose to remain silent.

We have therefore ascertained from the overwhelming evidence on court record that this money was paid to UVETISO managed by the appellants to be paid to the beneficiaries but as shown by evidence of PW1, PW2, PW4 and PW6, the said money was never received by the intended beneficiaries and the trial judge rightly considered this evidence to come to his conclusion. We thus find that the failure to account for the said money leaves no doubt in our minds that the appellants stole the said funds as rightly held by the trial court.

In further, analysis, counsel for the appellant submitted that prosecution evidence was marred with contradictions and inconsistencies. The law on inconsistencies and contradictions has been stated over and over again by this Court. In the **case of Bumbakali Lutwama and 4 others SCCA Criminal Appeal No. 38 of 1989** (unreported) citing with approval **Alfred Tejar v Uganda Cr. Appeal No. 167 of 1969 EACA** (unreported) it was held among others that *"inconsistencies and contradictions in the prosecution case may be ignored if they are minor or do not point to deliberate untruthfulness on the part of the prosecution witnesses ....."*

In our observation, we did not find any contradictions or inconsistencies in the evidence of the prosecution witnesses, PW1, PW2 and PW3. By stating that they were not aware of the purpose of UVETISO and not subscribing to its membership does not make the evidence of the above prosecution witnesses inconsistent or contradictory. In founding a conviction on S.19 b(iii) of the Anti Corruption Act the trial Judge relied on the fact that the directors of UVETISO took into possession money which was meant for the company. We agree with the reasoning of counsel for the respondent

when he submitted that during trial the appellants opted to remain silent. The only explanation available to the court were the banking slips which proved that the appellants received UGX 4.9 billion in cash. Counsel referred to the case of **Teddy Ssezi Cheeye v Uganda CACA No. 105 of 2009** where this honourable court held that;

"In the instant case, the prosecution proved beyond reasonable doubt that the appellant withdrew the money in question from his Company's account. It is incumbent upon him to tell us where the money went since the matter is especially within his knowledge." This position which was upheld by the Supreme Court in **Teddy Ssezi Cheeye v Uganda SCCA Criminal Appeal No. 32 of 2010** was a clear departure from earlier interpretations of embezzlement under s.268 of the Penal Code which was repealed and replaced by the Anti Corruption Act. The supreme court noted that 'with respect, we think that Mr. Kakuru addressed us on the basis of the old law of embezzlement. Mr. Kakuru submitted that the Global Fund was not an aggrieved party and, therefore, it was wrong for the trial judge to order the appellant to compensate money to the Global Fund.'

A similar argument was upheld and re-affirmed by the Supreme court in when the court, departing from earlier opinions held that 'we are satisfied that the appellant was correctly convicted of the offence of embezzlement. We are equally satisfied that on the facts of this case, both the learned trial judge and the learned Justices of Appeal correctly relied on S.105 of the Evidence Act for the view that the appellant was the only person who knew how the money put on UCA account of which he was the only and sole signatory was spent.

See also **Kenneth Kaawe v Uganda Court of Appeal Criminal Appeal No. 103 of 2011.**

The trial judge therefore properly evaluated the evidence on court record and came to a right conclusion that the appellants were guilty of embezzlement.

Accordingly, ground 1 of the appeal fails.

Ground No. 2

That the learned trial Judge erred in law and fact when he held that the appellants were accountable to the treasury for money received under a memorandum of understanding arising out of a Civil Suit.

We noted that the money in contention was paid under a Memorandum of Understanding dated 21st may 2014 between PW4, the Secretary to Treasury, counsel for UVETISO and the 1st appellant. The trial judge noted that the treasury had a contract with UVETISO Association Ltd through its directors to pay the beneficiaries and had every right to demand accountability. By accepting to enter into an understanding with the PS/ST and becoming recipients of public funds, the appellants subjected assumed a responsibility for the money they received and were under obligation to utilise it for the purposes intended. Therefore although they were not strictly public officers, they had received public funds. Failure to use it for intended purposes would make them liable. They would have been liable for theft but since they also stole from UVETISO the offence became embezzlement as earlier noted. They therefore stole money from the public purse.

We see no reason to fault the trial judge for holding as such because this was public money paid from the consolidated fund paid by the Secretary to Treasury, thus he had every right to demand for its accountability.

We also wish to state that counsel for the appellants in his submissions contended that the trial judge wrongly convicted the appellants when he based his reasoning on the fact that the appellants were accountable to the treasury. This reasoning is misconstrued because the issue on accountability was part of the circumstantial evidence relied upon by the trial judge and not the sole evidence the trial judge based on to convict the appellants.

In the premises, ground 2 of the appeal fails.

Ground 3
That the learned trial Judge erred in law and fact when without proof of any fraud whatsoever, lifted the veil of incorporation and came to a wrong conclusion that the appellants were guilty of the offence of embezzlement.

The trial judge in the instant case noted that once there is evidence in support of the charges of fraud, the veil of incorporation will not shield the directors from inquiry, he concluded that the appellants were legitimately answerable to the charges in criminal law.

The Supreme Court in the case of **Fedrick Zaabwe v Orient Bank & Others SCCA No. 04 of 2006,** while relying on Black's Law Dictionary 6th Ed. at page 660, defined fraud to mean the intentional perversion of the truth by a person for the purpose of inducing another in reliance

upon it to part with some valuable thing belonging to him or her or to surrender a legal right. It is a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations or concealment of that which deceives and it is intended to deceive another so that he or she shall act upon.

Section 20 of the Companies' Act 2012 clearly provides that involvement in fraud is a ground for lifting the corporate veil.

According to **Gower's Principles of Modern Company Law,** 4th edition page 616 and paragraph 3 thereof, in certain circumstances directors shall incur personal responsibility notwithstanding that they had expressly contracted as agents only especially where they have signed or authorized the signature on behalf of the company and the company's name is not mentioned in legible characters. The trial Judge found, and correctly in our view, that the company was formed for a fraudulent purpose. The company was formed as a device , a stratagem, in order mask the fraudulent transactions of the appellants who were the directors. Under normal circumstances, these directors, the appellants would have been shielded from any wrong doing by the corporate veil. The company would have absorbed all their actions

under the **Salmon v Salmon and Co [1897] AC 22** . Until the veil is pierced one cannot look inside the minds of the company. However, when the veil is pierced, the true intention of the individuals involved is exposed. We wish to add that even if the company had been formed properly and without any fraud, clearly criminal acts of its directors in stealing such colossal amounts of money from it and committing offences under the Anti Corruption Act while acting as the minds and legs of the company and made it necessary to lift the veil. For instance in **Richmond London BC v Pinn and Wheeler Ltd the Court** held that a company cannot drive a lorry. The act of driving a lorry is a physical act which act can be performed only by natural persons. In this case what occurred were egregious crimes which involved the mind.

The crime of Embezzlement contrary to section 19(b)iii is committed when the directors of a company take possession of company funds or property. The law states as follow:

19. Embezzlement

A person who being—

(b) a director, an officer or an employee of a company or a corporation;

steals a chattel, money or valuable security—(i)being the property of his or her employer, association, company, corporation, person or religious organisation or other organisation;

(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 organisation or other organisation;

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 lifting the veil, the trial Judge appears to have regarded the directors who were the controllers of the company as the minds of the company. These appellants were the managing directors of UVETISO and made all management decisions of the company and were the signatories to the company accounts. They were given this elevated responsibility in the hope that they would use their powers to act for the benefit of the company. In doing so they had to act in loyalty, good faith and to avoid conflict of interest. In stealing from the company by withdrawing almost half of the retirement benefits paid into the

company by the Secretary to the Treasury. The three appellants used their elevated positions as the minds of the company to involve the company in criminal acts. In **Tesco Supermarkets Ltd v Natrass 1971** the House of Lords held that a person who was sufficiently senior in a company could be regarded as the mind of the company. If a person senior enough to be regarded as the mind of a company had a guilty mind, then the company could be regarded as having a guilty mind.

It is not disputed that the appellants were directors of UVETISO which, as we have already found above was formed for the sake of paying out benefits to former employees of ISO. The evidence on court record was that not all former employees received the money paid and the 4.9 billion shillings paid by government to UVETISO's bank account managed by the appellants was not accounted for.

With such evidence, there is no other inference that court can than that of guilt of the appellants as directors of UVETISO who were hiding behind the corporate veil to misappropriate company money.

We therefore find that the trial judge rightly found that the appellants were guilty of fraud hence lifting the corporate veil.

Ground 3 of the appeal equally fails.

Ground 4

That the learned trial Judge erred in law and fact when he held that PW1 and PW2 & PW3 were members of UVETISO and were therefore entitled to complain about the money received by UVETISO yet they denied being members of UVETISO.

The MOU dated 21st May 2021 stipulated that the money was to be paid to all former employees of ISO and not employees of ISO who had subscribed to membership of UVETISO. UVETISO was a company formed to help former employees of ISO access their terminal benefits which were paid by government thus claiming that one had to first subscribe in order to access their benefits would be defeating to the principles of natural justice.

It is true as submitted by counsel for the appellants that PW1, PW2 and PW3 were not subscribed members of UVETISO but from the evidence on court record, they testified that it was hard to attain membership because they had to pay certain fees which they did not have at that time. These were ordinary people who were promised their benefits

after winning a court case thus to create conditions for receiving their benefits already paid by government would tantamount to a grave injustice.

In the premises PW1, PW2 and PW3 were entitled to complain about their money received by UVETISO by virtue of being direct beneficiaries/former employees of ISO.

Ground 4 of the appeal thus fails.

Ground 5
The learned trial Judge erred in law and fact when he sentenced the accused persons (appellants) to a harsh and excessive sentence in the circumstances.

We have taken a cautious approach at the sentencing of the trial court and have observed that the trial judge sentenced each of the appellants to 7 years imprisonment. He ordered the three appellants jointly and severally to compensate the victims to a tune of 2.5 billion. We find that the sentences were not omnibus as submitted by counsel for the appellants. We find that since the maximum penalty for embezzlement is 14 years imprisonment as provided under **S. 19 (b) (iii) of the Anti-Corruption Act, 2009** we find the sentence of 7 years imprisonment appropriate.

We therefore confirm the sentence of the trial court.

This appeal is herewith dismissed.

Before we take leave of this matter, we note that the following applications; **Criminal Application No. 99 of 2020; Jeff Lawrence Kiwanuka v Uganda, Criminal Application No. 105 of 2020; Bernard Kamugisha v Uganda and Criminal Appeal No. 110 of 2020; Jamal Kitandwe v Uganda** all for Bail pending appeal by the appellants had been filed pending the main appeal.

However, since the main appeal has been heard and disposed of (dismissed) the above applications have been rendered a nugatory.

Dated at Kampala this .....21st.....day of .....Dec..... 2021.

Hon. Justice Fredrick Egonda-Ntende
Justice of Appeal

Hon. Lady Catherine Bamugemereire
Justice of Appeal

Hon. Justice Christopher Madrama
Ag. Justice of Appeal