THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

HIGH COURT CRIMINAL APPEAL NO. 3 OF 1995

EMMANUEL ZIRAGUMA……. APPELLANT

VS

UGANDA……..RESPONDENT

BEFORE: V.F. MUSOKE-KIBUUKA (JUDGE)

Reasons For Order Allowing Appeal

Emmanuel Ziraguma was the appellant in Criminal Appeal No. 3 of 1995. He was charged with the offence of embezzlement contrary to section 257(b) of the Penal Code Act. In the alternative, he was charged with the offence of causing financial loss, contrary to section 258(1) of the Penal Code Act. There were forty nine counts in respect of those two offences.

Furthermore, the appellant was charged with the offence of false accounting, contrary to section 305(a) and (b) of the Penal Code Act. There were forty-eight counts, with regard to that offence.

At the closure of a protracted trial, stretching well over one and a half years, on 24.2.95, the appellant was convicted against a total of forty-seven counts of the offence of causing financial loss c/s 259(1) of the Penal Code. He was sentenced to three years imprisonment in respect of each count of ihat offence. All sentences were to run concurrently. Similarly, the appellant was convicted against forty-seven counts of the offence of false accounting c/s

305(a) and (b) of the Penal Code Act. He was sentenced to two years' imprisonment, on each count. The sentences were also to run concurrently.

The appellant was ordered, under section 259 of the Penal Code, to compensate UCB, Kisoro Branch Shs. 6,079,010 .
After being sentenced, the appellant opted to appeal against conviction, in respect of both offences. But at the same time, the appellant opted to begin serving his sentences immediately.

Although the appeal was filed in the High Court Registry at Mbarara on 24' August 1995, owing to the absence of a resident judge at the station at the time, the appeal was not heard until after nearly a year and a half afterwards. After hearing the appeal, this court made an order quashing the conviction of the appellant on all counts under both the provisions of the Penal Code under which he had been charged. The sentence on each count was set aside. So was the order required the release of the appellant from custody.

Reasons for the order were to be deposited afterwards. But about the same time or soon afterwards, the appellant reported to court that he had served out his sentence and he had been released from custody. The order thus became partly moot and the file was kept out of the streamline as a result. I now briefly deposit the reasons for the order as a matter of course and for the compilation of the file.

The memorandum of appeal had six grounds in it. I will not set them out in this very brief judgement. Mr. Kwizera, for the appellant, dropped ground no.6 and argued each of all the remaining five grounds separately. Mr. Wagona, who appeared for the state, responded to the submissions of Mr. Kwizera in a similar order.

I will, very briefly analyse the submissions of counsel, on each side, in relation to the two offences of which the appellant was convicted. I will begin with the submissions relating to the offence of fraudulent false accounting contrary to section 305 of the Penal Code.

The objection to the conviction under section 305 of the Penal Code Act, was contained in

ground number 3 in the Memorandum of Appeal. It read as below:
"3. The learned trial Chief Magistrate erred in law and misdirected himself when he purportedly convicted the appellant of the offence created by section 305(c) for which he had not been charged, when the same was not a minor and cognate offence to section 305(a) and (b) under which the appellant had been charged and as a result, rendered the conviction a nullity at law."

It was not in dispute that in the charge-sheet the appellant was charged with the offence of fraudulent false accounting contrary to section 305(a) and (b) of the Penal Code Act. The learned trial Chief Magistrate concluded that the case of fraudulent false accounting had been proved beyond reasonable doubt against the appellant. He stated at P.46 of the judgement:

"On the offence of fraudulent and false accounting, this was admitted by the accused person as how he did not make entries on the various till sheets as even proved, so he is found guilty and convicted under section 305 (C) of the Penal Code though the charges were brought under section 305 (a) and (b) of the Penal Code."

In his submission, learned counsel, Mr. Kwizera attacked the learned judge's conclusion upon two separate fronts. First, Mr. Kwizera argued that the learned Chief Magistrate misdirected himself when he assumed that by admitting, in his defence, that he had omitted to make entries of the money deposited by the various customers into the teller sheets, the appellant had admitted the commission of the offence of fraudulent and false accounting. Secondly, Mr. Kwizera attacked the decision of the learned trial Magistrate to convict the appellant of the offence created by section 305 (c) of the Penal Code when the appellant had been charged with offences created under section 305 (a) and (b), of the Penal Code Act. Mr. Kwizera pointed out that there had been no amendment to the charge-sheet and that the offence under section 305 (c) was not a minor or cognate offence to the offence created by section 305 (C) of the Penal Code. Convicting the appellant under a provision of the law under which he had not been charged and of an offence the ingredients of which had not been explained to the appellant, was, in learned counsel view, a gross misdirection which had caused a miscarriage of justice.

Like Mr. Kwizera, learned counsel, Mr. Vincent Wagona, who appeared on behalf of the DPP, did not support the convictions and sentences against the appellant, under section 305 (C) of

the Penal Code Act. Mr. Wagona agreed with the objections raised by Mr. Kwizera against the conviction. He conceded that the conviction could not be sustained and that the misdirection by the learned trial Magistrate could, in the circumstances, have caused a miscarriage of justice.

It is, indeed, a well established principle which was enunciated by the Court of Appeal for East Africa in Murim Vs Republic (1967) E.A. 542, that an appeal court will not reverse a conviction on account of any error by a trial court unless the error has in fact occasioned a failure of justice.

I duly agree with the arguments put forward by Mr. Kwizera. In the instant appeal, the appellant had been charged under section 305(a) and (b) of the Penal Code Act. The essential ingredients of the offences created under those two provisions of the law, are quite different from those of the offence created under section 305 (c) of the Penal Code under which the appellant was convicted. It is obvious in the circumstances that the appellant was convicted of an offence to which he had not been called upon to plead. The charge-sheet should have been amended to give him an opportunity to do so. He should also have been given an opportunity to cross-examine the witnesses of the prosecution in light of the ingredients of the new offence. The omissions in those two aspects, in my view caused a serious miscourage of justice and the conviction could not stand. See Erasto Bitamazire Vs Uganda, H/C Criminal Appeal No. 641 of 1968 and Fransisko Okebe Vs Uganda, H/C Criminal Appeal No. 600 of 1967 (cases in criminal procedure, vol. 2, LDC publications at P.86)

For those reasons, ground number three of the memorandum of appeal succeeds. The conviction of the appellant, of the offence of fraudulent false accounting c/s 305 (c) of the Penal Code Act, in respect of all the 48 count that offence ought to be set aside and it is. So are the 48 sentences of two years in respect of each count.

In respect of the offence of causing financial loss to the bank, contrary to section 258(1) of the Penal Code, which was covered by the rest of the grounds of appeal in the memorandum of appeal, the essence of the submissions by learned counsel, Mr. Kwizera was that the evidence which was produced by the prosecution did not prove the offence of causing financial loss against the appellant beyond reasonable doubt.

It is a general rule of criminal procedure that an accused person can only be convicted on the basis of the strength of the evidence adduced by the prosecution at that person's trial. Never can an accused person's conviction be based upon the weakness of his or her defence. R.V. Israel Epuku s/o Achietu (1934)1 EACA 166. In addition, as a general rule of law, the burden of proving the guilt of a prisoner beyond reasonable doubt lies upon the prosecution and never shifts to the defence at any time during a criminal trial.The burden of proof always rests upon the prosecution to prove the case beyond reasonable doubt. Ssekitoleko Vs Uganda *(1967)* E.A. 531.

Similarly, it is trite law that for the prosecution to be said to have proved the case against an accused person beyond reasonable doubt, the evidence produced during the trial must be such as proves each of the essential ingredients of the offence charged. If the evidence does not prove, beyond reasonable doubt, any of the essential ingredients of the offence charged, then the trial court must draw the conclusion that the prosecution has not proved the case beyond reasonable doubt. Indeed, it is always the evaluation process that leads to the appropriate conclusion whether or not the prosecution has proved its case against an accused person beyond reasonable doubt. Pandya Vs R. (1957) E.A. 336. As a first appellate court, I will do that but in a very brief manner in this case.

The essential ingredients of the offence of causing financial loss contrary to section 25 1(1) of the Penal Code Act, were very clearly stated and discussed by the Supreme Court of Uganda in Kassim Mpanga Vs Uganda Supreme Court Criminal Appeal No. 30 of 1994, (unreported). From the decision of the Supreme Court in that case, there appears to be three essential ingredients of the offence of causing financial loss c/s 258(1) of the Penal Code:
a) There must be an act or omission on the part of the accused person;

b) The accused must have had knowledge or reason, to believe that the act or omission would cause financial loss to his or her employer; and

c) Financial loss must have been caused to the employer.
In the instant case, there is evidence of the witness from Pw1 to Pw2 which clearly shows that while working as a cashier at UCB, Kisoro Branch, the appellant received different sums

of money from different customers of the bank (the witnesses). The money was for depositing in the savings accounts of those witnesses. The appellant, in each case, received the money, signed the banking slips and passed on the banking slip and passbook to the ledger keeper. The evidence also showed that the appellant did not reflect the amounts in the respective till sheets. Though the amounts deposited were reflected in the various passbooks, the appellant, in his own evidence during his defence, admitted that he received the money on behalf of the bank and that following instructions from the manager and the accountant of the branch, he did not enter the various amounts into the till sheets on the respective days on which the deposits were made.

It appears to me that on the basis of the above evidence, the learned trial Chief Magistrate was justified to conclude that the first essential ingredient of the offence of causing financial loss had been proved beyond reasonable doubt. The appellant did deliberately omit to reflect the various amounts of money received by him, as a cashier of the bank, in the till sheets of the days on which the money was received, according to him, because he had been instructed by the manager and accountant of the branch do so to omit.

But an evaluation of the evidence on record, in respect of the second and third essential ingredients of the offence of causing financial loss, clearly leads to the inevitable conclusion that those essential ingredients were not proved beyond reasonable doubt.

The crucial aspect of the evidence is the fact that there was no direct evidence leading to the conclusion that the appellant took the money which was not reflected in the bank books for his personal use. If there had been such evidence, then knowledge or reason to believe that the money would be lost would have been properly attributable to him. The appellant was not responsible for reflecting the amounts of money received by him in the ledger cards of the various persons who deposited the money on the accounts. He was, similarly, not responsible for reflecting those amounts in the scroll book. Both the ledger keeper and the scroller, who were available to the prosecution, and who were crucial witnesses, were not called to testify. If they had been called, they would have cleared the air by stating why each of them committed to reflect those amounts in the ledger cards and in the scroll as their duties required and when the evidence clearly showed that each pass book and the respective banking slip had been stamped by the appellant and transmitted behind the counter, presumably to the ledger clerk. The failure to call both the ledger clerk and the scroller, in my view should have led the trial court to drawing the conclusion that the evidence of those two

most relevant witnesses would have been adverse to the prosecution's case. Bukenya Vs Uganda (1972)E. A. 549. Clearly, the prosecution called inadequate evidence in relation to the crucial aspect of why the money was not reflected in the books of the bank. The evidence of the ledger clerk and that of the scroller would have been valuable in that respect.

The influence to be drawn from the failure to call those two crucial witnesses strengthens the defence put forward by the appellant that the branch manager and the accountant had, indeed, instructed him to omit reflecting those amounts in the till sheets and that the accountant used to collect the money from the appellant on behalf of the manager and that to the appellant it looked as if it was an internal management arrangement even though he thought it was not a proper banking arrangement. That was why he sought to protect himself by obtaining from the manager some kind of authority chits or vouchers in respect of some of the amounts of money forming the subject of the case.

The learned trial magistrate appears to have accepted the evidence of the appellant to the effect that the omission to record in the till sheets amounts of money in question was not entirely his own idea. The fact that the learned trial magistrate convicted the appellant under section 258 (1) and section 21 of the Penal Code Act is indicative of that acceptance knowledge that financial loss would occur was a specific element of the offence of causing the finding by the court that the appellant had blindly obeyed his superiors in the bank. But that fact alone could not prove "knowledge" or "reason to believe" that financial loss would occur to the bank. The evidence required to prove that essential ingredient must be concrete and positive.
The gist of the prosecutions case was all along that the appellant had taken the money for his own use and in doing so he ought to have known that financial loss would occur to the bank. But after the trial magistrate had found differently, he was under obligation to analyse the evidence to ensure that all the essential ingredients of the offence had been proved beyond reasonable doubt.

The learned trial magistrate appears to have attached undue emphasis upon the fact that the appellant had retained debit vouchers from the scroller in respect of some of the suppressed amounts. He wrongly drew the conclusion that, owing to that fact, the appellant had had knowledge or reason to believe that financial loss would result. He also wrongly concluded

that there had been embezzlement and financial loss without bothering to establish whether or not the evidence had proved all the essential ingredients of those offences. The learned trial magistrate wrote:

"The accused person says that it was an arrangement between him and his bosses so to act. "At the end of the day because he (scrolls) would not have Put it in the scroll he would total up the deposits so taken and give me a debit voucher and take the money while I retain the voucher. At other times they used to take the money even without giving me such vouchers. What prompted me to keen these vouchers was because I knew they were doing something, which was not proper, which would at one time get me into trouble. So I kept these and other vouchers. I knew what they were doing was not proper. As these were bosses and there was no way I could report on them, I started seeking for a transfer since 1989.'

From the above, the learned that chief magistrate appears to have concluded as below:

"Thus from the above, it is clear that money was embezzled. Financial loss is likely to transmit to the bank which must pay out to its customers money it never received and there are actual fraudulent accounting under S. 305 (c) of the Penal Code."

On page 11 of the judgement ,of the learned magistrate wrote further, "Analysing the evidence carefully and mindful of the burden of proof which always lies on the prosecution to prove the case beyond reasonable doubt, the standard of proof being as was set out in the case of Miller Vs Minister of Pensions (1947) & All E. R. 372, court must come out with a decision as to whether the accused did actually embezzle the money by himself or enabled others to do so hence liable under S.21 of the Penal Code; or alternatively, if any of his acts amounted to an offence under S. 258(1) of he Penal Code Act. As evidence has revealed our record clearly, there was embezzlement of the money due to the acts of the accused person and he is liable as such.

Concerning causing financial loss I again find this charge established and the accused person equally liable.

Since these offence are in the alternative, court has to come out and convict the accused with the most likely of those offences.

As the accused admits his actions of suppressing the accounts and his acts having actually or likely to actually lead to loss by the bank financially the most appropriate offensive to convict the accused of in these circumstances is the alternative of causing financial loss to the bank c/s 258 (1) of the Penal Code Act". (emphasis is mine). In my view, the trial magistrate drew a blanket conclusion, which, in my view, did not pay proper regard to the need for every essential ingredient of the offence charged to be proved beyond reasonable doubt. With due respect, the court simply engaged in more speculation as to what offence the appellant ought to have been convicted. Thus, the court itself appears to have been uncertain about the proof of the offences charged. From the two abstracts, which I have set out above, and indeed from the evidence set out on the record of the trial, it is inevitable to conclude that the essential ingredient of financial loss having actually occurred was not proved.

The learned trial magistrate appeared to me to have been conscious of the absence of concrete evidence proving financial loss to the bank. He merely engaged in speculation when he stated that financial loss was likely to result. The bank official who testified during the trial did not state that the bank had lost money or that it had any arrangement to pay the various customers whose deposit had not been recorded in the bank books. Their views were, generally, that the appellant had taken the various customers' money and that appellant should pay it to them. The prosecution produced no evidence justifying the compensation order made by the trial magistrate under section 259 of the Penal Code Act.

I must, therefore, conclude that grounds one, two and six must also succeed. The conviction of the accused in respect of both counts ought to be set aside. Equally set aside was the order of compensation of 6.079.010/= any money paid by the appellant in relation to that order of compensation under section 259 was to be returned to the appellant.

V.F.MUSOKE KIBUUKA
JUDGE.
29/6/2002