THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Kenneth Kakuru, Muzamiru M. Kibeedi & Irene Mulyagonja, JJA)

CRIMINAL APPEAL NO. 085 OF 2018

ODELE PATRICK :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

*[Appeal from the Judgment of the High Court of Uganda at Kampala, Anti-Corruption Division (**Hon. Lady Justice Margaret Tibulya**) delivered on the 04th November 2017 in Criminal Session Case No. HCT-00-AC-SC-0007 of 2014]*

JUDGMENT OF THE COURT

BACKGROUND.

The appellant was indicted with 11 Counts of the offence of Embezzlement Contrary to Section 19(b)(iii) of the Anti-Corruption Act No. 6 of 2009, 30 counts of the offence of Forgery Contrary to Sections 342 and 347 of the Penal Code Act, Cap.120 and 62 counts of the offence of Uttering False Documents Contrary to Sections 351 and 347 of the Penal Code Act.

The facts of the case as established by the trial court were that the appellant was employed by the African Centre for Global Health and Social Transformation (ACHEST) as its Manager Finance and Administration. ACHEST was a company limited by guarantee with its offices located in Kampala. ACHEST's major activities included conducting research in the health sector and coordination of education and training of medical professionals.

The appellant held the position of Manager Finance and Administration with ACHEST from 5th January 2009 to 8th September 2011, when he was forced to resign from this position following complaints from one of ACHEST's funders that he was involved in a fraud case during his earlier employment with one of the USAID funded programmes in Kampala. As the Manager Finance and Administration, the appellant was responsible for the management of all ACHEST's financial transactions, and he was also a joint signatory to ACHEST's bank accounts.

Following the appellant's resignation, the Executive Director of ACHEST, Professor Francis Omaswa, conducted preliminary investigations into the company's financial records and found that the appellant made several unauthorized withdrawals from the company accounts with Bank of Baroda. The Executive Director further discovered that ACHEST had not been making remittances to the National Social Security Fund (NSSF) and the Uganda Revenue Authority (URA) yet, the appellant withdrew money from the company accounts for these payments. Upon this discovery, the Executive Director reported the matter to police. He also commissioned an audit firm, Carr Stanyer Sims & Co., to carry out an investigative audit into ACHEST's finances and financial records from 2009 to 2011.

The audit investigation established that the appellant stole a total sum of Shs. 456,677,347/= in addition to US Dollars $175,547, using forged cheques that falsely indicated that they were signed by Professor Omaswa, who was the Principal Signatory to ACHEST's bank accounts, whereas not.

The appellant used forged cheques to steal ACHEST's funds which included Pay as You Earn (PAYE) deductions to URA, deductions and payments of Contributions to NSSF, Fictitious Payments for Taxi Hire Services, Unaccounted for cash withdrawals, Fictitious payments to Consultants, Flight costs, and overpaid staff salaries and allowances.

On his part, the appellant denied having committed any of the offences.

The trial court acquitted the appellant in respect of three Counts, namely: Count 8 (Embezzlement of USD 9,000/=), Count 38 (Forgery of Cheque No. 789812 dated 22/06/2011 of Ugx 5,338,416/=) and Count 85 (Uttering a False Document, to wit: Receipt No. BTT 315 dated 13/12/2010 in the sum of Ugx 2,100,000/=). The trial court convicted the appellant in respect of the remaining 100 Counts and sentenced him accordingly.

The appellant appealed against both the conviction and sentences on the following 14 grounds:

1. *The learned trial Judge erred in law and fact when she disregarded the Constitutional Court order to admit the Appellant to bail which denied the appellant his right to freedom and tainted the trial as a nullity.*
2. *The learned trial Judge erred in law and fact when she convicted and sentenced the appellant basing on a charge sheet and indictment not prior consented to nor mandatorily signed and sanctioned by the mandated officers.*
3. *The learned trial Judge erred in law and fact to convict the Appellant without Police Statements and Charge and caution statements being adduced in evidence before court.*
4. *The learned trial Judge erred in law and fact when taking into account the four years spent on remand harshly and excessively sentenced the appellant to 18 [Sic] years imprisonment.*
5. *The learned trial Judge erred in law and fact when she gave the appellant an ambiguous sentence that is incapable of being attributable [sic] to any one interpretation.*
6. *The learned trial Judge erred in law and fact when she proceeded to make judgment without considering the appellant's submissions in his defence which were filed, stamped and received by the Court Registry.*
7. *The learned trial Judge erred in law and fact when she applied two different enactments of the Penal Code Act and the Anti-Corruption Act to punish the Appellant for an offence that arises from one set of facts.*
8. *The learned trial Judge erred in law and fact when she allowed embezzlement charges instituted under S.19 of the Anti-Corruption Act when the complainant is not a specified public body.*
9. *The learned trial Judge erred in law and fact when she convicted the Appellant with embezzlement despite audit evidence that showed that the complainant lost no money in the stated period of January 2009 to June 2012, having got total revenue in grants of 3.4 Billion Shillings from Donors, spent 3 Billion shillings leaving an excess of income over expenditure of UGX 400 Million.*

10. *The learned trial Judge erred in law and fact when without evidence of external auditors and in disregard of Annual Audited Accounts for the impugned period she proceeded to convict and sentence the Appellant on charges of embezzlement contained in the numerous counts.*

11. *The learned trial Judge erred in law and fact when she continued to preside over the case despite bias objections raised against her.*

12. *The learned trial Judge erred in law and fact when she made corrections to defects in the charge sheet and indictments authored by the prosecution.*

13. *The learned trial Judge erred in law and fact when she disregarded the major contradictions and inconsistencies exhibited in the testimonies of the prosecution witnesses and proceeded to rely on them to convict and sentence the Appellant.*

14. *The learned trial Judge wrongly evaluated the evidence on record concerning the charges in indictment, the required burden of proof and the attendant sentencing and thereby came to wrong conclusions.*

REPRESENTATION

When the appeal came up for hearing, the appellant, Odele Patrick, was present in court but his Counsel, Dr. James Akampumuza, was absent. On the other hand, Ms. Gloria Inzikuru, Chief State Attorney in the office of the Director of Public Prosecutions (DPP) represented the respondent.

Both parties filed written submissions which we shall consider when resolving the specific ground(s) of appeal to which they relate.

DUTY OF COURT

As the 1st appellate court, our duty is to reappraise all material evidence that was adduced before the trial court and come to our own conclusions of fact and law while being mindful of the fact that we neither saw nor heard the witnesses testify. See Rule 30(1)(a) of the Judicature (Court of

Appeal Rules) Directions, *Baguma Fred Vs Uganda SCCA No. 7 of 2004, Kifumante Henry Vs Uganda SCCA No. 10 of 1997, and Pandya Vs R [1957] EA 336.*

We shall bear in mind the above principles while resolving the grounds of appeal starting with the allegations of bias set out in ground 11 as such allegations affect the jurisdiction of the trial judge. Then we shall consider ground 1 which deals with allegations of infringement of the appellant's right to freedom and illegality of the trial. Thereafter we shall separately deal with grounds 2, 8 and 12 all of which deal with preliminary points of law. We shall then resolve grounds 9, 10, 13 and 14 jointly as all of them deal with evaluation of evidence by the trial court. Thereafter we shall separately deal with each of the procedural complaints laid out in grounds 3, 6 and 7. We shall end with grounds 4 and 5 which deal with the sentences.

GROUND 11

Ground 11 was couched as follows:

The learned trial Judge erred in law and fact when she continued to preside over the case despite bias objections raised against her.

In his submissions on ground 11, Counsel for the appellant accused the trial judge for not recusing herself from the hearing of the case on account of bias. Counsel submitted that the Appellant's application to the trial judge to recuse herself from the proceedings was based on what he termed "the fact" of the trial judge being a sister to Dr. Stephen Kagoda, the former Permanent Secretary of the Ministry of Internal Affairs, who in turn was a personal friend to Prof. Francis Omaaswa, the Executive Director of ACHEST. That because of this, there was an apparent conflict of interest, but the trial judge declined to recuse herself when the appellant made the application for her to do so.

Counsel prayed that this honourable Court does uphold this ground of appeal.

In reply to the appellant's submissions on ground 11, the respondent submitted that the claim of bias did not meet the test as set out in the case of *GM Combined Ltd Vs AK Detergents (U) Ltd*

Supreme Court Civil Appeal No. 19 of 1998 namely, that there must appear to be a real likelihood of bias in the eyes of reasonable people. That surmise or conjecture is not enough.

Counsel ended by inviting this court to reject this ground of appeal.

A perusal of the record of appeal indicates that the application for recusal against the trial judge was made on 13th May 2014 by the appellant in person. On that date, the appellant informed court that all his lawyers had withdrawn from representing him in the trial. So, he was looking for new lawyers to engage "to support [him] in [his] defense onwards".

Second, the appellant informed court that he wrote a letter to the Principal Judge complaining about his perception of bias on the part of the trial judge in the conduct of the trial. That the Principal Judge replied to the appellant asking him to bring the complaint to her attention.

The appellant then went ahead and made the application for recusal in the following terms:

> *"... I am asking you to excuse yourself from this trial because the decisions you have been making are arbitrary and I am not going to get justice if you continue presiding this trial because the items/documents I am requesting for are critical in this trial."*

In response, the prosecuting attorney stated that she had already availed all the documents on which the prosecution intends to rely to the appellant's lawyers and that the said lawyers confirmed receipt of the documents to court in the presence of the appellant.

Regarding the appellant's claim of bias on the part of the trial judge, the prosecuting attorney stated that it would be wrong to interpret it as a sign of bias whenever a judicial officer makes a decision which is not favourable to a party.

In her very brief Ruling, the trial judge stated:

> *"...I am not biased and for that reason I will not recuse myself from hearing the case. I will continue presiding over the matter."*

On 09.05.2016 the appellant once again applied to have the trial judge recuse herself from the trial of his case. On that day, none of the appellant's two advocates, Dr. James Akampumuza

and Mr. Godfrey Mafabi, attended court despite the trial judge having warned the defense on 15.10.2015 that if the appellant's counsel continued absenting themselves, the court would order the appellant to proceed unrepresented. On that day, the prosecution witness, the then Medical Superintendent of Mityana Hospital, Dr. Kawooya (PW9), was in court for the 3rd time to be cross-examined by the appellant's counsel to no avail. The prosecution also had two other witnesses ready to testify namely, the Deputy Director of Forensic Services/Examiner of Questioned Documents, Mr. Ezati Samuel, and the Investigating Officer, D/IP Mapeera David. The appellant objected to the case proceeding in the absence of his counsel. But the trial judge ordered that the hearing does proceed.

After three Prosecution witnesses had been examined-in-chief and not cross-examined by the appellant, the appellant once again applied to have the trial judge recuse herself. This time round, the grounds were stated by the appellant to be "abuse of court process", the trial judge being "a sister of Mr. Kagoda a friend of the complainant", demanding for a bribe by sending a one Ham Emukule, and breaching an order of the Court of Appeal. The appellant further stated that he had sent his complaint against the trial judge to the Judicial Service Commission (JSC), His Excellency, the President of Uganda and the Principal Judge (PJ).

In her short Ruling, the trial judge stated:

> *"As the accused has said his complaints were to JSC, PJ and the President, all are correct forums.*
>
> *About the request I stand down from hearing the case, I have no reason to stand down because I have been, and I am and will continue to handle the case professionally.*
>
> *The request is rejected."*

Allegations of bias and others raised for any judge to recuse himself or herself should be addressed comprehensively by the judge. It requires the judge to take time off and prepare a ruling. This would include the allegations, the evidence brought to prove them as well as the law. The trial judge omitted to do this, and she was wrong in this aspect. She ought to have done a better job by writing a comprehensive ruling, especially when the appellant confronted her about

being related to the complainant and Mr. Kagoda, the then Permanent Secretary of the Ministry of Internal Affairs. However, the fact that she did not do so did not occasion a miscarriage of justice or failure of the trial. By virtue of Section 139 of the Trial on Indictments Act, this court cannot reverse the decision of the trial judge where the omission or error did not occasion a failure of justice. The section provides as follows:

> ***"139. Reversibility 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."*

The aforesaid notwithstanding, from the summary of the record of proceedings before the trial court which we have set out hereinbefore, it becomes crystal clear that the grounds of the alleged bias kept changing. Whereas the basis of the appellant's perception of bias was originally stated before the trial court, by the appellant himself, to be the "arbitrary" decisions the trial judge was making against him, the grounds continued changing as the trial judge pushed for the trial to go ahead without excuses from the appellant. When the matter came to this court, the basis of bias was stated in the appellant's written submissions to be the alleged blood relationship between the trial judge and an alleged friend of the complainant, Dr. Kagoda. Claims of bias should be consistent and not the product of a wild goose chase or conjecture.

We have considered the general context in which the appellant made the applications for recusal before the trial judge. From the record of proceedings, before making the applications for recusal, the appellant and his counsel made several attempts to frustrate the hearing of the case through adjournments, non-attendance of his counsel on several occasions while the prosecution witnesses were in court ready to testify, repeatedly raising objections with little or no regard to the

applicable law, repeatedly applying for documents which had already been availed to his counsel, to mention but a few. The trial judge saw through the appellant's scheme and did summarily dismiss some of the applications and reserve others for Rulings at later dates. When the appellant and his counsel realized that the trial judge was bent to have the matter heard after giving the appellant and his legal team the last opportunity to prepare and be ready to proceed at all costs, the appellant's counsel changed the tactics. The appellant's counsel "abandoned" their client and appeared to have advised him to come up with the claim of bias on the part of the trial judge so that the judge exits the case. Getting this case heard to finality the way it did required firmness on the part of the trial judge and guarding against the parties taking charge of the conduct of the matter from the court. It is common for such firmness to be misconstrued as bias on the part of the trial judge. Expeditious disposal of cases dictates that *inter alia* the presiding judicial officers should, as far as possible, be encouraged to be firm and take full charge of their court proceedings while, at the same time, being mindful of the interests of the other stakeholders like the litigants and the overall obligation of court to render justice. Ground 11 accordingly fails.

GROUND 1

Ground 1 of this appeal was couched as follows:

The learned trial Judge erred in law and fact when she disregarded the Constitutional Court order to admit the Appellant to bail which denied the appellant his right to freedom and tainted the trial as a nullity.

In his submissions on ground 1, Counsel for the appellant faulted the trial judge for ignoring the Order made by the Constitutional Court on the 11th day of March 2016 in *Constitutional Application No.26 of 2015 Odele Patrick Vs A.G & 4 Others* directing the Anti-Corruption Court Division of the High Court to admit the applicant to bail on terms and conditions it determines to be just and equitable, within seven days of the ruling. Counsel submitted that the Constitutional Court Order was brought to the attention of the trial judge several times, but she ignored it. Counsel submitted that the unexplained violation of appellant's constitutional right entitles the appellant to an acquittal irrespective of the nature and strength of evidence which was adduced

in support of the charges against him. For this submission, Counsel relied on the Kenyan case of *Albanus Mwasia Mutua Vs Republic (Kenya) Court of Appeal Criminal Appeal No.120 of 2004,* and *Dr. Kizza Besigye & Ors vs The Attorney General, Constitutional Petition No.07 of 2007*.

In her reply, Counsel for the respondent submitted that grant of bail is discretionary. That the grant of the appellant's bail was still within the discretion of the trial Court. That the decision to grant or not to grant bail did not in any way affect the nature of evidence that was presented against the Appellant at the trial and that the decision did not affect the integrity of the trial. Lastly, that grant of bail is not a ground for determining whether or not the trial was valid. For her submissions, Counsel for the appellant relied on Article 23(6) of the Constitution of the Republic of Uganda 1995, *Uganda Vs Kiiza Besigye Constitutional Reference No. 20 of 2005* and *Livingstone Mukasa & Others Versus Uganda (1976) HCB 117*

The Order of the Constitutional Court which is the subject of this ground of appeal was not part of the Record of Appeal which was sent to this court from the trial court. Nonetheless, upon our request, we were subsequently availed a copy of the Ruling in *Odele Patrick Vs Attorney General Constitutional Application No. 26 of 2015 and 4 others* by the Registrar of this court from the Constitutional Court Registry.

The background to the above Court Order was that following the arraignment of the appellant for trial by the Anti-Corruption Division of the High Court for the offences which are the subject matter of this appeal, he petitioned the Constitutional Court challenging the constitutionality of the laws under which he was being tried by the High Court. He simultaneously filed an application for a temporary injunction staying the Criminal Proceedings pending disposal of the Constitutional petition by court. He also filed an application for an interim order seeking, *inter alia*, stay of the criminal proceedings and grant of bail pending the disposal of the application for the temporary injunction, vide: *Odele Patrick Vs Attorney General Constitutional Application No. 26 of 2015 and 4 others.*

While dismissing the application for the Interim Order to stay the proceedings in the trial court on 11th March 2016, the Constitutional Court nevertheless ordered thus:

> *"Anti-corruption Division of the High Court is hereby ordered to admit the applicant on bail on terms and conditions that it determines to be just and equitable within 7 (seven) days of this ruling."*

We have carefully read the record of appeal. It indicates that on 09.05.2016 the appellant stated before the trial judge that they made an application for bail on 16.06.2014. On 01.08.2014 court directed them to file written submissions. They filed the written submissions on 18.06.2014. But no Ruling was delivered since then.

The appellant further stated that the Order of the Constitutional Court directing his release on bail within seven days was served on the trial court on 11.03.2016 but no response was received by the appellant. The trial judge did not deny service of the order of the Constitutional Court.

On 12.09.2016 the appellant's counsel, Isaac Semakadde, once again raised the issue of the trial court not complying with the Order of the Constitutional Court 51 days after its issue.

In her Ruling on that point, the trial judge stated:

> *"About the prayer that I give effect to the Constitutional Court Order, I am aware that an application has been made and is pending ruling in the Court of Appeal over this issue. We all wait for the outcome of that application."*

From the above, there is no doubt that the appellant is justified in faulting the trial judge for disregarding the Constitutional Court order to admit the Appellant to bail within seven days of the date of the order on terms and conditions that she should have determined to be just and equitable. Counsel for the appellant submitted that the consequence of the error or omission on the part of the trial judge was to render the trial a nullity. Counsel relied on the authorities of *Albanus Mwasia Mutua Vs Republic (Kenya) (Opcit),* and *Dr. Kizza Besigye & Ors vs The Attorney General (Opcit)*.

In the Kenyan case of *Albanus Mwasia Mutua Vs Republic (Kenya) (Op cit),* the appellant was tried and convicted by the trial magistrate of the offence of attempted robbery with violence and

sentenced to suffer death. The conviction and sentence were upheld by the High Court on the 1st appeal. On the 2nd appeal to the Court of Appeal, it was established that the appellant was first brought before the trial magistrate eight months from the date of his arrest and no explanation at all was offered for that delay which violated the appellant's constitutional right which required that a suspect of such an offence be charged before a court of law within 14 days from the date of arrest. By a majority decision of 2:1, the Court of Appeal allowed the appeal and acquitted the appellant on the sole ground that the detention of the appellant by the police for the period of eight months before bringing him to court for trial not only violated the appellant's constitutional right to liberty but also delayed the commencement of his trial and resulted in the trial not being held within a reasonable time as prescribed by the constitution. The Court further held that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of the evidence which may be adduced in support of the charge.

In the case of *Dr. Kizza Besigye & Ors vs The Attorney General (Opcit)* where there was overwhelming evidence that in the process of arresting, producing, and presenting the suspects in the courts, the security forces, the police and prosecution agencies violated numerous constitutional rights of the accused persons, the Constitutional Court likewise held that it cannot sanction their continued prosecution irrespective of how strong the evidence against them may be, as no fair trial can be achieved.

In the circumstances of this case, should the appeal be allowed on the sole ground of the failure of the trial judge to give effect to the Order of the Constitutional Court already referred to?

The violations of the rights of the accused persons that formed the basis of the court decisions in the Kenyan case of Albanus *Mwasia Mutua Vs Republic (Kenya) (Opcit),* and the Ugandan case of *Dr. Kizza Besigye & Ors vs The Attorney General (Opcit)* were committed by security agencies, the police, and other prosecuting authorities of the executive arm of government over whom the judiciary does not have **direct** disciplinary power. In those circumstances, the courts adopted the reasoning that the discharge of the mandate of the judiciary of checking the serious abuse of power on the part of the executive which threatens either basic human rights or rule of

law is by the courts refusing the police and other prosecuting authorities to take advantage of the abuse of power through denying them audience and discharging the victims of the abuse.

In the instant case, the fault complained about was on the part of one of the officers of the judiciary, the trial judge, and not on the part of the executive organs. All the other players in the criminal justice system did their part: The victim of the alleged crimes registered his complaint with the police; the police did its investigations and the office of the DPP did its part in securing the conviction by the trial court. The fault complained about is only on the part of the judicial officer whose independence is guaranteed by the Constitution. But even then, it is not alluded to that the fault or omission on her part occasioned an injustice or otherwise denied the appellant a fair trial. In these circumstances, should all these stakeholders be prejudiced by the fault of the judicial officer over whom they have no control and the appellant let to go scot-free on that ground alone?

Article 126(1) of the Constitution enjoins us with dispensing judicial power *inter alia* in conformity with the values, norms, and aspirations of the people. While this court has a duty to uphold the human rights of the persons charged with crime, it must balance it with the equally important duty to ensure that crime, where it is proved, is appropriately punished. Letting an accused person go against whom crime has been proved on account of no fault of the stakeholders except the court itself undermines the public confidence in the court system and is a recipe for anarchy in society through people resorting to "mob justice" for redress. Such a society is not what our people aspire for. The justice in the instant case demands that the disciplinary consequences for the errors and omissions of the judicial officer be suffered by the judicial officer alone and not extended to the other stakeholders in the criminal justice system. Fortunately, the court record indicates that the appellant commenced action against the judicial officer to be held personally accountable for her failure to give effect to the Order of the Constitutional Court.

In the circumstances of this case, we have not found that the errors and omissions on the part of the trial judge warrants nullification of the trial. Ground 1 accordingly fails.

GROUND 2.

Ground 2 was couched as follows:

The learned trial Judge erred in law and fact when she convicted and sentenced the appellant basing on a charge sheet and indictment not prior consented to nor mandatorily signed and sanctioned by the mandated officers.

In his submissions on ground 2, Counsel for the appellant argued that the indictment was incurably defective for having been signed on 07/3/2014 by Ms. Margaret Namatovu, the Senior State Attorney who was prosecuting the case, instead of the Director of Public Prosecutions (DPP). For this submission, Counsel relied on Section 49 of the Anti-Corruption Act, 2009, which requires that a prosecution under the Anti-Corruption Act shall not be instituted except by or with the consent of the DPP or the Inspector General of Government (IGG).

Counsel further submitted that the charge sheet on which the Appellant was convicted was sanctioned between January 23, 2014 and January 28, 2014 by the Hon. Justice Richard Buteera as the DPP and yet he had already been appointed a Justice of Appeal on the 4th day of July 2013. As such, counsel contended, he could not legally sanction the charge sheet as the DPP while at the same time holding the office as a Justice of Appeal. For this submission, counsel referred to the decision of the Constitutional Court in *Bob Kasango Vs AG, Constitutional Petition No.16 of 2016* and *Jim Muhwezi & 3 Ors v AG, Constitutional Petition No.10 of 2008*.

Counsel prayed that this Honourable Court be pleased to find that the trial was a nullity and acquit the appellant.

In reply to ground 2, Counsel for the respondent submitted that the consent of the DPP prescribed under Section 49 of the Anti-Corruption Act was required only at the time of instituting the criminal charges against the appellant before the magistrate's court in accordance with Section 42 of the Magistrate's Courts Act. That upon committal of the appellant for trial by the

High Court, it was not again necessary to obtain the consent of the DPP. For this submission, Counsel relied on the decision of this court in the case of *Nakiwuge Rachael Vs Uganda, CACA No. 248 2015.*

Counsel prayed that this court be pleased to find that the proceedings against the appellant were properly instituted.

Section 49 of the Anti-Corruption Act, provides as follows:

> *"A prosecution under this Act shall not be instituted except by or with the consent of the Director of Public Prosecutions or the Inspector General of Government; but a person charged with such an offence may be arrested, or a warrant for his or her arrest may be issued and executed, and the person may be detained or released on police bond, notwithstanding that the consent of the Director of Public Prosecutions or the Inspector General of Government to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained."*

From the above section of the law, the consent of the DPP is a mandatory requirement at the time of institution of the prosecution for the offences under the Anti-Corruption Act. The issue for consideration is, at what point in time can it be stated that the prosecution of the appellant was instituted? Was it at the time the prosecution laid the Charge Sheet before the Magistrate in accordance with Section 42 of the Magistrate's Courts Act, Cap. 16 (MCA)? Or was it at the time of committal of the appellant to the High Court for trial by way of the Indictment and Summary of the evidence?

This court had occasion to consider and resolve the above issue in the case of *Nakiwuge Rachel Vs Uganda, Court of Appeal Criminal Appeal No. 248 of 2015*. The court held as follows:

> *"The prosecution of the appellant was commenced or instituted at the time of her committal to the High Court by a Magistrate as required under Section 42 of the Magistrate's Act. It is at this stage of proceedings that compliance with Section 49 of the Anti-Corruption Act, that is, procuring the consent of the DPP is required. Such committal is initiated by a Charge Sheet and not the indictment referred to by the appellant's counsel."*

We have no basis to deviate from the above interpretation of the law.

In the instant case, the appellant's complaint is directed at the indictment which was signed by Ms. Margaret Namatovu, the Senior State Attorney, on behalf of the DPP. This is a total misdirection. The requirement to obtain the DPP's Consent did not extend to the indictment upon which the trial in the High Court proceeded. It was limited only to the Charge Sheet which instituted the proceedings before the Magistrate's court. Nowhere in his Memorandum of Appeal or submissions does the appellant's counsel allude to the charge sheet which commenced the prosecution of the appellant as lacking the consent of the DPP.

We have reviewed the proceedings before the trial court. The issue of the consent of the DPP to the institution of the criminal proceedings against the appellant was not raised at all before the trial judge. It is being raised for the first time on appeal. As a general rule, an appellate court cannot address an issue which is raised for the first time on appeal as the lower court had no opportunity to rule on (See: *Rwabugande Moses Vs Uganda, Supreme Court Criminal Appeal No. 25 of 2014*).

However, one of the exceptions to the above general rule is where the question being raised for the first time raises the question of illegality. This is because a court of law cannot sanction what is illegal once brought to its attention (See: *Kisugu Quarries Vs The Administrator General, SCCA No. 10 of 1998*).

In the instant appeal, we are satisfied that the complaint raised by the appellant of the criminal proceedings having been instituted without the consent of DPP goes to the legality of the appellant's trial. As such, it falls within the exceptions under which this court can consider an issue for the first time on appeal.

Further, we noted that the original Charge sheet which was used to commence the proceedings in the Magistrate's Court was not part of the record of appeal before us. Nevertheless, and for purposes of completeness, we requested the Registrar of this Court to avail us the Court file in the Committal proceedings held before the Chief Magistrate to enable us to review the Original Charge Sheet and come to our own conclusions.

The charge sheet was received by the Registry of the Anti-Corruption Division of the High Court on 28.01.2014 under Reference Number CO-0028/2014 and was signed by the magistrate on the same day. It bears the signed consent of the DPP in the form below:

"I consent to the above charges
Richard Buteera
Director of Public Prosecutions"

We are thus satisfied that the criminal proceedings against the appellant were instituted with the consent of the DPP.

The other complaint of the appellant under ground 2 was that the DPP who sanctioned the Charge Sheet did it between 23rd January 2014 and 28th January 2014 while at the same time holding the office as a Justice of Appeal which rendered the Charge Sheet a nullity.

The actual date on which the DPP consented to the Charge Sheet was not indicated on the Charge Sheet itself or anywhere in the record of appeal. As such, Counsel's submission is not borne out of the evidence before this court. It is simply a submission from the bar bordering on mere speculation. What is definite is that the Consent was granted by the DPP before the Charge Sheet was filed in court on the 28th day of January 2014

The aforesaid notwithstanding, whether it is true that at the time of consenting to the charges, the DPP had also been appointed a Justice of Appeal, did not by itself render the consent a nullity as submitted by the appellant's counsel. We have closely reviewed the decision of the Constitutional Court in *Bob Kasango Vs AG* (Supra) which the appellant relied upon. In the lead judgment of Justice Kenneth Kakuru, JA/JCC, with which the other Justices concurred, it was held that it was unconstitutional for a sitting judicial officer to hold the office of DPP or any other executive and constitutional office without first resigning the judicial office. But as far as the past actions already executed by the DPP and the other judicial officers unconstitutionally holding executive and constitutional offices prior to the date of the judgment (18th March 2021) were concerned, they were held to be still valid if executed in accordance with the constitutional mandate of their

respective offices. This was in accordance with the doctrine of "prospective annulment" which was elaborated in the judgment of Justice Geoffrey Kiryabwire, JCC in the said case.

We accordingly find no merit in ground 2 of the appeal.

GROUND 8.

Ground 8 was couched as follows:

The learned trial Judge erred in law and fact when she allowed embezzlement charges instituted under S.19 of the Anti-Corruption Act when the complainant is not a specified public body.

In his submissions, counsel for the appellant faulted the trial judge for trying and thereafter convicting the appellant on the counts of embezzlement contrary to Section 19 of the Anti-Corruption Act without evidence having been adduced by the prosecution to prove the essential ingredient to the effect that the appellant was an employee, servant or an officer of the Government or a public body. For this submission, counsel referred to the decision of Justice Paul K. Mugamba, J (as he then was) in *Uganda vs Rose Mary Tibiwa Session Case No.HCT-00-SC 90/2013.*

In reply, Counsel for the respondent submitted that from the long title of the Anti-Corruption Act, 2009, the Act applies to both the public and private sector.

Further, that from the evidence before the trial court, there is no doubt that the Appellant was employed by the ACHEST as a Finance and Administration Manager and therefore rightly falls within Section 19 of the Anti- Corruption Act (supra).

According to the Indictment, the appellant was charged with 11 counts of embezzlement contrary to Section 19(b)(iii) of the Anti-Corruption Act. The particulars of the offence of embezzlement which are relevant to the resolution of this ground were set out in the indictment in the following terms:

"Odele Patrick between ... (date) and ... (date) at Bank of Baroda Main Branch in the Kampala District, being employed by Africa Centre for Global Health and Social Transformation (ACHEST) as a Manager of Finance and Administration stole .....(amount) being property of ACHEST to which he had access by virtue of his employment." [Emphasis added]

The argument of the appellant's counsel is that ACHEST is not a specified "public body" in order to bring the appellant within the ambit of Section 19(b)(iii) of the Anti-Corruption Act under which he was charged.

Section 19 of the Anti-Corruption Act provides as follows:

"A person who being: -

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

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

c) a clerk or servant employed by any person, association or religious organisation or other organisation;

d) a member of an association or a religious organisation or other organisation, 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; or

iii. to which he or she has access by virtue of his or her office,

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

The words used in the section above are wide enough to cater for the trial of both persons employed within government and outside government for the offence of embezzlement. This is in line with the major objective of the Act as set out in the long title of the Act of *"prevention of corruption in both the public and the private sector..."*

From the evidence of PW1 Prof. Omaswa, the appellant was an employee of ACHEST as a Manager of Finance and Administration. From exhibit P28 (Certificate of Incorporation) and exhibit P29 (Memorandum and Articles of Association) ACHEST is a company limited by

guarantee having been incorporated under the Companies Act of Uganda in 2005. The prosecution's case as set out in the indictment was that the appellant stole money from ACHEST to which he had access by virtue of his employment. This brought the appellant within the ambit of subsection (b)(iii) of section 19 of the Anti-Corruption Act under which he was charged. There is no lawful basis to fault the trial judge for having agreed to try the appellant for embezzlement despite the fact that the complainant, ACHEST, was not a public body. The appellant was properly charged with the offence of Embezzlement contrary to Section 19(b)(iii) of the Anti-Corruption Act. Ground 8 accordingly fails.

GROUND 12

Ground 12 was couched as follows:

The learned trial Judge erred in law and fact when she made corrections to defects in the charge sheet and indictment authored by the prosecution.

In his submissions on this ground, Counsel for the appellant argued that in counts 5 and 6 of the Indictment the Appellant was alleged to have embezzled funds from account numbers 01680 and 12117 respectively when in fact the complaining organization (ACHEST) never held such accounts with Bank of Baroda. Accordingly, the appellant could not embezzle money from non-existent accounts. That ACHEST held six accounts in Bank of Baroda (3 dollar and 3 Uganda shillings) and all the six accounts had 14 digits.

Further, Counsel submitted that in count 4 of the Indictment, the Appellant was alleged to have embezzled Ugx 101,874,00. But that the trial judge corrected the above figure by adding zero at the end when she was not the prosecution.

Counsel contended that the above evidence from the prosecution witness, was cardinal for acquitting the Appellant and discharging him. Counsel invited this court to uphold all the above grounds of appeal and acquit the appellant accordingly.

On her part, Counsel for the appellant supported the decision of the trial court to the effect that it is obvious that the missing information was left out inadvertently. But that the appellant suffered no prejudice as evidenced by the fact that the appellant extensively referred to the exhibits which indicated that he fully understood the prosecution's complainants.

Counsel concluded by inviting this court to dismiss the grounds of appeal above.

The gist of the appellant's complaint in ground 12 is to fault the trial Judge for making corrections to what the appellant termed "defects in the charge sheet and indictments authored by the prosecution". The "defects" in issue were the following:

1. The amount allegedly stolen by the appellant which was stated in the particulars of the offence in count 4 to be "***Shs. 101,874,00/=***" *(sic).*

2. The account number from which the appellant was alleged to have fraudulently withdrawn USD 51,828 which was stated in the particulars of the offence in count 5 thus: "ACHEST's US DOLLAR Bank Account No. **01680** with Bank of Baroda..." *Emphasis added*

3. The account number from which the appellant was alleged to have fraudulently withdrawn USD 51,828 which was stated in the particulars of the offence in count 6 thus: "ACHEST's US DOLLAR Bank Account No. **12117** with Bank of Baroda..." *Emphasis added*

When dealing with this matter, the trial Judge stated thus:

> *"I have looked at the particulars of the offences in counts 5 and 6 and noted that the value of the matter was printed as 101,874,00 and the account numbers were written as 01680 and 12117. Given that the audit which was disclosed to the accused and he extensively referred to bears the sum of 101,874,000 as the amount which is unaccounted for and the numbers 95010200001680 (exhibit p17) and 95010100012227 (exhibit p18) as the affected accounts, it is obvious that the missing information was left out inadvertently. None the less, the fact that the accused extensively referred to the exhibits shows that he fully understood the prosecutions complaints. He suffered no prejudice."*

There is no basis to fault the trial judge's findings and actions. Section 22 of the Trial on Indictments Act requires that the particulars of the offence should be drafted in such a way as to give "reasonable information as to the nature of the offence charged".

The section is couched as follows:

> **22. Contents of indictment**
>
> Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged." *[Emphasis added]*

We are satisfied that the particulars of the offences complained about in the instant case gave the appellant reasonable information as to the nature of the offences he was charged with, the apparent omissions notwithstanding. This satisfied the standard set by S.22 of the TIA. A trial judge is justified to correct the error when it is apparent that the accused knows and understands the offence he/she was charged with.

Above all, no injustice was occasioned upon the appellant by the actions of the trial judge complained about. Ground 12 accordingly fails.

GROUNDS 9, 10, 13 AND 14

Grounds 9, 10, 13 and 14 are, in substance, complaints about the evaluation of the evidence by the trial court. They were couched as follows:

Ground 9 - The learned trial Judge erred in law and fact when she convicted the Appellant with embezzlement despite audit evidence that showed that the complainant lost no money in the stated period of January 2009 to June 2012, having got total revenue in grants of 3.4 Billion Shillings from Donors, spent 3 Billion shillings leaving an excess of income over expenditure of UGX 400 Million.

Ground 10 - The learned trial Judge erred in law and fact when without evidence of external auditors and in disregard of Annual Audited Accounts for the impugned period

she proceeded to convict and sentence the Appellant on charges of embezzlement contained in the numerous counts.

Ground 13 - The learned trial Judge erred in law and fact when she disregarded the major contradictions and inconsistencies exhibited in the testimonies of the prosecution witnesses and proceeded to rely on them to convict and sentence the Appellant.

Ground 14 - The learned trial Judge wrongly evaluated the evidence on record concerning the charges in [the] indictment, the required burden of proof and the attendant sentencing and thereby came to wrong conclusions.

Submissions of Counsel for the Appellant on Grounds 9, 10, 13 and 14

In his submissions on grounds 9 and 10, Counsel for the appellant argued that from the two external Audited accounts of ACHEST made by George William Egaddu, the auditor appointed by ACHEST's board, the organisation suffered no loss at all. That the said Audit reports showed that ACHEST received a total of Ugx 3,662,264,048 for the 32 months the appellant worked with it, while its total expenses amounted to Ugx 3,215,505,660. That there was therefore a total surplus of Ugx. 446,758,388 being the difference between the total income received and the total expenditure. That this status was confirmed by DW6 George William Egaddu in his testimony in court.

Counsel faulted the trial judge for not relying on the above audit reports to find that ACHEST suffered no loss and thereby acquit the appellant. Instead, the trial court relied on the investigative audit by Carr Stanyer Simms & Co. to convict the appellant. Counsel faulted the investigative audit for having been commissioned by the Executive Director of ACHEST instead of the Board of Directors as provided by Article 6(b)(3) of the Articles of Association of ACHEST. And neither was it authorised by the General Meeting of ACHEST in accordance with the mandatory provisions of the Companies Act.

Further, that the investigative report was carried out by Mr. Martin Nelson Okwir who had no practicing license issued to him by the Institute of Certified Public Accountants in Uganda which not only breached S.20(1) and (2),27,34, and 53(2) of the Accountants Act, Cap 266 Laws of Uganda, but also discloses commission of serious penal offences against him and ACHEST.

Counsel submitted that there was no authorization from the accounting firm (Carr Stanyer Sims & Co) to exhibit the investigative Audit Report in Court as the Report had a disclaimer to the effect that:

> *"This investigative Audit report is strictly for the Executive Director, African Centre for Global Health and Social Transformation (ACHEST) and is not intended for public use without our express permission".*

The appellant's Counsel further faulted the investigative audit for exceeding its terms of reference and having been concluded without interviewing or otherwise getting the input of the appellant.

With regard to grounds 13 and 14 of the appeal, Counsel submitted that the Prosecution had a duty to prove each of the ingredients of the offence as appeared in all the counts beyond reasonable doubt, but they failed to do so.

As far as the offence of embezzlement is concerned, counsel for the appellant reiterated his argument that the prosecution failed to prove the major ingredient of the offence, namely: that the appellant was at the material time an employee of government.

Counsel further submitted that the prosecution failed to prove that the cheques were forged. That on the contrary, the evidence before the trial court proved that all the cheque leaves presented to the bank for cashing were from cheque books issued by Bank of Baroda for all the six accounts held at the bank. That all the cheques when presented to the bank for cashing were run through ultraviolet light to confirm that they were genuine. That in addition, four bank officials verified each cheque before it was cashed. The bank also made telephone calls to the principal signatory, Prof. Francis Omaswa, to confirm each and every cheque before it could be paid out.

Counsel further submitted that the case was not investigated by a neutral state organ or agent empowered to do so under the Constitution of Uganda, the Criminal Procedure Act, and the Police Act. That no arresting policeman, or interviewing policeman ever testified. That there were no Police statements exhibited by Prosecution, save for the few exhibited by the Defence. That there was no single Police statement of the investigating Police officer tendered in court and that the prosecution never wanted Police Statements to be tendered in evidence in this case because they supported the Defence case. That all the above failures breached the law. Counsel referred to the case of *Ndege & Another V Uganda Cr. Appeal No.12 of 1978* in support of his submissions.

Counsel further submitted that the criminal trial was not fair and impartial. That it was inherently biased and actuated by the desire of the complainant to persecute and exercise personal vendetta against the appellant. That it was a clear case of abuse of Criminal process and a derogation of Accused's right to a fair hearing and fair trial which are non-derogable under Article 44(c) of the Constitution. That this rendered the conduct of the whole trial void *ab initio* and entitles the appellant to be acquitted. For this submission, counsel relied on the case of *Rt. Col. Dr. Kiiza Besigye Vs AG, Constitutional Petition No. 7 of 2007* where the court held that irrespective of how strong the evidence against them was, the court could not sanction any continued prosecution of the petitioners where, during the proceedings, the human rights of the petitioners had been violated.

Lastly, Counsel contended that all the exhibits tendered by the prosecution in respect of the Bank are inadmissible for violating the law as set out in Section 225 of the Magistrates Courts Act Cap.16. That there was no DPP and Police involvement in obtaining all the Bank Cheques and other documents which the prosecution relied upon and, therefore, the prosecution had no basis to tender the same in court. That the bank documents tendered were all not reliable and it was done for the sole purpose of by passing PW6's insistence that there were no bank documents that were forged and there was no false uttering.

Counsel submitted that there was no chain of Exhibits that could be and/or was proved before court in the absence of the investigation Police introducing any of the Bank Financial Statements, Audits, Vouchers and Bank Statements. That there were no committal proceedings based on preliminary inquiries conducted by Police/law officers.

Counsel ended by praying that this Honourable court be pleased to allow the appeal, set aside the conviction and acquit the appellant on all counts.

Respondent's Reply to The Submissions On Grounds 9,10, 13 and 14

In reply to the appellant's argument that the organization never lost money, the respondent submitted that the same was watered down (rebutted) by the prosecution evidence presented which was followed by his eventual conviction, namely: Martin Okwir (PW12) clarified that the audit he carried out was an investigative audit which was done to verify whether something had gone wrong or not in the organization. He also distinguished between a statutory audit that was carried out by Egadu whose purpose was to express an opinion on whether the financial statements of ACHEST showed a true and fair financial state of accounts of ACHEST. That according to the Audit report of Carr Styner Sims & Co it was discovered that the appellant misappropriated 459,177,347 Shillings.

As regards the appellant's contention that PW12 Martin Okwir, the auditor, did not have a license at the time of the audit, the respondent referred to the evidence of Okwir where he clarified that the firm, Carr Styner Sims & Co, was a certified audit firm. And that he worked under DW3 John Mpalampala who was their engagement partner, with Sam Bwaya as their engagement manager and himself as the head of investigation and, as such, he did not need a license to audit.

DW3 further corroborated the evidence of Martin Okwir and confirmed that indeed they worked jointly on the audit carried out by Carr Styner Sims & Co and that Okwir did not need a license as he was working under DW3. He further confirmed that Okwir was a competent auditor at the material time and that it was not true that the said Okwir was dismissed from their Audit Firm.

As regards ground 13, Counsel submitted that it ought to be struck out for contravening Rule 86(1) of the Court of Appeal Rules in so far as it is very general and does not specify any particular contradictions and/inconsistencies in the evidence of the prosecution complained about.

Counsel for the respondent submitted that in the alternative, should there be any inconsistencies, the same should be ignored for being minor and not going to the root of the case. For this submission, Counsel relied on the case of *No. 0875 PTE Wepukhulu Nyuguli Vs Uganda SCCA No. 1 of 2011*, at page 3.

Counsel submitted that there was sufficient evidence adduced by the prosecution to prove all the ingredients of the offences charged to the required standard of proof which led the trial court to convict the appellant as it did. This evidence included the evidence of PW1 Professor Omaswa, the Executive Director of ACHEST who, stated that upon getting information that the appellant was involved in fraud at his former workplace, which involved non-submission of statutory taxes like PAYE to URA and non-payment of NSSF contributions, he developed a strong suspicion that the appellant might have done the same at ACHEST. He commissioned an investigative audit which confirmed his suspicions. He also reported the matter to the Police.

Counsel submitted that from the Investigative Audit (Exhibit P38), it was established that a total of Ugx 305,638,120/= was withdrawn by the Appellant as PAYE tax yet the same was never remitted to URA. That the learned Trial Judge evaluated both the prosecution and defense evidence and rightly arrived at the verdict that the appellant was guilty in respect of count 1.

Counsel went ahead to analyze in detail the evidence of the prosecution witnesses in respect of the remaining counts with which the appellant was charged. Counsel concluded that the appellant has no basis to fault the findings of the trial judge.

Regarding the criticism of the appellant's counsel about the failure of the prosecution to tender in evidence the statement of the Investigating Officer, Counsel submitted that no injustice was occasioned to the appellant. The purpose of recording police statements is to enable the

Prosecution to analyse the evidence and come up with appropriate charges. Courts prefer the witness evidence that is adduced in court as it is tested by cross examination. For this submission Counsel relied on the case of *Chemonges Fred Vs Uganda SCCA No. 12 of 2001*.

With regard to the appellant's submissions that the trial was illegal, an abuse of the Criminal process and a derogation of appellant's right to a fair hearing and fair trial all of which rendered the whole trial void *ab initio* and entitled the appellant to be acquitted, Counsel for the respondent stated that these submissions should be struck out on the ground that they don't originate from any of the grounds of appeal as set out in the Memorandum of Appeal. For this submission, Counsel relied on Rule 86 of the Judicature (Court of Appeal) Rules and the case *of Opolot Justin and Another Vs Uganda (COA Crim. Appeal No. 155 of 2009)* where it was held that the requirement of Rule 86(1) is mandatory and not directory.

Counsel concluded by supporting the decision of the trial court.

Resolution of Grounds 9, 10, 13 and 14

The gist of the appellant's complaints in grounds 9, 10, 13 and 14 was to fault the trial judge for failing to properly evaluate the evidence before her which resulted in wrongly convicting the appellant.

The appellant was indicted with 11 Counts of the offence of Embezzlement Contrary to Section 19(b) (iii) of the Anti-Corruption Act, 30 counts of the offence of Forgery Contrary to Sections 342 and 347 of the Penal Code Act, and 62 counts of the offence of Uttering False Documents Contrary to Sections 351 and 347 of the Penal Code Act.

Right from the outset of her judgment, the trial judge rightly set out the ingredients that the prosecution had to prove in respect of each one of the 11 Counts of the offence of Embezzlement as being the following:

1. The accused was an employee of ACHEST;
2. He stole the money in issue in the respective counts;

3. The money was the property of his employer; and

4. He had access to it by virtue of his employment.

The trial judge then gave a summary of the sums of money allegedly embezzled by the appellant as set out in each of the 11 counts. Thereafter she went ahead to analyse the prosecution evidence adduced in proof of all the four ingredients in respect of each one of the 11 counts – both oral and documentary. The trial judge also considered the defence put up by the appellant in respect of each one of the 11 counts of embezzlement. Then she came to the findings that:

1. There was sufficient evidence to sustain conviction on count 1, but the amount of money proved to have been embezzled was Ugx 286,448,952/= and not Ugx 305,638,120/= as alleged.

2. There was sufficient evidence to sustain the embezzlement charges in counts 2 to 7.

3. There was no sufficient evidence to sustain a conviction on count 8.

4. There was sufficient evidence to sustain the embezzlement charges in counts 9 to 11.

We have carefully reviewed the evidence in respect of the conviction of the appellant for charges in count 1 namely: embezzlement of Ugx. 286,448,952/= which was deducted from ACHEST staff salaries as P.A.Y.E but not remitted to URA by the appellant. The prosecution's evidence in proof of the Count 1 consisted of:

1. The letter appointing the appellant as ACHEST's Manager of Finance and Administration and tendered into evidence as exhibit P1.

2. The payrolls, vouchers, bank statements and Waste cheques which were retrieved from Bank of Baroda and tendered into evidence as exhibits P4 to P15.

3. The forged URA payment receipts which were tendered into evidence as exhibit P32.

4. URA report compiled by PW13 Protazio Begumisa and tendered into court as exhibit P39.

5. The handwriting expert's report tendered into court by PW10 Ezati as exhibit P38.

6. The oral testimony of PW1 Prof. Omaswa.
7. The oral testimony of PW5 Wokadala Grace.
8. The oral testimony of PW10 Ezati.
9. The oral testimony of PW13 Protazio Begumisa.

We are satisfied with the trial court's detailed evaluation of the above evidence whose net effect was that the prosecution proved to the prescribed standard that on diverse dates between May 2009 and August 2011 the appellant by virtue of his employment as the Manager of Finance and Administration of ACHEST withdrew cash from ACHEST's account in Bank of Baroda totalling to Ugx 286,448,952/= intended for payment of PAYE taxes of ACHEST staff but did not remit it to URA.

We have also carefully reviewed the evidence in respect of the conviction of the appellant for the embezzlement charges in counts 2 to 7 and 9 to 11. The trial judge likewise set out in detail how the appellant employed more or less the same scheme of withdrawing funds from ACHEST's bank accounts and claiming to make payments in respect of the NSSF contributions of Ugx 36,000,000/=, taxi hire services, consultants' fees, staff salaries and air tickets whereas no such payments were in fact made to the intended payees. The full particulars of the intended purpose/person of each payment was set out in the payment vouchers of ACHEST and reproduced in each respective count 2 to 7 and 9 to 11. The trial judge went to great length to set out the intended purpose and payee of the respective payments, the details of the cheque used to withdraw the cash, the dates of the withdrawals and the sums proved as embezzled by the appellant in each of counts 2 to 7 and 9 to 11. We therefore find that the trial judge properly analysed the evidence before her and cannot be faulted for convicting the appellant for the embezzlement charges in counts 2 to 7 and 9 to 11.

In his submissions, Counsel for the appellant Counsel contended that the Bank Cheques and all the other bank documents tendered in evidence by the prosecution were inadmissible for

violating the law as set out in Section 225 of the MCA in so far as there was no DPP and Police involvement in obtaining them.

In his testimony, the Investigating Officer, Detective Inspector of Police (D/IP) Mapeera David, stated that he obtained the bank cheques and the other documents from Bank of Baroda after obtaining a Court Order and presenting it to the bank. The Court Order and Affidavit in support of the application for the Court Order were tendered in evidence as exhibit P40.

We have examined Exhibit P40. The Court Order to inspect and take documents /copies of any entries in the books of Bank of Baroda, Kampala Main Branch in respect of ACHEST's Account No. 95010200001697 was issued on 10th November 2011 by the Magistrates Court at Buganda Road Court pursuant to Section 6 of the Evidence (Bankers' Books) Act, Cap.7. The said Section provides as follows:

> *"6.* ***Court or judge may order inspection, etc.***
>
> *(1) On the application of any party to a legal proceeding, a court may order that the party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of those proceedings.*
>
> *(2) An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before it is to be obeyed, unless the court otherwise directs."*

The waste cheques tendered in evidence were in original form. They were properly admitted in evidence by the trial court pursuant to Section 63 of the Evidence Act, Cap.6. The Bank Statements tendered in evidence in court were Certified Copies and admissible in evidence pursuant to Section 2 of the Evidence (Bankers' Books) Act, which provides as follows:

> ***"2. Mode of proof of entries in bankers' books***
>
> *"Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of that entry, and of the matters, transactions and accounts recorded in it."*

With regard to the 30 counts of the offence of Forgery Contrary to Sections 342 and 347 of the Penal Code Act, the trial judge likewise correctly set out the ingredients of the offence early in her judgment as follows:

1. Making a false document;
2. The document must have been made with the intent to defraud or deceive;
3. The accused must be proved to have participated in the making of the document.

The subject matter of the 30 counts of the offence of forgery consists of cheques which can be categorized as follows:

1. The cheques comprised in exhibits P4 to P15 which the trial court rightly found as having been used by the appellant to embezzle the PAYE tax funds under Count 1.
2. The cheques comprised in exhibit P21 which relate to NSSF contributions which the trial court rightly found as having been embezzled by the appellant under Count 2.
3. The cheques and accountability documents comprised in exhibit P23 which relate to consultancy fees which the trial court rightly found as having been embezzled by the appellant under count 7.

We have carefully reviewed the evidence relied upon by the trial judge to convict the appellant of the offence of forgery as charged. We are satisfied that the trial judge likewise evaluated the documents and testimonies of witnesses and properly came to the conclusion to convict the appellant as charged.

In his submissions, the appellant contended that the prosecution failed to prove the offence of forgery in so far as the evidence before the trial court proved that all the cheque leaves presented to the bank for cashing were from cheque books issued by Bank of Baroda, and that the bank confirmed their genuineness whenever presented by the appellant by running the cheques through ultraviolet light and making telephone calls to the principal signatory, Prof. Francis Omaswa, before effecting cash payment to the appellant. We have examined the trial court

record. The real contest about the cheques that rendered them false documents was the signature attributed to Prof. Omaswa which was appended to each one of the cheques in issue. Prof. Omaswa denied the said signatures and he was believed by the trial judge. Even the handwriting expert, PW10 Ezati Samuel, in his Report exhibited as P38 confirmed that the signatures were forged. Lastly, the Chief Manager of Bank of Baroda, DW4 Ranvijay Singh testified that the procedure of the bank ringing the account signatories before honouring the cheques presented was introduced by the bank after he joined the bank in August 2013. By that time, the cheques in issue in this matter had already been cashed by the appellant.

As regards the 62 counts of the offence of Uttering False Documents Contrary to Sections 351 and 347 of the Penal Code Act, the trial record reveals that the subject matter of the said counts consisted of:

1. The cheques which were the subject of the embezzlement charges in counts 1 – 11 and the forgery charges for which the trial judge convicted the appellant.
2. The accountability receipts constituting exhibits P24 and P51.
3. URA receipts in Exhibit P32 and P47.

We have carefully reviewed the evidence that was adduced before the trial court in respect of the offence of Uttering False Documents Contrary to Sections 351 and 347 of the Penal Code Act. We are satisfied that the trial judge properly evaluated the evidence and applied the law to it and came to the right decision to convict the appellant of uttering false documents as charged.

Counsel faulted the investigative audit for having been commissioned by the Executive Director of ACHEST instead of the Board of Directors as provided by Article 6(b)(3) of the Articles of Association of ACHEST. That neither was it authorised by the General Meeting of ACHEST in accordance with the mandatory provisions of the Companies Act.

Further, that the investigation was carried out by Mr. Martin Nelson Okwir who had no practicing license issued to him by the Institute of Certified Public Accountants in Uganda which was in breach of S.20(1) and (2),27,34, and 53(2) of the Accountants Act, Cap 266.

We have re-examined the grounds of appeal in the context of the above complaints. The complaints are completely alien to the grounds of appeal as set out in the Memorandum of Appeal. Under Rule 74(a) of the Rules of this court, the appellant is barred from arguing any ground which is not specified in the Memorandum of Appeal without prior leave of the court. In the instant case, neither such leave was sought nor granted.

The aforesaid notwithstanding, we have reviewed the Audit Report of Ms Carr Stanyer Sim and Co. which was exhibited as P26 and considered it alongside the testimony of the Managing Partner of Ms Carr Stanyer Sim and Co., DW3 John Christopher Mpalampa. DW3 Mpalampa testified that it was he that signed the Audit Report (Exhibit P26). There is no complaint that DW3 Mpalampa was neither licensed nor incompetent to sign the Report.

DW3 Mpalampa, testified that as a firm, they work as a team. That the other persons with whom he worked to produce the Audit Report were Martin Okwi (PW12) and Samson Bwaya. He confirmed that at the time material to the audit, the firm had a valid license issued to it by the Institute of Certified Public Accountants in Uganda. This fact was also confirmed by the Secretary of the Institute of Certified Public Accountants in Uganda, DW2 Derek Nkajja.

In the premises, the complaints about the legality of the Audit report lack merit.

The aforesaid notwithstanding, the record shows that the trial judge focused on the source documents themselves (waste cheques, bank statements, vouchers and receipts) and not the audit report, to convict the appellant.

The other complaint raised by the appellant in his submissions on grounds 9, 10, 13 and 14 is that the trial was a clear case of abuse of the criminal process to persecute and execute a personal vendetta of Prof. Omaswa against the appellant and was a derogation of appellant's

right to a fair hearing and fair trial which rendered the conduct of the whole trial void *ab initio* and entitles the appellant to be acquitted.

As was the case with the immediately preceding complaint, this complaint appears to be an afterthought as it was not set out in the Memorandum of Appeal. Neither was leave obtained from this court by the appellant under Rule 74(a) of the Rules of this court, to present it. It was simply set out in the written submissions of the appellant. It has no basis in the evidence before the trial court.

In the premises, grounds 9, 10, 13 and 14 fail for lack of merit.

GROUND 3

Ground 3 *was couched as follows: -*

The learned trial Judge erred in law and fact to convict the Appellant without Police Statements and Charge and caution statements being adduced in evidence before court.

In his submissions on this ground, Counsel for the appellant criticised the Investigating Officer, PW 11 D/AIP David Mapera, whom he termed to as the "supposed Investigative Police Officer and only police officer who testified", for having no Police Statement of his on record when he testified on 28/6/2016. Further, that he also never exhibited any Charge and Caution Statement at all. But that it was only when the Defence asked him for his Police Statement that the same was tendered as Defence Exhibit D9 because the Prosecution had dodged doing so.

Counsel also attacked the testimony of PW11 in Court to the effect that he did not know the ingredients of the offences he was investigating. According to Counsel, the admissions as to ignorance raised doubt as to what the witness was investigating which should have been resolved in the Appellant's favour.

In reply, Counsel for the respondent submitted that there is no legal requirement that for a witness to testify in Court, he or she ought to have recorded a statement at police. Furthermore, there is no time limit within which a witness statement can be recorded.

That whereas it is desirable that witnesses record statements during investigations, these statements are a mere guide on the nature of the evidence the prosecution intends to rely on. They cannot be considered as substantive evidence (i.e. evidence of facts stated therein), as such statements are neither made during trial nor given on oath, or tested by cross examination. That the Courts will always prefer the witness evidence that is tested by cross examination. For this position, counsel referred to the case of *Chemonges Fred Vs Uganda*, *Supreme Court Criminal Appeal No. 12 of 2001*.

Counsel therefore submitted that by the Investigation Officer (PW11) recording a police statement shortly before testifying in Court, it did not affect the credibility of his evidence since he was subjected to cross examination by the defence. The police statement was not substantial evidence. Furthermore, the prosecution determines the evidence to rely on to prove the guilt of an Accused person.

It is not true that a trial court cannot convict an accused person without Police Statements and Charge and caution statements being adduced in evidence before the court. The Supreme Court stated in the case of *Chemonges Fred Vs Uganda, (Supra)* that the court will always prefer the witness' evidence adduced in court under oath which is tested by cross-examination over the police statement. In the instant case, there was sufficient documentary evidence tendered before the trial court by the prosecution to enable it to discharge its burden of proof as we discussed in detail when resolving grounds 9,10,13 and 14.

We also accept the respondent's submissions that in the context of this case, the Police Statements were largely to enable the prosecution to identify the appropriate criminal charges to prefer against the appellant and the defense to have a picture of the evidence to be produced against it during the trial in order to prepare an appropriate defence. Ground 3 accordingly fails.

GROUND 6

Ground 6 was couched as follows: -

The learned trial Judge erred in law and fact when she proceeded to make judgment without considering the appellant's submissions in his defence which were filed, stamped and received by the Court Registry.

In his submissions on this ground, Counsel for the appellants stated that whereas the appellant's submissions were filed, stamped and received by the Court Registry on 25/8/2017, the trial judge in the evaluation of both the prosecution and defence evidence, never made any mention of the Appellant's submissions. That this denied the Appellant a fair hearing which is non-derogable under Article 28(1)(3) and 44(c) of the Constitution. That it was greatly prejudicial to the Appellant who, as a prisoner on remand all that time, was entitled to be heard in his defence.

Counsel invited this Court to find that the failure to consider the Appellant's submissions prejudiced him greatly.

In reply, Counsel for the respondent submitted that while the said submissions were not referred to in the judgment of the trial court, they were not binding on the Court and would have only been persuasive. That the Court still has a duty to evaluate the evidence on record and cannot be bound by submissions.

In the alternative, Counsel for the respondent submitted that the failure to consider the submissions did not occasion any miscarriage of justice because the evidence was evaluated by the Trial Judge as a whole and his right to a fair hearing was not derogated.

We note that the appellant's written submissions were filed in the court registry on 25/8/2017. But nowhere in the judgment did the trial judge make reference to them or, at the very least, acknowledge their filing. Submissions, if well researched and written by counsel, may greatly assist court in the dispensation of justice. It is a good practice for the court to acknowledge the filing of the submissions of counsel or lack of it. And where, after perusing them, court finds the

submissions irrelevant or not helpful, it should not hesitate to state so. However, in the instant case, no injustice was occasioned by the failure of court to consider the submissions of the parties. Ground 6 accordingly fails.

GROUND 7

Ground 7 was couched as follows:

The learned trial Judge erred in law and fact when she applied two different enactments of the Penal Code Act and the Anti-Corruption Act to punish the Appellant for an offence that arises from one set of facts.

In his submissions on this ground, Counsel for the appellant faulted the trial judge for punishing the appellant for different offences created by two different enactments and yet they all arose from the same set of facts. Counsel submitted that the two laws were deliberately enacted to govern two different legal regimes. That the conjoining of the two sets of legal regimes, to punish the Appellant for an offence that arises from one set of facts was prejudicial and undermined the right to a fair trial required by Article 28(1)(3) and 44(c) of the Constitution and that it also undermined the requirements for a fair, speedy trial before an impartial Court of law or tribunal.

Counsel for the respondent did not agree. She submitted that the Appellant was charged under S.19(iii) of the Anti-Corruption Act as well as Sections 342 and 347, 351 and 347 of the Penal Code Act. That the offences for which the appellant was charged were properly based on the 2 laws cited above and there was no duplicity of charges or injustice occasioned to the appellant.

The different offences for which the appellant was indicted, tried, convicted and sentenced were the following:

1. Embezzlement contrary to Section 19(b)(iii) of the Anti-Corruption Act;
2. Forgery contrary to Sections 342 and 347 of the Penal Code Act; and
3. Uttering False Documents contrary to Sections 351 and 347 of the Penal Code Act.

Charging different offences arising from the same facts (otherwise termed as "Joinder of offences") in the same indictment is provided for by Section 23 of the Trial on Indictments Act in the following terms:

> ***"23. Joinder of counts***
>
> *(1) Any offences, whether felonies or misdemeanors, may be charged together in the same indictment if the offences charged are founded on the same facts or form or are a part of a series of offences of the same or a similar character.*
>
> *(2) Where more than one offence is charged in an indictment, a description of each offence so charged shall be set out in a separate paragraph of the indictment called a count.*

The different offences for which the appellant was tried were founded on the same facts despite being creatures of two different laws, the Penal Code Act and the Anti-Corruption Act. Joinder of such offences is permissible under S.23 of the TIA. The indictment set out the different counts specifying the different offences with which the appellant was charged, together with the particulars of each offence as was necessary for giving the appellant reasonable information as to the nature of the offences charged as prescribed by S.22 of the TID. The joinder of the offences did not in any way prejudice the trial of the appellant. And neither did it occasion any injustice in the terms of the sentences passed against the appellant as will be shown when resolving grounds 4 and 5. Ground 7 accordingly fails.

GROUNDS 4 and 5

Grounds 4 and 5 were couched as follows:

Ground 4 - The learned trial Judge erred in law and fact when taking into account the four years spent on remand harshly and excessively sentenced the appellant to 18 (sic) years imprisonment.

Ground 5 - The learned trial Judge erred in law and fact when she gave the appellant an ambiguous sentence that is incapable of being attributable [sic] to any one interpretation.

In his submissions on grounds 4 and 5, Counsel for the appellant stated that the appellant was sentenced to 18 years' imprisonment after he had been on remand for 4 years and two weeks. That the sentence was extremely harsh and excessive and amounted to life imprisonment because at the end of the imprisonment term the Appellant will have been in prison for a total of 22 years and two weeks.

Counsel submitted further that the sentence was ambiguous and that the Prison authorities failed to interpret it. That such a sentence contravened the Constitution, the law and the judicial guidelines on sentencing.

Counsel prayed that this court upholds the Appellant's submission on grounds 4 and 5.

In reply, Counsel for the respondent submitted that the sentence handed to the appellant was neither manifestly excessive nor illegal to necessitate the intervention of the appellate court. For this submission, Counsel referred to the case of *Hudson Jackson Andrua & Anor SCCA No. 17 of 2016,* in which the Supreme Court reiterated the grounds upon which an appellate court can interfere with a sentence imposed by the trial court.

Counsel argued that in any case, the appellant was sentenced to a total of 9 years and not 18 years as argued by the appellant in his submissions. And that the sentence was arrived at after the learned trial Judge considering both the aggravating and mitigating circumstances of the case.

Counsel for the respondent denied that the sentence was ambiguous as claimed by the appellant. She concluded by praying that we dismiss grounds 4 and 5 of the appeal.

The sentencing proceedings of the trial court indicate that after considering the period spent on remand, and the mitigating and aggravating factors raised by the parties in their submissions, the trial judge went ahead to sentence the appellant in the following terms:

> *"1. On count one (embezzlement of 286,448, 952) I would have sentenced him to 12 years, but since he has been on remand for four years, I reduce the sentence by the four-year remand period and sentence him to* ***8 years' imprisonment.***

2. Counts 2 to 7 and 9 to 11 (embezzlement) I still reduce the sentences from 10 years which I would have given for each count by four years spent on remand and sentence him to 6 years' imprisonment on each of those counts. ***The sentences in counts 2 to 7 and 9 to 11 are to be served concurrently among themselves.***

3. In respect of forgery in counts 12 to 36 and 40 to 76, he is sentenced to 2 years' imprisonment on each of those counts.

4. In respect of uttering false documents in counts 13 to 77 and 78 to 84, and 86 to 103, he is sentenced to 2 years' imprisonment on each of those counts.

The sentences in counts 12 to 36, 40 to 76, and counts 13 to 77, 78 to 84, and 86 to 103 are to be served concurrently among themselves.

Orders.

1. *Under Article 126 of the Constitution and Section 126 of the Trial on Indictments Act the accused is ordered to pay compensation of Ugx 457,677,347/= and USD 197,565 to the victim Organisation.*

2. *Any monies that were deposited in court as cash bail should be paid to the victim organization as part of the compensation, and the amount of money payable in compensation should be reduced by that amount."*

The appellant's first complaint about the custodial sentence is that it is ambiguous and liable to different interpretations. Section 2 of the Trial on Indictments Act provides for the sentencing power of the High Court in the following terms:

"***2. Sentencing powers of the High Court***

1) *The High Court may pass any lawful sentence combining any of the sentences which it is authorized by law to pass.*

2) *When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her to the several punishments prescribed for them which the Court is competent enough to impose, those punishments, when consisting of imprisonment, to commence one after the expiration of the other in such order as the Court may direct, unless the Court directs the punishments to run concurrently.*

3) *For purposes of appeal, the aggregate of consecutive sentences imposed under this section, in the case of convictions for several offences at one trial, shall be deemed to be a single sentence."*

In the instant case, the Trial Judge clearly stated the sentences for each count and indicated which particular sentences would run concurrently. In the terms of Section 106(2) of the TIA, the sentences commence on the date of the conviction. The complaint that the sentence is ambiguous is baseless. Ground 5 accordingly fails.

The appellant's second complaint about the sentence is that it is harsh and manifestly excessive in the circumstances. In dealing with this complaint, we have been mindful of the often quoted dicta below:

> *"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts which a Judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice: Oglala s/o Owoura Vs R. (1954)1 E.A.C.A. 270 and R. Vs Mohamedali Jamal [1948]1 E.A.C.A 126."*

The sentences imposed by the trial court in the instant matter were within the sentencing range prescribed by law. Section 19 of the Anti-Corruption Act provides for a maximum sentence of 14 years for embezzlement. The trial judge considered the remand period and the mitigating and aggravating factors. She then imposed 8 years' imprisonment in respect of the 1st count of embezzlement after deducting the remand period of 4 years. She also sentenced the appellant to 6 years' imprisonment on each of the counts 2 to 7, and 9 in respect to the offences of Embezzlement. The sentences for counts 2 to 7, and 9 were to run concurrently among themselves. However, the trial judge was silent about the relationship between the sentence in respect of the 1st count and the sentences for the other counts, especially counts 2 to 7, and 9 all of which relate to embezzlement. The implication of this silence is that in terms of S.2 of the TIA, the 6-year concurrent term for counts 2 to 7, and 9 commences after the expiration of the 8-year imprisonment term for count 1.

In practical terms, the appellant would be in prison for an additional total of 14 years from date of conviction for the offence of embezzlement as set out in counts 1, counts 2 to 7, and count 9. According to the case of *Rex Vs Sawedi Mukasa S/O Abdallah Aligwaisa, Criminal Appeal*

No.182 of 1945, [1946] EACA 1, the practice of the courts in cases where an accused is convicted of a series of counts/offences arising from the same transaction has been to direct the sentences to run concurrently. This was not done in respect of Count 1 which rendered the sentence rather harsh and manifestly excessive.

On this basis, the appellant's complaint is justified.

As for the sentence of 2 years' imprisonment for the offences of Forgery as set out in counts 12 to 36 and 40 to 76, it was well below the maximum sentence of 3 years' imprisonment and within the sentencing range.

As regards the sentence of 2 years' imprisonment for the offences of Uttering False documents in counts 13 to 77, 78 to 84, and 86 to 103, it is likewise below the prescribed maximum sentence of 3 years' imprisonment and within the sentencing range.

As for the compensatory order, the trial judge indicated its basis. There is no reason to fault her.

In the premises, ground 4 partly succeeds while ground 5 fails.

FINAL DECISION AND ORDERS

1. The conviction of the appellant by the High Court is hereby confirmed.
2. The Custodial sentences imposed by the High Court are hereby upheld subject to only one condition namely, that all the sentences shall run concurrently with effect from the 04th of November 2017 the date of conviction. In the terms of S.106 (3) of the TIA, any period after the date of conviction during which the appellant has been on bail pending appeal shall be excluded from the computation of the sentences.
3. The compensatory orders of the trial court are likewise upheld.

We so order.

Signed, dated and delivered this 1st day of April 2022

KENNETH KAKURU
Justice of Appeal

MUZAMIRU MUTANGULA KIBEEDI
Justice of Appeal

IRENE MULYAGONJA
Justice of Appeal