THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 232 OF 2011

BAKOLE HAMZA ..... APPELLANT

VERSUS

UGANDA ..... RESPONDENT

CONSOLIDATED WITH
CRIMINAL APPEAL NO. 244 OF 2011

UGANDA ..... APPELLANT

VERSUS

1. KAMACOOKO ONESMAS
2. ZZIWA JOSEPH ..... RESPONDENTS

(An appeal from the decision of the High Court of Uganda (Anti-Corruption Division) before Hon. Lady Justice Catherine Bamugemereire, J dated 25th October, 2011 in Criminal Case No. 19 of 2011)

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Muzamiru Mutangula Kibeedi, JA
Hon. Lady Justice Irene Mulyagonja, JA

JUDGMENT OF THE COURT

The appellant in Criminal Appeal No. 232 of 2011 and the two respondents in Criminal Appeal No. 244 of 2011 were jointly charged with others on five counts of causing financial loss, contrary to Section 20(1) of the Anti-corruption Act, conspiracy to defraud contrary to Section 309 of the Penal Code Act and embezzlement contrary to Section 19(b) of the Anti-corruption Act.

Brief facts

The brief facts as accepted by the learned trial Judge are:-

It was alleged that between August and December 2010 the six accused persons conspired together to defraud Barclays Bank Masindi of UGX 684,100,000 (Six Hundred Eighty Four Million One Hundred Thousand Shillings).Barclays Bank was a company in which the first four accused were gainfully employed.

At the material time A1, Kimeze Jeremiah, was a branch operations manager, Bakole Hamuza, was the branch manager while A3 Kamacooko Onesimus and A4 were Bank Tellers at Barclays Bank Masindi Branch, hereinafter referred to as 'the Bank'.

Accused Number Five (A5) is an older sibling of A1 and held two accounts with Barclays Bank Masindi Branch. One of his accounts was in the name of a company he owns - Crown Financial Services, A/c No. 6001805337and the other was A/c No. 6000115955 all through which fictitious deposits were purportedly made.

It is further alleged by the prosecution that between August and December 2010, with the knowledge that no money had been deposited on the said accounts, A1, A2, A3 and A4 purported to credit the said accounts with over six hundred million Uganda shillings under the false pretence that the said money had been deposited whereas not. Apparently pay-in slips were filled in by a banking official (AI) and handed to A3 and A4 but they were not accompanied by the corresponding cash. It followed that every time any of these two accounts was credited in Masindi, an equivalent sum of money was immediately withdrawn from the same accounts, in Kampala, sometimes within the space of less than an hour. The trial Court viewed Close Circuit Television (CCTV) footage for some of the days in question. The exhibited chips related to human activity in the banking hall and the Vault of Barclays Bank Masindi Branch.

The appellant in Court of Appeal Criminal Appeal No.232 of 2011 Bakole Hamza was convicted of the said offences and appeals against both conviction and sentence.

The respondents in Criminal Appeal No. 244 of 2011 were acquitted. The Directorate of Public Prosecutions being dissatisfied with the Judgment and order of the High Court acquitting them now appeals that decision to this Court.

Interestingly the other two accused persons in the same Criminal Case appealed separately against the same Judgment *vide* Court of Appeal Criminal Appeal No.231 of 2011. That appeal was heard and determined by another Coram of this Court on the 5th November 2019.The appeal substantially failed. It only succeeded in the reduction of the amount of money the second appellant in that appeal was ordered to pay in compensation to the complainant bank.

On 11th of August 2020 another Coram of this Court ordered that Court of Appeal Criminal Appeal No.232 of 2011 and 244 of 2011 both arising from the Judgment of the High Court Anti-corruption Division in Criminal Case No. 19 of 2011 dated 25th October 2011 be consolidated.

In view of the consolidation order referred to above, the two appeals have been heard together.

On 30th March 2021 the parties appeared before this Court for further directions. Being satisfied that both parties had filed their respective submissions on record as earlier directed by the Court, for the sake of clarity and expediency two separate Judgments have been prepared in respect of each appeal on the basis of the written submissions on record.

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 232 OF 2011

BAKOLE HAMZA..... APPELLANT

VERSUS

UGANDA..... RESPONDENT

The appellant appeals against both conviction and sentence.

In his memorandum of appeal, the appellant Bakole Hamza sets out his grounds as follows:-

1. *The learned trial judge erred in law and fact when she tried the appellant on an indictment that was bad in law and embarrassed the appellant in his defence thereby occasioning a miscarriage of justice*
2. *The learned trial judge erred in law and fact when she convicted the appellant on count 2, Causing Financial Loss, without the appellant having taken a plea on the count thereby occasioning a miscarriage.*
3. *The learned trial judge erred in law when she allowed the admission of and relied on inferior- CD video evidence that had been improperly collected and stored thereby occasioning a miscarriage of justice.*
4. *The learned trial judge erred in law when she convicted the appellant of causing financial loss in count 1 and 2 without giving reasons for rejecting the defence case thereby occasioning a miscarriage of justice.*
5. *The learned trial judge erred in law and fact when she convicted the appellant of causing Financial Loss in count 3 after accepting as truthful prosecution evidence exonerating the appellant thereby occasioning a miscarriage of justice.*
6. *The learned trial judge erred in law and fact when she convicted the appellant of embezzlement in count 5 without evidence that the appellant stole money from the bank thereby occasioning a miscarriage of justice.*
7. *The learned trial judge erred in law and fact when she held that the appellant conspired with others to defraud the Bank after failing to properly evaluate the evidence on record and apply it to the law of conspiracy thereby occasioning a miscarriage of justice.*

8. *The learned trial judge erred in law and fact when she sentenced the appellant to a cumulative sentence of 2 years imprisonment and ordered him to pay UGX 10 million compensation to the bank and barred him from holding office in a financial institution for a period of two years after completing the sentence after ignoring/wrongly applying the mitigating factors thereby occasioning a miscarriage of justice.*

The Appellants' case

The appellant who represented himself set out his submission in writing which we have endeavored to abridge. In respect of ground one, it was submitted that the appellant was indicted on 3 counts of causing financial loss as well as conspiracy to cause financial loss. He contended that since the counts arose from the same facts, the offence of conspiracy to cause financial loss could only be a minor and cognate offence and as such it could only have been set out in the alternative in the indictment. The failure to do so by the prosecution caused him embarrassment and great jeopardy under Article 28(9) of the Constitution. He asked Court to strike out Count No.4. He cited to us *Seifu S/O Bakar vs R [1960] EA 338 and Marjani vs Uganda [1967] EA 111.*

In respect of the second ground the appellant contended that the learned trial Judge erred when she convicted him of the offence of causing financial loss contrary to Section 20 of the Anti-corruption Act (ACA) whereas the said count was never read to him and he did not take a plea in respect to it.

He asked Court to acquit him on that count.

In respect of ground 3 he submitted that the learned trial Judge erred when she admitted and relied on CD Video evidence in contravention of Section 8 of the Electronic Transactions Act.

He submitted that, the recovery of the video was not done in compliance with law. That PW4 who presented the video evidence did not rescue it after retrieval. She kept the hard disc in her drawer at the office where it was accessible to other persons. There was evidence that the video had been tempered with. Further, that the chain of video evidence was broken as a result of unauthorised interference by unknown persons. The hard disc was lost yet the prosecution had stated that it was in their possession.

Lastly that the video evidence was information/data transferred from the hard disk to the laptop of PW5. The same had been edited. Accordingly it was not the best evidence and ought to have been disregarded by the learned trial Judge.

On ground 4 it was submitted that, the prosecution case was based on circumstantial evidence, yet there were other plausible explanation offered by the defence that the Judge failed to consider. Had she done so she would not have convicted the appellant as she did on insufficient circumstantial evidence.

The appellant contended that he was not involved in the making of fictitious deposits. The process of accepting cash deposits at the Bank started with the teller and ended with the Branch operations manager. It was the appellant's case that he was never involved in this chain of transaction and that the learned trial Judge erred when she found that he had been so involved.

Further that there was no evidence adduced to conclude that he knew or had reason to believe that financial loss would occur. He contended that he had just been appointed branch manager and he followed the procedure he found in place and was never informed by DW3 or DW4 about the questioned transactions. He contended that the act of signing reconciliation forms alone, was insufficient to prove that he caused financial loss to the bank.

He further submitted that, from the evidence adduced by the prosecution as a whole no proof was shown that the compiainant bank had lost shs.701,000,000/= as alleged by the prosecution in the indictment.

He faulted the prosecution for having failed to call one Rowland Ndyomugenyi the person who audited the branch bank accounts on 6th bank December 2010. This rendered the prosecution case weak and the trial Judge ought to have found so.

The appellant submitted that he did not make any fictitious deposits on Account No. 6001805337 and 6000115955 belonging to Crown Financial Services (U) Ltd and Daniel Matovu. Further that Shs.263,000,000/= in respect of count 1 was never lost and the same had been deposited with the bank by DW_4 having received USD 90,000 from the appellant, 22 million from an agent of Crown Financial Services Ltd in cash and USD 40,000 deposited in cash. That amount was therefore not lost.

In a rather lengthy statement, the appellant submitted that there was no loss occasioned to the complainant bank and if there was no evidence to attribute it to him. On the other hand there was sufficient evidence that the loss, if any, was attributable to other individuals employed by the bank other than him.

He submitted that, the learned trial Judge erred when she found that, the appellant had caused a fictitious deposits entry of shs.410,000/= on the account of Crown Financial Services and Daniel Matovu whereas DW9, Amanda Ankunda in her testimony admitted that as a teller she received this money from the appellant and A_1 Kimeze and credited it on the said accounts.

It was the appellant's case that shs.74,160,000/= which the learned Judge found had been embezzled by him was money that was not accounted for, and therefore it was an error on the part of the Judge to have convicted him of having embezzled that money. Further that there was no evidence adduced to prove that he stole the money and accordingly the charge of embezzlement against him could not have been sustained.

In respect of ground 7 the appellant relied in his earlier submissions that the charge of conspiracy to defraud could not stand as it would subject him to double jeopardy. Further that the ingredients of that offence were proved. He asked Court to allow the appeal and set aside the Judgment.

Finally in the alternative the appellant submitted that the sentence imposed upon him is illegal as the Court did not take into account all the days he had spent in custody while passing sentence. Secondly that while passing sentence the trial Judge failed to take into account all mitigating factors in his favour. Instead she considered extraneous matters and as a result she imposed on him a harsh and severe sentence.

Lastly, the appellant faulted the learned trial Judge for having issued an order barring him from holding office in a financial institution for ten years after completion of his sentence whereas Section 49 of the Act provides for ten years after conviction.

The appellant prayed for orders quashing the conviction and setting aside the sentences.

The Respondent's reply

In reply to ground one, the respondent submitted that, there was no evidence to prove that the appellant had been embarrassed by the charges. Secondly, that the rule against double jeopardy was inapplicable to facts of the case.

In respect of ground 2 the respondent dismissed the claim that the appellant had not taken plea in respect of count 2 as the High Court record and record of appeal clearly reveal that he did.

In respect of ground 3 it was the respondent's reply that the learned trial Judge correctly admitted the CD video recording. Further that the learned trial Judge correctly applied Sections 7 and 8 (1) of the Electronic Transactions Act 2011.

In respect of grounds 4 and 5 it was the appellants' reply that the learned trial Judge correctly evaluated the evidence adduced by both the prosecution and defence before she came to the conclusion that the offence of causing financial loss in respect of counts 1, 2, 3 had been proved beyond reasonable doubt against the appellant.

The respondent pointed out that the evidence of Pw_2 Amanda Ankunda sufficiently proved it was the appellant who gave her money to credit the questioned accounts and not the account holders, thereby directly linking him to the crime.

In respect of ground 6 and 7 it was the respondent's reply that the learned trial Judge properly evaluated the evidence and arrived at the correct conclusion that the prosecution had proved count 5 against the respondent.

Lastly, in respect of the alternative ground against sentence, it was submitted that the sentence imposed upon the appellant was legal and justified. That, it was well within the discretion of the trial Judge to impose the sentence and the orders of compensation as she did and the sentence ought to be upheld.

Determination of grounds of appeal

This is a first appeal and this Court is required to re-evaluate the evidence and make its own inferences on all issues of law and fact. We shall proceed to do so.

Ground One.

The appellant faults the learned trial Judge for having failed to find that the appellant had been charged with 3 counts of causing financial loss as well as conspiracy to defraud, both offences arising from the same facts.

He concluded that, the lesser offence ought to have been preferred against him only in the alternative.

He faults the trial Judge for having convicted him on count 4, conspiracy to defraud as it was set out as a substantive count and not in the alternative. He cited *Seifu S/O Bakar vs R [1960] EA 338 and Marjani vs Uganda (supra)* for the proposition that such count would not be sustainable at law.

The record reveals that there were a number of illegal transactions entered into by various individuals, including the appellant, that caused financial loss to the complainant bank in hundreds of millions of shillings over a period of almost six months.

Some of the transactions were stated to have been executed through conspiracy and others were not. Particulars of the charge of conspiracy to defraud were set out in the indictment. It is an offence preferred under Section 309 of the Penal Code Act. The amount involved is shs. 635,000,000/=.

The charges in counts 1, 2 and 3 are preferred under Section 20(1) of the Anti - corruption Act. Count 4 in respect of conspiracy to defraud brought under Section 309 of the Penal Code Act could not have been a minor and cognate offence to any charge brought under Section 20(1) of Anti-corruption Act.

We find no merit in this ground as it is misconceived. Double jeopardy does not apply to the facts in the case. There could not have been any embarrassment caused to the appellant and none was proved.

Ground 2

The record of appeal at page 95 reveals that count 1 and 2 were both read to the appellant and he pleaded not guilty to both. This ground is brought in bad faith. The appellant hoping against hope that the record could have been incomplete, but it is. The ground is misconceived and is hereby dismissed.

Ground 3

Under this ground the appellant seeks to impeach the video evidence adduced in Court and relied upon by the learned trial Judge as part of the prosecution evidence to convict the appellant.

The record of appeal reveals that at the trial the defence objected to exhibiting the video (CCTV) evidence on account that PW4 testified that they lost the hard drive. The learned trial Judge then relied on Sections 5 (1) and 8(1) of the Electronic Transactions Act to have the CD video evidence footage admitted in evidence. This Court while determining this very issue, arising from the High Court case the subject of this appeal, (High Court case No. 19/2011) had the occasion to adjudicate on this matter. The appellants in Court of Appeal *Criminal Appeal No.231 of 2011 Kemeze and Matovu vs Uganda* were jointly charged with the appellant in this case.

While determining the legality and admissibility aspect of the very video evidence now in issue, this Court at page 26 of the Judgment stated:-

> *"As a first appellate court we, after subjecting such evidence to fresh scrutiny, note from the adduced evidence that PW4 installed the cameras, extracted the data on a laptop and backed it up on CDs. It is the CDs, which were previously marked by PW4, that were tendered in evidence and admitted as exhibits P42 (1) (2) & (3). In essence, the CDs were back-ups of the footage that had been stored on the hard disk which got lost. Section 64 (1) (c) of the Evidence Act cap 6 provides that secondary evidence may be given where the original has been destroyed, lost, or is in the possession of a person who refuses or does not produce the original. The provision refers to documents but the principle can be adopted to apply to other forms of data, including electronic data.*
>
> *In that regard the defence's objecting to the tendering in evidence of the back-ups merely because the hard disk was lost was not tenable, since the back-ups were authentic substitutes. PW4, who installed the cameras, removed the hard disk and did the back-ups on CDs, testified that she is the one who kept and marked the CDs.*

It is our finding therefore that CCTV footage was authentic evidence and was properly admitted as evidence."

We agree with the above position of law and we shall follow it here as it is applicable by law and fact. We accordingly find no merit in this ground of appeal which we hereby dismiss.

Ground 4

The appellant was the branch manager at the complainant's branch at Masindi at the material time. A routine check by the bank's officials revealed that there was less cash at the bank than what was reflected in the books of accounts. There is an audit report tendered by PW_2 Lawrence Otim. Evidence was adduced that two accounts held by and opened by Matovu Daniel and the brother to Kimeze Jeremiah the first accused at the trial who was the bank's operations manager were on several occasions credited with vast sums of money whereas no such amounts were ever deposited on those accounts. The money would be immediately withdrawn from Kampala branch by A_5, who knew that no such cash had been deposited at the Masindi branch.

The appellant and the co-accused persons covered the fraud by fictitious and false pay in slips on a number of occasions over a period of time. The appellant whose branch was supposed to have been holding over one billion shillings in the vault had shs.700,000,000/= cash missing. The appellant then tried to refund or replace the money lost himself according to evidence of PW_3.

The evidence of each witness was set out by the learned trial Judge. There is evidence that pay in slips were forged by A_1 and handed over to A_3 and A_4 for them to endorse as if money had been received in cash at the bank earlier where as not. The CCT video footage reveals that no such physical transaction of banking that money even took place at the material time.

Therefore, the theory that money could have been received at the bank and stolen by other persons including the investigators or others is unpleasable to state the least. It is an attempt by a drowning man to clutch at a straw. We find no merit in this ground of appeal as we are satisfied that the learned trial Judge properly evaluated the evidence and found that the appellant actively participated in the crime. This case is not based only on circumstantial evidence but also substantially based on evidence linking the appellant to the counts he was indicted of.

We however agree with the appellant that having been convicted of causing financial loss he should not have again been convicted of conspiracy to commit a felony. This is so because the offence of conspiracy to commit a felony appears clearly to have been preferred in the alternative. Where charges against an accused person are in the alternative, the proper course upon conviction of the accused on one count, is for the Court to refrain from entering a verdict or finding on the other. *Seifu s/o* Bakari v *R* [1960] 1 EA 338 and *Serunkuma Edirisa & Others vs Uganda, Court of Appeal Criminal Appeal No. 0147* of 2015 [unreported].

Ground 4 of this appeal succeeds to that extent.

Ground 5

In respect of ground 5 the learned trial Judge found that the appellant deposited shs.410,000/= on A5's account with the complainant bank. Uncontroverted evidence reveals that, it was that account that was used to perpetuate the offences set out in the indictment. The evidence of Pw_9 that she received cash from the appellant and banked it on A_5's account provided a clear link between the appellant and A5. The explanation provided by the appellant is not plausible and it was correctly rejected by the trial Judge.

We agree with the learned trial Judge that the act of banking shs.410,000/= by the appellant on A_5's account which account was being used to syphon cash from the bank was proof of the charge of conspiracy to defraud. We agree with the learned

trial Judge that this act was in furtherance of a fraudulent scheme in which the appellant, A_2, A_5 were directly involved. The deposit was intended to cover up the fraud. It was in furtherance of the commission of the offence that resulted into financial loss to the bank.

We find no substance in this ground which we hereby dismiss.

Ground 6

In respect of ground six the learned trial Judge observed and found as follows at page 32 of the her Judgment.

> *"I agree with the prosecution that PW2 confirmed that -when he discovered 709,160,000/== missing, he managed to trace 635,000,000/= which had been fictitiously deposited on the account of A5 and Crown Financial Services, but he failed to trace UGX 74,160,000/=. A1 and A2 were the only custodians of the vault. They both received money at the material time in the course of their duties and stored it in a secure location. However, they both failed or refused to produce it when asked to do so. In the absence of any other explanation, one invariably draws the inference that they stole the money. The evidence of PW3 pins A1 and A2 and shows that they were illegally putting their hand in the bank till. They had unlawful dealings outside the Bank which they carried out using their internal bank accesses. I find that the prosecution has proved beyond reasonable doubt that AI and A2 stole UGX 74,000,000/= belonging to Barclays Bank, money which came into their possession by virtue of their employment with the Bank. I find each of AI and A2 guilty of Embezzlement and Convict each of them accordingly."*

We agree with the learned trial Judge that the evidence established that Shs. 709,160,000/= was lost at the branch at which the appellant was a manager. It was missing in cash. Only A_1, and the appellant could have had access to the vault. Shs. 74,160,000/= purportedly received in cash at the bank could not be found. Evidence points to A_1 and the appellant and we find so.

There is sufficient proof beyond reasonable doubt that A_1 and A_2 stole Shs. 74,160,000/= from the complainant bank and they are equally guilty of the offence of embezzlement .This ground has no merit and it is hereby dismissed.

Ground 7

Ground 7 has been resolved in the resolution of ground one. We find that the appellant did not and could not have suffered double jeopardy on the facts of the case.

Ground 8- Sentence

Finally in respect of sentence the appellant contends that he spent 52 days in pre-trial detention. There is no evidence to this effect. Even if there was such evidence, Article 23(8) of the Constitution relates only to the period spent in lawful custody. The 52 days the appellant claims spent at police station could not amount to being under lawful custody. The police could only have held him legally for 48 hours. The appellant is at liberty to pursue a remedy in a civil Court for unlawful detention.

The order banning the appellant from office in a financial institution for ten years after completion of sentence appears to have been made in error and could have been corrected under the slip rule.

Be that as it may, we hereby set aside the order and substitute it with an order directing that the appellant is hereby barred for holding office in any financial institution for a period of 10 years from 22nd November 2018, the date he was convicted.

Ground four of this appeal succeeds. The conviction in respect of count 4 conspiracy to defraud is hereby quashed and the sentence set aside.

However, the appeal substantially fails and is hereby dismissed save for ground 4 and the orders made in respect of holding office in a financial institution above.

We so order.

We now proceed to determine Criminal Appeal No. 244 of 2011.

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 244 OF 2011

UGANDA..... APPELLANT

VERSUS

3. KAMACOOKO ONESMAS

4. ZZIWA JOSEPH.....RESPONDENTS

This is an appeal from the Judgment of Bamugemereire, J (as she then was) in High Court, Anti-Corruption Division Criminal Case No. 19 of 2011 dated 25th October 2011 in which both appellants we are acquitted.

The Director of Public Prosecutions now appeals against the acquittal of the two respondents.

The appellants were employees of Barclays Bank (U) Ltd at its branch at Masindi. It was the prosecution's case that between September and December of 2010 over Shs.700,000,000/= was lost at that branch.

Both respondents were charged with causing financial loss contrary to Section 20 of the Anti-Corruption Act and with conspiracy to defraud contrary to Section 309 of the Penal Code Act. Both respondents were at the material time employed as bank tellers at the Masindi branch of Barclays Bank.

They were charged together with one Kimeze Jeremiah (A_1) who was at the material time the bank's operations manager, Bakole Hamza (A_2), the bank's branch manager and Matovu Daniel a brother to Kimeze A1 whose account was found to have been used to syphon the money resulting into financial loss to the bank.

We must state here that all the other accused persons were convicted and charged except the two respondents in this appeal. Further, that Kimeze Jeremiah and his brother Matovu Daniel both appealed against the Judgment of the High Court to this Court, in *Court of Appeal Criminal Appeal No.231 of 2011*. That appeal was heard and dismissed by this Court on 5th November 2019. Bakole Hamza also appealed against both his conviction and sentence. That appeal was heard together with this appeal as *Court of Appeal Criminal Appeal No. 232 of 2011*. It was also dismissed on all grounds. What remains for determination is this appeal by the Director of Public Prosecutions against the acquittal of the two respondents. Since both appeals were consolidated at the hearing, we shall not endeavor to repeat what we have already stated in *Appeal No. 231 of 2011* referred to above. We also take judicial notice of the Judgment of this Court in *Court of Appeal Criminal Appeal No. 244 of 2011* referred to above arising from the same facts and the same decision of the High Court.

We must also state, as we have already, in *Court of Appeal Criminal Appeal No.231 of 2011 Bakole Hamza vs Uganda*, that we agree with the decision of this Court in *Court of Appeal Criminal Appeal No. 244 of 2011, Kimeze and Matovu vs Uganda.*

Both parties had been directed to proceed by way of written submissions. This was done. It is on the basis of the written submissions on record that this Judgment has been prepared.

The appellants' grounds of appeal are as follows:-

1. *The learned trial Judge erred in law and fact when she concluded that the first respondent (Kamacooko Onesmus) was merely used in the fraud and thereby acquitted him of the offence of causing financial loss.*
2. *The learned trial Judge erred in Law and fact when she found that no evidence was led by prosecution to prove that the second respondent (Zziwa Joseph) participated in causing financial loss and thereby acquitted him.*

3. *The learned trial Judge erred in Law and fact when she failed to properly evaluate the evidence on record in regards to the offence of conspiracy to defraud and thereby acquitted the respondents.*

The Appellant's Case

It is the appellant's case that this appeal is properly before the Court. This is in respect to the first respondent's objection raised in writing prior to the hearing of this appeal. The objections were:-

(1) The appellant's notice of appeal is defective.

(2) The appellant failed to take necessary steps to prosecute this appeal.

The appellant concedes that the notice of appeal cited a law that is not applicable. We find that, that is an inadvertent error that does not go to the root of the controversy. We would have allowed an amendment thereto had it been orally sought.

We also find that the notice of appeal does not have to be signed by the Director of Public Prosecution in person as there is no such legal requirement. We find that the objections raised are not substantial and the errors and omissions mentioned did not cause any miscarriage of justice. We shall therefore disallow the objections under Section 34(1) of the Criminal Procedure Code Act and Section 139 of Trial on Indictment Act.

Section 34(1) of the Criminal Procedure Code Act

(1) The appellate court on any appeal against conviction shall allow the appeal if it thinks that the judgment should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that it should be set aside on the ground of a wrong decision on any question of law if the decision has in fact caused a miscarriage of justice, or

on any other ground if the court is satisfied that there has been a miscarriage of justice, and in any other case shall dismiss the appeal; except that the court shall, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

139. Reversability or alteration of finding, sentence or order by reason of error, etc.

(1)Subject to the provisions of any written law, no finding, sentence or order passed by the High Court shall be reversed or altered on appeal on account of any error, omission, irregularity or misdirection in the summons, warrant, indictment, order, judgment or other proceedings before or during the trial unless the error, omission, irregularity or misdirection has, in fact, occasioned a failure of justice.

(2)In determining whether any error, omission, irregularity or misdirection has occasioned a failure of justice, the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

As stated earlier we have found no error or irregularity in the proceedings that occasioned a failure of Justice as a requirement to set aside the Judgment.

We now revert to the grounds of appeal. It is the appellant's case that the first respondent was charged with causing financial loss .The appellant led evidence to prove that the first respondent made a fictitious deposit on Account No. 6001805337 belonging to Crown Financial Services Ltd and Account No. 600011955 held by A_5 Matovu Daniel. The fictitious deposit was shs. 370,990,000/=.

The prosecution tendered bank statements in respect of the above accounts that proved the said amount had been credited on those accounts.

The CCT video evidence proved that there was no one seen depositing that amount of money at the bank at the material time. The learned trial Judge found so. However, she exonerated the first respondent on account that he had been used or misled by the bank operations manager, his immediate superior and supervisor.

The trial Judge found that the first respondent was truthful. The appellant submits that this was an error. The appellant now prays that this Court finds so and sets aside the acquittal.

In respect of the second ground regarding the culpability of the second respondent who was acquitted of the offence of causing financial loss contrary to Section 20 of the Anti-corruption Act, evidence was led at the trial to prove that the second respondent together with co-accused persons caused financial loss to Barclays Bank (U) Ltd of Shs.263, 600,000/= when they made fictitious deposit slips.

The appellant faulted the trial Judge for having acquitted the second respondent on the basis that no evidence was led to prove beyond reasonable doubt that he actively and fraudulently participated in the irregular scheme.

It was submitted that Section 19 of the Anti-Corruption Act requires that for a person to be guilty of causing financial loss such a person must have done an act knowingly or having a reason to know that the same would cause financial loss.

The prosecution evidence adduced from the relevant bank statements referred to above proved that money was received and withdrawn from those two accounts in Kampala. Yet no such money had been deposited with the second respondent at his till at Masindi as the record showed. The CCTV camera evidence proved that no one ever deposited the said sums of money at the second respondent's till at the material time the sums were credited on the questioned accounts.

It was submitted further that by the second respondent crediting the questioned accounts without having received any cash deposit in respect thereto, he knew or must have had a reason to know that the same would cause financial loss to his employer.

Further that A_1 had access to the bank's computer system and could have verified whether or not the monies in respect of which he credited the accounts were

physically banked by A_1 or not. He failed or neglected to do so. The appellant asked Court to allow this ground of appeal.

Ground 3 is in respect of the charge of conspiracy to defraud. The appellant submitted that there was evidence upon which the Court convicted A_1, A_2 and A_5 of causing financial loss having made fictitious bank deposits on questioned accounts. The trial Judge found that the said offences had been committed with the participation of the appellants. However, she went ahead to acquit them. It is the appellant's case that, the Judge erred when she did not find the two respondents guilty of conspiracy to defraud the bank on the basis of the facts she had accepted.

Those facts included the fictitious deposits which were made several times at the bank over a period of time stretching over two months. The video evidence did not show any undue influence occasioned to any of the respondents but rather revealed the respondents acting freely.

The appellants prayed that the appeal be allowed and both respondents be convicted as charged and sentenced accordingly.

The 1st Respondent's reply

The first respondent supported the Judgment of the trial Judge and asked this Court to uphold it. He supported the finding of the learned trial Judge where she found that A_1 and A_2 falsified the treasury book and subsequent reports including monthly re-conciliations and that A_1 presided over false snap checks. Further that the finding by the trial Judge that the first respondents was only used by A_1 to document a fraud but was not himself involved must be upheld as it is supported by the evidence adduced at the time.

Further that, because the first respondent believed his superior the manager A_1 who had the authority to deal with any amount above shs. 20 million the respondent could not have been guilty of the offence in respect of which he had no criminal

intention to commit. It was argued that, the first respondent could not have cross checked the information given to him by A1 that the money had been received and kept in the vault, to which he didn't have access.

The learned trial Judge correctly evaluated the evidence and found that the issuing of treasury-in-slips by the first respondent was not sufficient to sustain a conviction against him. Further that the learned trial Judge correctly found that it was not unreasonable on the part of the first respondent to have trusted his manager's word especially so in a top-down organizational structure.

The first respondent relied on *R vs Traine & Another [1984] 4 F & F 104* for the proposition that an employee is not to be held liable where he acts in compliance with his superior's express instructions.

In respect of ground 3 it was submitted for the first respondent that the evidence adduced at the trial could not have sustained a charge of conspiracy to defraud as no such conspiracy had been proved. The first respondent supported the Judges finding on this issue and asked this Court to do so. He further relied on *Scott vs Metropolitan Police Commissioner (1974) 3 All ER 1032, R vs Anderson [1985] ALL ER* in support of the Judges' finding.

He asked Court to dismiss the appeal.

The 2nd Respondent's reply

The second respondent's submissions were *pari passu* with those of the first respondent. He supported the judgment of the learned trial Judge in its entirety and asked this Court to uphold it.

Specifically the finding of the learned trial Judge that, the second respondent was truthful and no evidence was led to prove beyond reasonable doubt that he actively participated in the irregular scheme, beyond playing a conveyor belt role in obedience of A1's instructions.

Further that, proof of his honesty was that whenever he received cash to be credited on the questioned accounts he would do as he did when he received the USD 90,000 which he credited to that account on instructions by A_1. This evidence was confirmed by the CCTV video camera evidence.

He asked this Court to find, as did the trial Judge, that there was no evidence linking him to the charges preferred against him.

He asked Court to dismiss this appeal.

Resolution by the Court

As a first appellate Court we shall proceed to re-evaluate the evidence and make our own inferences on all questions of fact and law. This is a legal requirement under Rule 30(1) of the Rules of this Court. In *Oryem Richard vs Uganda, Supreme Court Criminal Appeal No. 22 of 2014,* the duty was re-stated as follows;-

> *"We should point out at this stage that Rule 30 (1) of the Court of Appeal Rules places a duty on the Court of Appeal, as first appellate court, to re-appraise the evidence on record and draw its own inferences and conclusions on the case as a whole but making allowances for the fact that it has neither seen nor heard the witnesses. This gives the first appellate court the duty to rehear the case..."*

See also;- *Bogere Moses* and *Another Vs Uganda, Supreme Court Criminal Appeal No. 1 of 1997* and *Kifamunte Henry Vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997.*

The question for determination in this appeal is whether under the provisions of Section 20 of the Anti-corruption Act the prosecution proved beyond reasonable doubt that the accused persons actively participated in the commission of the offence that caused financial loss to the complainant institution.

Section 20 of the Anti-corruption Act stipulates as follows:-

20. Causing financial loss.

(1) Any person employed by the Government, a bank, a credit institution, an insurance company or a public body, who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution 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.(Emphasis added)

The key words in the above section are underlined. It is clearly set out that:-

"Any person . . .

who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss . . . is liable..."

In the appeal before us, it is admitted by the respondents and was a finding of the trial Judge that, the loss occasioned to the complainant bank occurred during the period when both respondents were employees of the said bank. It also occurred whilst both were performing their duties as bank tellers/cashiers.

The duties of a bank teller/cashier were primarily to receive cash from the customers and credit it on the accounts as indicated on pay in slips, stamp and keep the copy of the receipt and return one copy to the customer. The particulars of the indictment on count 2 state that A_1, A_2 and A_4 who is the second respondent, being Barclays Bank branch operational manager, branch manager and teller /cashier respectively carried out fictitious deposits amounting to shs 370,000,000/= on accounts of Crown Financial Services Ltd and Matovu Daniel, purporting that actual deposits had been made whereas not, and knowing or having reasons to believe that such acts would cause financial loss to Barclays bank.

In his defence the first respondent stated that he would receive cash deposits and payouts. He reported to the operations manager and was required as part of his duties to make daily reconciliation reports. He had a cash limit as a teller of 20 million; beyond that, the money would have to go to the line managers and thereafter to the vault. A treasury in-slip would be made, the money and the slip would be handed to the manager. He would write a treasury in-slip and hand it over to the manager who would acknowledge it.

He would be informed by the manager that, the money in respect of which he had issued pay in slips had been duly received and put in the vault to which he had no access. He would believe this information. He would therefore make a day balancing receipt acknowledging that, he had received cash reflected on pay in slips.

In cross examination he stated that:-

> *"my line manager said if the customer brought money, the manager would personally take the money to the vault himself. I would then write treasury in-slips.*
>
> *Whenever I asked him he would confirm that the money had been brought. I do not recall seeing any of the above cash brought in. He would confirm verbally that it was brought."*

This in our view is sufficient admission on part of the first respondent that he failed to carry out his duty as teller at the complainant bank. He was required to prepare treasury in-slips. There are forms filled in by the customers and presented to a teller together with the cash intended to be deposited. They specify the account holder, the account number, the amount of cash deposited. They may also indicate the person paying in the cash. The teller is required to count the cash, verify and stamp the slip, retaining one and giving back one to the customer. This evidence is on record, specifically from the respondents' oral testimonies and the Bank manual. This did not happen, the respondents as cashiers/tellers in their own evidence were

making false daily balances. The balance would include the amounts of money they had not received. It is this money that they did not see but recorded that was found by the trial Judge to be missing. They were each aware that the snap checks carried out by the manager were false pretences intended to cover up the fraud. If they did not they ought to have known. Any reasonable person would have known. The respondents each were aware that the end of the day balancing reports were false, as they included cash they neither received nor saw but in respect of which they had issued acknowledgment.

According to the evidence of the first respondent he did credit the questioned accounts stated above on a number of occasions at different times on different days under the instructions of the manager, without question. He did therefore prepare false end of day balances in respect of which he had not received all the money a number of times. He ought to have known and had reason to believe this could cause financial loss to his employer, the bank. We find so because the missing money was always in respect of the two questioned accounts. It was always large amounts of money that he had neither received, nor seen on each and every occasion. This is the criminal behaviour Section 20 of Anti-corruption Act is intended to curtail.

In respect of the 2nd respondent, his testimony is not different from that of the first respondent. He too was a cashier / teller. His duty was to receive cash , count it, receipt it, and credit the account number of the holder set out in the pay in –slip

In his examination in chief he stated as follows:-

> *"From what I can remember in August 2010, I was approached by A1. He told me that there was a customer who wants to make a deposit but unfortunately he was stuck but wants his money posted immediately that when he came he would come with the money and would give it to A1 who would take it to the treasury. He never disclosed the name of the customer. He had a deposit slip. It*

was filled. As a cashier I had a teller limit of 20 million during the day and at all times.

I posted the transaction. I got details from deposit slip.

I sold cash to the vault since I was above 20 million

Electronically I sold cash

The transaction was authorised by Kimeze (A1). He was authorized.

On 2nd November 2010 I received USD 90,000 in cash from Kimeze Jeremiah.

Yes I entered this into the system."

In cross examination he stated as follows:-

"I did not think these were suspicious. A1 explained that the customer was caught up, stuck and was not in the bank. I trusted A1. Exhibit P15 shown to DW4 and Exhibit P12 (1) Exhibit P.12 (2).

Looks at P12 (2) 30th September 2010. I see opening balancing. It is on crown Financial Services. My User ID was ZJ 2629. On 7th October 2002, 10, 181, 724.

It was at 11:47am. Yes I was told that a customer was caught up. I was told a customer would come at 3:30pm. The bank would be open. It closes at 4:00pm. He wanted the money immediately. I knew he needed the money.

I knew the money would be used before physical cash was given"

It is self-evident that, the second respondent was making false entries and false reports in respect of the amounts of money he was receiving as a cashier. He was indicating in his reports that he had received more money in cash than he actually recorded and acknowledged receipt at his till. The explanation that a customer was

held up and would appear later with the money given to him by the manager is neither impressive nor believable.

Even if he believed the manager he had no obligation to receipt money he had not physically received. He had a duty to his employer and to the law to ensure that the records reflected exactly what he had done or what had transpired and not just what he was told.

He failed to do this. He must have been at all times aware of fraud. He must have been aware or ought to have been aware of the fact that his act of crediting money on a customer's account before it was received by him at the bank at which it was to be deposited could cause financial loss to his employer.

For the above reasons we find that this appeal has merit and hereby succeeds on both grounds.

The learned trial Judge erred when she acquitted the respondents on account that they had simply trusted the manager. Each of them had a duty of his own attached to his own contract of employment. Each of the respondents failed to do what they were employed to do. They knew or ought to have known that crediting customers' accounts with money they each had not received would result into financial loss. Further they forged or falsified end of day reports. They also were accomplices to the crime and they participated and facilitated false slips checks. They failed to report any of the stated irregularities to higher authorities at the bank. They could also simply have refused to participate in the wrong doing.

We accordingly set aside the acquittal against the first respondent and substitute it with an order of conviction on both counts. We set aside the order of acquittal against the 2nd respondent and substitute it with an order of conviction on both counts.

Bail in respect of each convict hereby lapses and we order that both appellants be remanded in prison until Court sets a date for hearing allocutus and determination of their respective sentences.

We so order.

Dated at **Kampala** this.....17th.....day of .....September..... 2021.

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Kenneth Kakuru
JUSTICE OF APPEAL

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Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

.....

Irene Mulyagonja
JUSTICE OF APPEAL