

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CRIMINAL APPEAL NO. 0017 OF 2008

UGANDA ::: APPELLANT

VERSUS

MUBINGE STEVEN::: RESPONDENT

*[Appeal from the Decision of Kintu Simon Zirintusa Esq.
(Magistrate GI) dated the 14th April 2008,
in Iganga Criminal Case No. 0190 of 2007]*

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arose from the decision of Kintu Simon Zirintusa, Esq. sitting as the Grade I Magistrate at Iganga Chief Magistrates Court, in which he acquitted the respondent on three counts of theft. The Director of Public Prosecutions appealed against the acquittal.

The case for the prosecution in the lower court was that the respondent was a Parish Chief of Namalemba Parish and an employee of Iganga District Local Government (Iganga DLG). Sometime in 2002, he and several other chiefs were laid off by the District Service Commission at Iganga. They claimed arrears of salaries that had not been paid to them. The ex-employees formed an association to pursue their claims from Iganga DLG and the respondent was appointed the Chairperson of the Association. Through M/s Okalang Law Chambers of Jinja, they filed suits against Iganga DLG. The suits, H.C.C.S 51 and 52 of 2001 were settled and Iganga District Local Government agreed to pay the arrears due to the plaintiffs. The monies were transmitted through Okalang law Chambers who in turn handed the monies to the respondent to pay the various plaintiffs.

The complainants, Magumba Samuel, Wandera Amisi and Naigaga Hadija claimed that though they were also entitled to be paid, they did not receive their dues. Magumba Samuel claimed shs 1,296,929/=, Naigaga Hadija claimed shs 963,000/= while Wandera Amisi claimed shs 1,048,824/=. When they tried to claim their dues from Iganga DLG they were informed that their money had been remitted to Okalang Law Chambers and that the respondent was supposed to have paid them. On inquiring from the respondent what had happened to the money he insisted that he had paid them. They then lodged a complaint with the police and the respondent was arrested and charged on three counts of theft.

The respondent denied all three counts of the charge. He testified that though he received money from Okalang Law Chambers, a mistake was made and several persons who were not members of the Association were paid, leaving out others who were entitled to payment following the consent orders in the suits. Further that when Mr. Okalang realised that an error had been made, he instructed the respondent to stop paying. He also advised that another suit be filed on behalf of those who had not been party to the previous suits so that they could also recover their salary arrears. The respondent further stated that the ex-employees who had not been paid elected one Abdulla Oboth and they filed a suit against Iganga DLG through M/s Okalang Law Chambers. According to the respondent the complaints were some of the ex-employees included in the list of persons that were to file a fresh suit against Iganga DLG.

The trial magistrate believed the respondent and acquitted him on all three counts of theft. The DPP appealed and raised three grounds of appeal as follows:

1. The learned trial magistrate erred in law and fact in failing to evaluate the entire evidence on record hence arriving at a wrong decision.
2. The learned trial magistrate erred in law and fact in not addressing all pieces of the prosecution evidence like the list prepared by the respondent which he submitted to PW3 in which he claimed that PW1, PW2 and PW4 were among the people he paid which was not correct, thereby arriving at a wrong decision.
3. The trial magistrate misdirected himself on the evidence before him in holding that efforts were under way to recover money from people who were wrongly paid thus making a wrong decision.

4. The trial magistrate erred in law in not ensuring that the trial was conducted fairly and competently thus causing a mistrial.

The prosecution then prayed that the appeal be allowed and the acquittal be substituted with a conviction; and in the alternative, that this court orders a retrial before another magistrate.

When the appeal was called on for hearing on the 2/04/2009, the respondent appeared *pro se*. He informed court that he had a written defence prepared in the appeal which he submitted. As a result, I ordered that the prosecution file written submissions as well. The DPP then filed written submissions on 06/04/2009. The respondent filed a rejoinder thereto on 23/04/2009.

With regard to grounds 1 and 2 of the appeal, Mr. Sewankambo Hamza (RSA) submitted that the duty of the prosecution was to prove that there was fraudulent conversion of something that was capable of being stolen or conversion of something capable of being stolen to the use of any person other than the general or special owner thereof. He relied on the decision in the case of **Mwakapesile v. R. [1965] EA. 407** where it was stated that when a person receives money on behalf of another, the money is deemed to be the property of the person on whose behalf it is received. Applying the principle to the case at hand he submitted that the prosecution had proved the offence against the respondent because of the testimonies of PW1, PW2, PW4 and PW5. He thus concluded that the trial magistrate's finding that the respondent did not convert the money to his own use was wrong.

Turning to ground 3 of the appeal, Mr. Sewankambo submitted that the trial magistrate erred when he came to the conclusion that efforts were underway to recover money that had been wrongly paid to persons that were not party to the suit. That though the respondent named the complainants as persons who had been paid in **Exh.P1**, the testimonies of all three complainants were that they were not paid. Further that the respondent had failed to prove that there were any efforts underway to recover the complainant's dues because he withdrew the copy of the plaint that he had produced to prove that allegation. That as a result the respondent's allegation was not supported by any evidence.

With regard to grounds 1 and 2, the respondent who filed his submissions earlier than the appellant's counsel contended that the prosecution failed to prove that the complainants were entitled to be paid. He argued so because in his opinion no evidence was adduced to show that they were party to the

suit in which a settlement was reached and money paid to Okalang Law Chambers on behalf of the plaintiffs. He further submitted that theft was not proved against him because PW5 (Mr. Okalang) testified that the complainants were in the list of people who had been paid but who were not on the court list. Further that the complainants were not entitled to the money in issue because it did not belong to them. That the trial magistrate was correct when he found that there was no evidence to prove that the respondent converted the money to his use so as to amount to theft. The respondent thus concluded that the trial magistrate exhaustively evaluated all the evidence on the record and arrived at a correct decision.

In his reply to the appellant's submissions, the respondent contended that the authority cited by the appellant on the definition of theft was not useful to their case because the complainants were not party to the suit and therefore none of the money that he received from Okalang Law Chambers belonged to them. Further that the list of names in **Exh.P1** clearly showed that the complainants were not party to the suit. That according to the testimony of PW5 the money that was wrongly paid to the persons in **Exh.P1** was to be recovered from them and paid to the rightful owners. He reiterated that the prosecution should have produced the plaint in the suit to show that the complainants were some of the judgment creditors. In conclusion, the respondent charged that the appeal was a desperate attempt by the prosecution to make out a case that they failed to prove in the lower court and to make him pay money to persons who were not party to the suit.

Turning to ground three the respondent submitted that the question of recovery of money from people who were wrongly paid was not in issue in the case. Further that it was not the basis of his acquittal. That as a result, the trial magistrate properly acquitted him of the charges.

Since this is a first appeal the appellant is entitled to have the whole evidence submitted to fresh scrutiny so that this court weighs any conflicting evidence and arrives at its own conclusions {**Okero v. Republic [1972] EA**}. In so doing an allowance should be made for the fact that the trial court had the advantage of hearing and seeing the witnesses {**Peters v. Sunday Post, [1958] EA. 424**}.

On perusal of the memorandum of appeal I came to the conclusion that the grounds of appeal were only two as follows:

1. The trial magistrate erred when he failed to evaluate all the evidence on record and as a result came to a wrong decision.
2. The trial magistrate erred when he failed to ensure that the trial was conducted fairly and competently and thus occasioned a mistrial.

However, in the written submission filed by the DPP, ground 4 of the appeal (which I reframed as ground 2 above) was abandoned. I will therefore address ground 1 as re-framed above and in the process I will address the questions that were raised in grounds 2 and 3 of the appeal as follows:

- i)** Did the trial magistrate properly address his mind to the list of persons that the respondent claimed to have wrongly paid (**Exh.P1**).
- ii)** Was the evidence that there were efforts to ensure that ex-employees of Iganga DLG who were not paid got their dues pertinent to the case? If so was the fact proved by the respondent?

In order to prove theft, the prosecution must prove three ingredients. First of all, there must be property capable of being stolen. Secondly, the property must be proved to have belonged to some person. Finally, the accused person must be proved to have appropriated that property with the intention of permanently depriving its owner of it.

In order to prove the ingredients of the offence, the prosecution relied on the testimonies of PW1, PW2 and PW4 (the complainants) and PW3, the Chief Finance Officer of Iganga DLG. Magumba Samuel (PW1) testified that he was party to a suit to claim salary arrears from the District and that the respondent led the plaintiffs in that process. That they were successful in the suit and Iganga DLG agreed to pay them through the firm of Okalang Law Chambers. Further that when the firm received the money they entrusted the respondent with the responsibility to distribute it among the various claimants. Further that he learnt from the Chief Administrative Officer (CAO) that the money went to Okalang Law Chambers and Mr. Okalang told him that he was on the list of 103 persons to be paid. Further that he was shown a list made by the respondent which indicated that he received his share. That he was No. 22 on that list but he did not get his money. It was also PW1's testimony that the respondent later told him that there would be no money unless they sued the District. On a clarification by court, PW1 stated that there were 3 people who did not get their money and they had documents claiming the money.

PW1 was cross-examined very briefly by the respondent. He insisted that he asked the respondent about his money but it was apparent that he did not get a favourable response from him.

Naigaga Hadija (PW2) said that she knew the respondent as the Chairman of the staff who were laid off. That she did not get her money and she complained to the CAO. Further that when she complained the CAO gave her a list of people who were paid. That her name was on that list but she did not receive her money. Further that she was supposed to get the money from Okalang (Law Chambers) but Mr. Okalang told her that the Chairman took it from there and distributed it to the various claimants. That when she approached the Chairman he told her that he did not have her money. That she was No.23 on the list (of people who were said to have been paid) but she did not get her money which was shs 963,000/=. When the respondent cross-examined PW2 she said that though she went to him to follow up her claim, the respondent insisted that she had had already been paid.

Wandera Amisi testified as PW4. He stated that he too was a Parish Chief and he knew the respondent who became their Chairman when he was claiming his salary arrears of shs 1,488,240/=. That he went to the Chairman several times but he never received his money. On cross-examination by the respondent he insisted that he was among the persons who went to court with him. That the money was given to Mr. Okalang but he did not get his share. He produced various documents to support this claim, i.e. payment vouchers as well as memoranda of acknowledgement of receipt in respect of the money received by M/s Okalang Law Chambers. The documents were admitted in evidence and marked PX1, PX2 and PX3.

I examined the documents produced by the prosecution to prove their case. **Exh.P1** was a list of names of people that were said to have been paid but who were not on the court list. The list was signed by Mubinge Stephen as the District Chairman of Iganga-Mayuge D.P.C.A. It was submitted in court attached to a letter dated 19/9/2006 from M/s Okalang Law Chambers to the CAO Iganga District. In the letter, M/s Okalang Law Chambers informed the CAO as follows:

“Our clients’ leader however made an error in good faith and paid people on first come basis instead of following the court list and as a result people who were not in the court list were paid. Attached hereto are those persons not in the court list (who)

were paid to the total (tune) of shs 34,356,671/= (Thirty four million three hundred fifty six thousand six hundred seventy one shillings only).

That when we realised the error, subsequently, we directed the leaders to follow the court list and now 19 people in the list have not been paid a total of shs 30,615,238/= (Thirty million six hundred fifteen thousand two hundred thirty eight shillings only) and their names are attached hereto. You realize that a problem is the money which was paid to the persons who were not on the list.”

In the list of people that Mubinge Stephen led Mr. Okalang to believe that he had paid by mistake, Magumba, Wabwire and Naigaga appeared as No. 20, 22 and 23, respectively.

Robert Okalang testified as PW5. He told court that there was a suit, C/S No. 051/2002 in which 183 people sued Iganga DLG. That the suit was settled and plaintiffs' arrears remitted to his firm through Nile Law Chambers, the Advocates for the District. That two people, the respondent and one Mawulire, collected the money from his firm and paid it to the various plaintiffs. Further that after several payments these two made a report to inform him of people they had paid. He further testified that when he saw the report, he realised that money was paid to people who were not on his list. He also told court that when this happened he stopped Mawulire and the respondent from making further payments. He also advised them to recover money from people who had been wrongly paid. PW5 testified that the complainants were Nos. 20, 22 and 23 on the list of people that were paid but who were not on the court list.

The respondent did not cross-examine PW5. Neither did he seriously challenge PW2 on her testimony that when she approached him to follow up her claim, he (the respondent) insisted that he had already paid her. I therefore came to the conclusion that the respondent somehow converted the money that he represented to Mr. Okalang that he paid to the complainants. In effect, the trial magistrate underestimated the effect of the list of persons said to have been paid in error. The list was an effort by the respondent to fraudulently account to M/s Okalang Law Chambers for the monies that he had received. The trial magistrate therefore arrived at a wrong decision about the respondent's guilt.

I also examined the documents that were produced by PW4 and admitted in evidence as PX1, PX2 and PX3. PX1 consisted of documents in respect of payments to Magumba Samuel. There was a schedule that showed that on 22/06/05, 21/12/05 and 24/01/06, a total of shs 1,207,908/= was paid to Magumba through Okalang Law Chambers. That the money was paid vide cheques 001305, 001371, 000945 and 000663. There was supporting evidence to show that the cheques which included Magumba's payments were received by M/s Okalang Law Chambers on 30/06/2005, 28/12/2005 and 11/01/2006 and that they were subsequently banked on the firm's clients' account.

PX2 was a group of documents in respect of Wandera Amisi. It showed that on 2/09/05, M/s Okalang Law Chambers received cheque No. 001149 of Stanbic Bank Iganga Branch for shs 10,353,492/=. Further that the same was banked in their account No. 0104792901 (Clients' Account). There was also a part of a schedule for Makutu sub-county which showed that shs 418,440/= on cheque 1149 was paid through Okalang Law Chambers for the benefit of Wandera Amisi. Similar evidence was contained in PX3 in respect of several payments that had been made for the benefit of Naigaga Hadija.

Ezra Lwabuhinda (PW3) was the Chief Finance Officer of Iganga DLG. He testified that he had the complainants and the respondent in his records though he did not know them personally. That the respondent was a Parish Chief and he and the complainants were laid off. He further testified that because the District owed them money they filed a suit in court. That they were successful in the suit and the District agreed to pay them through their lawyer-Okalang. That shs 10m was remitted per month. The respondent did not cross-examine PW3 which would mean that all that he said was true.

The evidence in PX1, PX2 and PX3, put together with Exh.P1, the list of persons that the respondent misrepresented to Okalang Law Chambers that he had wrongly paid, as well as the testimony of PW3 left no doubt in my mind that Iganga DLG paid the complainants through M/s Okalang Law Chambers. That the respondent received their money but appropriated it and then misrepresented to Okalang Law Chambers that he had wrongly paid them when they were not party to the suit, a fraudulent conversion which amounted to theft. This left the complainants open to claims to recover money that the respondent said he had paid to them when they did not receive it, another fraudulent act.

In his unsworn statement, the respondent stated that he participated in the payment of monies that were remitted to Okalang Law Chambers as arrears of salaries of employees of Iganga DLG. That he erroneously paid 18 people a total of shs 27,919,285/=. He did not clearly state whether the complainants were some of the people that he paid erroneously. He further stated that he made a list of 50 people who did not get their money and that Counsel informed him that he would file a suit against the District on their behalf if they gave him instructions. It was also his testimony that the 50 people elected one Abdulla Oboth to represent them in making their claim and he gave instruction to Mr. Okalang to file the suit. Further that Naigaga Hadija, Magumba Samuel and Wandera Amisi were some of the people who were affected and had to file another suit.

The respondent produced a list of 50 people signed by Hajji Y. Mawulire who he alleged were to file a fresh suit for their arrears. Though it was admitted in evidence as one of 4 documents that the respondent relied on to support his defence the trial court did not mark it. Nonetheless, the list showed that Magumba Samuel claimed shs 1,296,928/=, that Naigaga Hadija claimed shs 963,000/= but Wandera was not included in that list. The respondent also relied on the list to try and prove that the complainants were never owners of part of the money that was paid through Okalang Law Chambers because they were not party to the suit. He strenuously contended that this disentitled them to bringing charges against him for theft.

This piece of evidence (list of persons who were to file a fresh case) partially contradicted the list that the respondent submitted to Okalang Law Chambers, and which the said advocates forwarded to the CAO with their letter of 19/09/2006. This contradiction in his representations confirmed to me that the respondent was fraudulent in the transactions relating to the complainants' money. Given the testimonies of PW3 and PW4 and the contents of PX1, PX2 and PX3 that the complainants' salary arrears were paid through Okalang Law Chambers, I do not think that Iganga DLG would have paid the complainants' arrears a second time. I am also of the view that proving that the complainants were or were not party to the suit would not have made a difference to their claims against the respondent. Although it was not proved that the complainants were party to the suit, the state proved that Iganga DLG paid their money to Okalang Law Chambers. Whether this was done properly or by some error by the employees of Iganga DLG the complainants were owners of part of the money paid to M/s Okalang Law Chambers, who in turn paid it to the respondent in order for him to distribute it to its owners. His conversion of the money was nothing else but theft.

As to whether the evidence that there were efforts to ensure that ex-employees of Iganga DLG who were not paid got their dues was pertinent to the case, I am of the view that it was. However, it only served to expose the respondent's fraudulent actions. Though he had represented to M/s Okalang Law Chambers that he paid the complainants, he tried to prove that they had not been paid and could still lay a claim against the District. He failed to prove this when the plaintiff that he tried to rely on was rejected by the trial magistrate. I did not see any further efforts by the respondent to produce the correct plaintiff though court ordered that he produce it later. Moreover, even if he had proved the existence of the suit, it would not have lessened the strength of the prosecution evidence that he fraudulently converted money that Iganga DLG intended to be paid to the complainants.

I find that the evidence on record showed that the prosecution proved all the ingredients of the offence of theft against the respondent. There was money which is something capable of being stolen; the money belonged to the complainants, and the respondent fraudulently converted it to his own or to the use of some other persons with the intention of permanently depriving the complainants of its use. The appellant proved this beyond reasonable doubt so the respondent was wrongly acquitted of theft on all the three counts.

In the end result, the order of acquittal is hereby set aside and substituted with a conviction of theft contrary to s.254 (1) of the Penal Code Act, on all the three counts with which the respondent was charged. The file shall be remitted to the trial court for appropriate sentencing.

Irene Mulyagonja Kakooza

JUDGE

19/08/2010