THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 0041 OF 2006

KIBIRANGO JOHN:: APPELLANT

VERSUS

UGANDA:: RESPONDENT

[Appeal from the Decision of Her Worship Elizabeth Kabanda

(Chief Magistrate) dated the 18th September 2006

in Mukono Criminal Case No. 012 of 2004]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arose from the judgment of Ms. Elizabeth Kabanda, sitting as the Chief Magistrate at Mukono, where she convicted the appellant of the offence of embezzlement contrary to s. 268 of the PCA and sentenced him to serve a term of 5 years in prison. She further ordered that he compensate the complainant company in the sum of shs 9,215,200/=. He appealed against both conviction and sentence.

The case for the prosecution was that the appellant was one of the founder members of an Association called Bukunja People's Association. In 2001 the Association was incorporated into a company limited by guarantee, Bukunja People's Association Limited (hereinafter called "the Company" or "the Association." The appellant was elected to hold the office of Managing Director and he did so. He was also designated the financial controller of the company.

It was also the case for the prosecution that after he took office, the appellant abolished several posts in the company including that of the Chief Accountant and the Assistant Accountant. He appointed other persons to replace them but instead of allowing them to carry out their duties, he collected money from the various branches of the Association which he omitted to bank on the Association's account contrary to provisions of the memorandum and articles of association of the company. The

company called him to account for the funds but he failed to do so. At some point he admitted to having utilised company funds and agreed to refund the money but he failed to do so. He was therefore arrested and charged with the offence of embezzlement.

The appellant's case was that he was framed with the offence because he had misunderstandings with Sentongo, one of the shareholders of the company because he refused to lend him money. Further that Sentongo asked him to give a job to his son but he refused to do so because the son did not have the qualifications required for it. That in addition, he had accommodated Kibirige, another member of the company and his family when he had no house. Further, that when he asked him to leave Kibirige got annoyed and he and Sentongo ganged up against him and started a rumour that he (the appellant) had stolen money from the company. He denied that the company had a bank account. He admitted that money was collected but advanced the defence that it was all used on the spot for company activities. He admitted that he received money from members which he spent on company activities with the consent of the other directors. He denied that there was a policy that all money collected by the company had to be banked before expenditures were agreed upon.

The trial magistrate disbelieved the appellant's testimony and convicted him of the offence. The appellant appealed and raised three grounds of appeal, first that the trial magistrate failed to properly evaluate the evidence on record and thus reached a wrong decision. Secondly, that the trial magistrate denied the appellant his right to be represented by counsel. Finally, that the trial magistrate failed to take the mitigating factors advanced by the appellant after his conviction into consideration and as a result she handed down a harsh sentence.

I noted that though the appellant's notice of appeal was filed in this court on the 27/10/06, only ten days after the appellant was convicted, the memorandum and record of appeal were filed in court on 29/01/2009. By that time the appellant had almost concluded his sentence of 5 years. I think the appellant or his advocates contributed to the delay in processing the appeal. Though the notice of appeal was lodged by M/s Lutaakome & Co. Advocates, the memorandum of appeal and a record of proceedings were lodged by M/s Bakidde & Hannan Advocates. Appellant may have delayed to instruct counsel to follow up his appeal. As a result, though the record of appeal was complete and was certified on the 29/07/2008, the memorandum of appeal was lodged 6 months later.

When the appeal was finally called for hearing on 30/11/2009, I asked the advocates representing the parties to file written submissions. The appellant's advocates filed written submissions on 29/01/2010 while the DPP filed a reply on the 29/01/2010. Due to the heavy load appeals pending disposal in this court and an intervening criminal session in Mukono, I was not able to render judgment expeditiously. I am now informed that the appellant has completed his period of incarceration but he desires to have a decision on his appeal because he is now required to pay shs 9,215,000/= which was ordered as compensation to the Association.

With regard to the first ground of appeal, the appellant's advocate submitted that theft, which is one of the ingredients of the offence of embezzlement, was not proved against the appellant. That the evidence adduced by the prosecution showed that the appellant collected money for the company and spent it on company activities. In his opinion, it was not proved that the appellant had any intention of permanently depriving the company of the money. Counsel for the appellant further submitted that PW1 was not a fully paid up member of the company and therefore he was not a competent witness to testify on its behalf. It was further contended for the appellant that the evidence of PW1 showed that it was PW4's responsibility to collect money for the company and that he did so and banked it on the company account.

It was also contended for the appellant that the trial magistrate relied on the testimony of PW2 who testified that one Kilarire (Kayindi) informed him that the appellant collected money from him but the said Kayindi was not called to testify. Further that the trial magistrate relied on IDE2, which counsel alleged was a Photostat copy of an agreement to pay, in order to come to the conclusion that the appellant admitted the offence. He submitted that this contravened the provisions of s.63 and s.64 of the Evidence Act because the genuineness of the document was not proved.

It was also contended for the appellant that PW4, the accountant admitted in cross-examination that he had no problem with the appellant's accountability in respect of the company funds and acknowledged that the company had incurred expenses. That the trial magistrate failed to take this into account and found the appellant guilty of the offence. Counsel for the appellant further submitted that PW5 contradicted himself when he stated that the treasurer used to receive all the money but he could not remember how much he had handed over to the treasurer because he had no records. That in spite of that the trial magistrate relied on his testimony to come to the finding that the appellant received company funds. With regard to the testimony of PW6, counsel for the

appellant contended that it showed that most of the counter folios of receipts that he showed in court were not signed by the appellant but the court accepted them in evidence against him.

Counsel for the appellant challenged the testimony of PW7, the auditor, because his qualifications were not established. It was also contended that his audit could not be relied on because there was no evidence that he was appointed by the company to audit its accounts. Counsel for the appellant also contended that the testimonies of PW8 and PW9 failed to corroborate the testimonies of previous prosecution witnesses.

Turning to the amount that was alleged to have been stolen, counsel for the appellant contended that the loss of shs 9,215,200/= was not proved. He argued so because in his view, it was not proved that the said amount of money was collected or received by the appellant. Further that the 711 alleged contributories to the amount were not proved. He further contended that the testimony of PW7 was not corroborated by any evidence by the other witnesses. That the trial magistrate also admitted that PW7 did not inform court about the sources of the documents he used to get to that amount. That court erred when it relied on the testimony of PW7 who was not proved to be a member of the Institute of Certified Public Accountants of Uganda or a registered accountant under the Accounts Act. That the receipts adduced in evidence showed that the appellant collected only shs 1,500,000/= which he accounted for. Counsel for the appellant this submitted that there were contradictions and inconsistencies in the evidence which should have been resolved in favour of the appellant. He thus concluded that the order that the appellant pay shs 9,215,200/= ought to be quashed.

Turning to ground 2, counsel for the appellant submitted that the appellant was denied his right to representation during the greater part of the trial. He relied on Article 23(8) (d) of the Constitution of Uganda. He contended that though the appellant was initially represented by counsel, on occasions when the appellant’s lawyer did not attend court, the trial magistrate insisted on hearing the case without the appellant’s advocates. That at times, the court prevented the appellant from putting questions to the prosecution witnesses by being inconsiderate and harsh which intimidated the appellant. He concluded that the trial process was partial and overwhelming for the accused and as a result he did not receive justice. He thus prayed that the conviction should be quashed and the orders be set aside.

With regard to ground 3, counsel for the appellant submitted that the trial magistrate failed to take the appellant's advanced age into consideration when she passed sentence. Further that she failed to take it into account that he suffered from hypertension and diabetes and that he was a first time offender. That the trial magistrate had the discretion to order a lesser sentence than 5 years by virtue of s. 178 of the MCA but she failed to do so. Finally, that in the circumstances the sentence that was imposed was harsh.

In reply to the submissions on ground 1, Ms Nabisenke Vicky for the DPP submitted that the appellant admitted that he was the Managing Director and the overall Financial Controller of the Association. He further testified that between May 2001 and July 2002 they collected about shs 10m, which was consistent with the testimonies of PW1, 2, 4, 5 and 6. She further submitted that this was proved by copies of receipts admitted in evidence. That the testimony of PW7 tied this up when he testified that the audit they conducted showed that shs 9,215,200/= was missing. That PW9, the government analyst testified that the signatures on documents alleged to have been signed by the appellant were indeed his signatures. That as a result, the trial magistrate properly evaluated the evidence and came to a correct finding that the appellant stole shs 9,215,200/= from the Association.

With regard to ground 2, Ms. Nabisenke submitted that the trial magistrate was lenient with the appellant's counsel though they caused the trial to stall on many occasions. That he allowed them to participate in the proceedings even when they arrived late as happened on 2/03/2005. She added that on the days when the appellant's counsel did not appear in court, he cross-examined witnesses and did not complain that he was unrepresented. That on the day he presented his defence, he offered to present his own defence without counsel. That as a result the second ground of appeal should fail.

Turning to the third ground, Ms. Nabisenke argued that the maximum sentence for embezzlement is 14 years but the trial magistrate awarded a lesser sentence of 5 years. Further that in doing so she considered the mitigating factors advanced by the appellant. That the trial magistrate exercised her discretion under s.178 (2) of the MCA when she ordered compensation of shs 9, 215,200/=. That as a result, the sentence was lenient and should be upheld.

Ground 1

The first ground was a complaint about the trial magistrate's evaluation of the evidence before her. In **Okeno v. Republic [1972] E.A. 32,** it was held that an appellant on first appeal is entitled to

expect the evidence as a whole to be submitted to a fresh and exhaustive examination (**Pandya v. R [1957] EA 336**) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (**Shantilal Ruwalo v. R [1957] EA 570).** It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses (**Peters v. Sunday Post [1958] EA 424)**. I will therefore re-evaluate the whole of the evidence adduced against the appellant taking into consideration the points raised by his advocate in ground 1.

In order to prove the offence of embezzlement the prosecution had to prove the following ingredients:

(a) that there was a Company called Bukunja Peoples Association Ltd.
(b) that the accused was a Director, Official or Employee of that Company.
(c) that he had access to the Company's property
(d) and that accessibility enabled him to steal money belonging to the Company.

The ingredient of theft is central to proof of the offence of embezzlement. Theft is defined by s. 254(1) of the PCA. It is there provided that a person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing. Ordinarily, in order for the *actus reas* of theft to be proved, 3 elements have to be established. First and foremost, there must be property. That property must belong to another and the thief must appropriate the property.

Fred Sentongo (PW1) testified that after the Association was incorporated as a company, one Enock Ssali was supposed to collect money from cashiers in the six branches while the appellant and the other directors were to supervise him. PW1 produced the memorandum and articles of association of the company and they were admitted in evidence as Exhibits P1 and P3, respectively. He further testified that a misunderstanding developed between Ssali and the appellant and as a result, Ssali never collected any money. That by a letter dated 31/07/02 (Exh. P2) the appellant sacked Ssali.

It was also PW1's testimony that the appellant then took over the functions of Ssali and all the other employees whose positions he had vacated by virtue of Exh. P2. He began to collect money from the cashiers and other members of the Association and he issued receipts for it as well as signed for it. PW1 further testified that he was one of the cashiers and that the appellant took receipt books away from him and the money he had collected which came to shs 210,000/=. He showed a receipt book to court where the appellant signed out shs 210,000/=. PW1 further testified that the appellant collected money from several other cashiers but when they requested co-signatories to the company's account to cross-check and find out whether money had been banked, they found no money on the account. According to PW1, the appellant then called a meeting in which he told the members that he had collected shs 9,858,300/= from 711 people. He also informed the meeting that he used the money but according to PW1 this was without the authority of the company. That at the meeting the appellant tried to account for the money but the members rejected the accountability. That the appellant then promised to pay back the money within 2 months and wrote a letter resigning from the Association.

PW1 went on to testify that the appellant failed to refund the money against his undertaking and the Association solicited the intervention of the Inspectorate of Government. On his part, the appellant requested the LCIII Chairman, one Richard Majwega to intervene. That at a meeting called by Majwega, the appellant produced another account in which he informed the members that he collected only shs 10,119,700/= from 711 members. He agreed to refund shs 3,404,400/= which he said he collected from members as their savings. He undertook to pay this back in 3 months but failed to do so. Investigations against the appellant continued and auditors were instructed to audit the company accounts. PW1 testified that according to the auditors, the appellant did not bank any money on the company account. That subsequently, the auditors produced a report which showed that the appellant collected shs 9,215,000/=, but it was missing.

In cross-examination, PW1 testified that the appellant dismissed him from the association. Further that the audit of accounts was commissioned by the Police. He maintained that the association had an account which was opened in 2001. He clarified that expenses for the Association were supposed to be sanctioned by the directors and he was one of them but he did not take part in approving any expenses. That the powers that the appellant had were to bank money and make approved withdrawals. He added that when he subscribed for his shares, he did not pay shs 50,000/= per share because the members convened a meeting and all agreed that shs 5,000/= would be paid instead.

Given the testimony summarised above, the appellant's counsel's contention that PW1 testified that PW4 collected the money and banked it on the Association account was not true. On the contrary, PW1's testimony showed that the appellant using the misunderstanding that developed between him and PW4, usurped PW4's role of collecting money from branches and took it on himself. From this it can be inferred that he had formed an intention of spending the association's funds without being questioned by any of the members. This was confirmed by the fact that he even took receipt books away from several of the branch chairpersons that were collecting money from members, e.g. PW1 and PW5. This disabled them from making further collections from members leaving the appellant as the only person in charge of that function and thus stifling the goals of the Association.

I am also of the opinion that it did not matter that PW1 was not a fully paid up member of the Association. He was a competent witness because though he had not fully paid up his shares he participated in the activities of the Association and interacted with the appellant and other members. S.117 of the Evidence Act provides that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. PW1 was not disqualified by any of these.

Aloysius Ndibowa (PW2) testified that he too was a member of the company. He explained that it was the appellant who introduced the idea of forming the Association for the purpose of improving the income of people in their area. His testimony corroborated that of PW1 save that he added that the branch chairpersons of the Association were authorised to receive money on behalf of the company. That the company could lend money to its members but such lending had to be authorised by a loans committee of which he was a member. He further testified that sometime after the association was incorporated, the members wanted to borrow money but the appellant objected and told them that there was not enough money to lend. He asked them to wait for money from the Poverty Alleviation Programme (PAP) before they could borrow. That it was after this that the members discovered, through Charles Kilarire who was a signatory to the account, that the Association had no money on its account.

PW2 also testified that a meeting was called for the appellant to account for the monies. That at the meeting the appellant accounted that he had collected shs 9,858,300/= and he had spent it. Further

that 3 days later he told the members that he collected shs 10,119,700/=. PW2 corroborated PW1's testimony that the accountability advanced by the appellant was rejected by the members of the Association and they sought the intervention of the IGG who later instructed the Police to take on the matter. That during police investigations the appellant went back to the members and offered to refund some money but he failed to honour his commitment. PW2 also testified that it was after this that an auditor was commissioned by police to audit the company's books and he returned a report that the appellant stole about shs 9m.

The appellant cross-examined PW2 because his advocate was absent when he testified. In the process the appellant inferred that PW2 borrowed money from the company but PW2 denied it and instead told court that he borrowed money from the appellant in his personal capacity.

I therefore find that the submission on behalf of the appellant that the trial magistrate relied on PW2's testimony that one Kilarire told him that the appellant took money that he had collected from him is not true. PW2 attended a meeting at which the appellant presented accounts that showed that he collected shs 9,858,300/= and another at which he presented accounts that showed that he collected shs 10,119,700/=. His testimony was therefore not hearsay and it did not matter much that Kilarire was not called to testify.

Richard Majwega, the LCIII Chairperson, testified as PW3. He confirmed that he called a meeting between the members of Bukunja People's Association Ltd at which a dispute over the appellant's misappropriation of funds of the Association was discussed. According to PW3 the members alleged that the appellant had misappropriated over shs 10m and he agreed to pay shs 3,404,400/= and this was in writing. PW3 produced the agreement in court for identification and it was marked IDE2. He confirmed that the appellant failed to pay the amount of money that he had agreed to pay and he was arrested and charged.

The appellant cross-examined Majwega but his testimony was not shaken. He clarified that at the meeting it was established that the amount that had been collected by the appellant was shs 10,119,700/= and the appellant signed a document agreeing to refund some of the money.

It was contended for the appellant that the trial magistrate relied on an agreement produced by PW3 which was admitted as IDE2 to come to the finding that the appellant admitted the offence contrary

to the provisions of s.63 and 64 of the Evidence Act because the agreement was a Photostat copy and its genuineness was not proved. IDE2 was not an exhibit and there is in the law of evidence a big difference between an exhibit and an identification document or item. An identification item is not evidence. It is inchoate and has to be produced by a witness competent to do so in order to transform it into evidence. In this case the trial magistrate did not mention IDE2 anywhere in her judgment but there was ample oral evidence to show that the appellant admitted that he collected money for the Association in the testimonies of PW1, PW2, PW3 and PW5. The trial magistrate therefore did not require documentary evidence in order to come to her finding on that issue. From the testimonies above I was convinced that her finding was correct.

Enock Ssali (PW4) confirmed that he was designated the Accountant of the Association. He told court that the procedure that had been adopted was that each branch would collect money through its treasurer. He stated that after the branches collected the money, they would hand it over to the appellant. According Ssali the appellant also collected money and that while in the company of the appellant, the appellant collected a total of shs 9,800,000/=. He clarified that he collected shs 583,500/= which he too handed over to the appellant. He produced a receipt book to prove this and it was admitted in evidence as Exh.P4.

When he was cross-examined by the appellant, PW4 stated that he collected shs 20,000/= more than he had stated before making a total of shs 603,500/=. He insisted that he handed this over to the appellant who informed him that he was going to bank the money. He also told court that the appellant lent out some money but he did not have a record of the amount that he lent. He agreed that the Association incurred expenses on rent, furniture and transport during the collection of the money, as well as entertainment on a Minister's visit. He also stated that he did not have a problem with the appellant's accountability. He denied being involved in the day to day running of the Association but confirmed that the appellant made all the decisions. He also stated that he did not see any of the other directors get involved in the financial transactions of the Association.

Counsel for the appellant complained that the trial magistrate did not take PW4's testimony into account that he had not problem with the appellant's accountability. However, PW4 was a lone witness; he was the only member of the Association who testified that he had no problem with the accounts that the appellant submitted to the Association. However, later on in his cross-examined he stated that he did not know whether the appellant paid transport allowances. He also did not know

who was paying rent for the offices at Ngogwe and Nkokonjeru. He did not know whether there was a Loans Committee and he was not a director of the company. He finally admitted that he did not know what was going on in the Association day-to-day because he was not involved in its management. I therefore came to the conclusion that the trial magistrate was correct when he disregarded his testimony that he had no problem with the appellant's accountability.

Lubega Patrick (PW5) was also a member of the Association and the Chairperson in his area – Bubiro. He testified that he collected shs 2,556,500/= from the members at Bubiro. Further that the appellant collected the money and the receipt book from him and later gave him a list of all the members and the amounts they had contributed (**Exh.P5**). PW5 told court that the appellant did not bring back the money to him and it did not serve its purpose which was lending to members. Further that the appellant failed to explain to members as to what happened to their money. That though he claimed to have banked the money it was still not clear to the people of Bubiro whether he had done so or not and they still demanded to have their money back.

When he was cross-examined by Mr. Galiwango who then represented the appellant, PW5 stated that he handed some of the money that he collected to one Kayindi but he did not recall how much that was. He denied that he borrowed money from the Association but admitted that the appellant lent him shs 300,000/= in his personal capacity, which he had not yet paid back to him. When PW5 was re-examined he clarified that there was a Loans Committee that was chaired by the appellant.

Though counsel for the appellant complained about contradictions in PW5's testimony, I did not think that it was a contradiction of his earlier testimony when he stated in cross-examination that he handed some of the money that he collected to Kayindi. He clarified that some money was collected by the appellant at source and he took some money to Kayindi. He was truthful when he told court that he could not recall exactly how much the appellant collected and how much he took to Kayindi because he had no records. This was also true because he stated that the appellant took the receipt books away from him. PW5 was not challenged about the contents of **Exh.P5,** a list that showed that he collected shs 2,556,500/=, which he said originated from the appellant himself. I therefore find that it was true that the appellant collected some money from PW5. If there were contradictions in his testimony they were minor and of little consequence to the rest of his testimony and the body of evidence on record.

Kibirige John (PW6) told court that he was the Vice Chairman of the board of Bukunja People's Association. He testified that he collected money from the branches of Masaba and Nkokonjeru. He stated that Kilarire was at first the treasurer but when he left the appellant took over the responsibility of collecting money from the branches. He detailed the dates and amounts of money that the appellant collected from his branch and produced receipt books with counter folios against which the appellant had signed for the various amounts of money. He also produced a summary of the collections which was admitted as **Exh.P9**. He too told court that the appellant was supposed to bank the monies he collected on the Association's account in Micro Finance Branch at Mukono but when he checked the account he found out that the appellant did not bank any money on that account. Further that there were signatories to the account who were supposed to sanction withdrawal of the monies after the board of directors authorised expenditures but that did not happen. He too said the appellant failed to explain what happened to the money.

The bulk of the cross-examination of PW6 by Mr. Tibaherwa who represented the appellant focused on the internal management of the company. PW6 confirmed that though the memorandum of association provided that a share would be shs 50,000/= the members agreed that the amount be reduced to shs 5,000/= and that is what he paid for his shares. He insisted that the total amount of money he collected from the people in his area was reflected in **Exh.D1**. He too stated that the accused accounted for use of the money he collected but the board of directors did not agree with his accounts because he spent the money without the approval of the board. He added that the board did not agree with the accounts because they had not agreed on the items and the manner in which the appellant spent the money.

Though counsel for the appellant complained that the counter folios to the receipts that PW6 presented in evidence were not signed by the appellant and the trial magistrate should not have admitted them in evidence, the record shows that when the prosecution asked to have the receipts admitted in evidence, Mr. Tibaherwa for the appellant objected to their admission on the same ground. However, the prosecution clarified that the receipts inside the book had been signed by the appellant and on that basis the receipt books were admitted in evidence. PW6 was not challenged about the signatures on the receipts in cross-examination meaning that the appellant and his advocate did not doubt the authenticity of the signatures.

Lukwitira Yafesi (PW7) testified that he held a Diploma in Business Management from Nakawa Institute of Accounts. He told court that he audited the accounts of the Association after being approached by one of its directors. He testified that during the audit, he found that some information and documents of the Association were missing. In particular, he did not get any documents relating to cash expenditure; there wasn't any voucher that showed cash payments or cash withdrawals from the bank. The bank statement also showed that there were no drawings from the company account.

PW7 testified that they obtained a statement from the bank for the period May 28th 2001 to July 6th 2002. That from the statement (**Exh.P11**) it was established that the only expenses charged to the Association were ledger fees. Further that there was a mini savings balance of shs 26,000/=. That there were only two deposit entries, i.e. shs 10,000/= on 28/05/01 and shs 15,000/= on 13/07/01. PW7 further testified that he saw some receipt books showing collections or contributions, and payment vouchers showing loan payments and loan refunds, as well as an analysis cash book called the members register. PW8 stated that from these he deduced that collections and contributions between May 2000 and December 2001 were shs 9,215,200/= which was broken down in his testimony as follows:

ITEM	**AMOUNT** (shs)
Membership fees	1,355,000/=
Share contributions	4,420,000/=
Savings	3,350,000/=
Others	2,300/=
Pass books	65,000/=
Total	**9,215,200/=**

PW7 further testified that the amount that was given out as loans was not included in the schedule but it was shs 592,400/= so he concluded that shs 9,215,200/= plus 592,400/=, i.e. a total of shs 9,807,600/= was missing. PW7 finally produced a report which was admitted in evidence as **Exh.P10**. Attached to the main body of the report there was a summary of the amounts that he found had been collected from each of the various branches of the Association. The schedule of amounts that had been lent to members was also attached and it showed that shs 592,400/= was due on account of loans.

Though it was contended for the appellant that PW7's qualifications were not established, he stated them in his testimony. Although there was no evidence that the company made a resolution to appoint PW7's firm as auditors, I did not think that the firm was appointed as the company's official auditors. I am rather of the view that PM Associates, Public Certified Accountants (as stated on their letterhead) were appointed to carry out a specific audit, i.e. one that was to establish whether money had been collected by the appellant and how much of it was missing. PW7 testified that one of the directors of the company requested for the audit and I think he was entitled to do so in the circumstances.

It was also the evidence of PW1 and PW2 that the police requested the audit during the investigation of allegations of embezzlement for purposes of establishing whether any money was missing. PW8, the police officer who investigated the case, confirmed this when he stated that after the audit was done, the report was submitted to him. I therefore find that although PM Certified Public Accountants were not the company's auditors for purposes of Accounts required by the Companies Act, they served the purpose of conducting an audit for purposes of an investigation of company losses. Any accountant employed by their firm was competent to testify about their findings and to produce their report in court.

Counsel for the appellant further contended that it was not proved that shs 9,215,200/= was either collected or stolen by the appellant. On reviewing the testimony of PW7, I found that the amounts that he said amounted to shs 9,215,200/= listed in the table above did not amount to that. The total from the figures listed above should have been shs 9,192,300/=. However, the annexure showing the amounts that were reflected in the books of the Association as having been collected from each branch showed the following:

Branch	**Period**	**Amount (shs)**
Total for all branches	May-Aug 2001	4,046,900
Masaba	Sept-Nov 2001	154,800
Lubongo	Sept-Nov 2001	264,000
Ngogwe/Namagunga	Sept-Nov 2001	2,023,100
Nkokonjeru	Sept-Nov 2001	445,900
Kikwanyi	Sept-Nov 2001	222,000
Bubiro	Sept-Nov 2001	2,058,500

Total for May-Dec 2001		**9,215,200**

PW1, PW2, PW5 and PW6, all members of the Association testified that whatever amount the appellant collected, he failed to account for its use. They also testified that it was never banked contrary to the policy of the company that all monies collected had to be banked and expenditure would be sanctioned by the board. I find that although the appellant had been appointed the Managing Director of the company, the board of directors had the power to restrict his powers under the provisions of Article 45 of the Memorandum and Articles of Association of the company.

Contrary to the policy stated by fellow directors of the company (PW1 and PW2), PW4 confirmed that the appellant made all the financial decisions alone. The Company was a credit association; it collected monies from a large group of people. It was therefore prudent that the funds be banked and proper accounting practices be employed in the management of the funds. The body of evidence on record shows that this was not done and the appellant as managing director was responsible for this mess.

As to whether shs 9,215,200/= was proved to have been stolen by the appellant, I am of the view that the testimony of PW7 proved that the said amount was collected by the appellant and he did not account for it. It is not true that PW7 did not tell court what records he used to establish that amount for he set them out clearly in his testimony. Although PW4 testified that some money was spent on company expenses by the appellant PW7 established that there was no evidence in the books of account of the company to show how the money was spent. It is therefore not surprising that the members of the Association rejected the appellant's accountability. The fact that he did not bank any monies on the Association's account made his behaviour highly suspect.

D/C Joseph Okurut (PW8) was a police officer attached to Lugazi Police Station. He testified that he carried out investigations on a complaint of embezzlement against the appellant. He mentioned the books of accounts that he came across as registers and receipt books of the Association which had been used to receive the money alleged to have been embezzled. In this respect the testimony of PW8 corroborated that of PW7. PW8 further testified that the appellant admitted to him that he collected money and contrary to the policy of the company that collections had to be banked he spent it at source. PW8 further testified that he secured a copy of the bank statement in respect of the Association's account at Commercial Micro Finance, Mukono Branch and he produced it in court. It

was admitted as **Exh.P11**. PW8 also testified that he received the report of the auditor outlining the money that had been received by the Association but which was not accounted for by the appellant. Further that he secured specimen signatures of the appellant which he submitted to the Government Analytical Laboratory (GAL) together with receipt books from the company. He further testified that he secured a report of the handwriting expert from the GAL and he identified it in court. The specimen signature that PW8 secured from the appellant was admitted in evidence as **Exh.P12**. PW8 also produced the receipt books that he secured from the company and they were admitted in evidence.

PW8 was cross-examined by the appellant himself, his lawyer being absent on the day that he testified. The appellant did not challenge his testimony at all, especially about the signatures on the questioned documents that he submitted to the GAL. Neither did he challenge his testimony that he spent monies collected at source without banking it on the Association account.

Apollo Mutashwera Ntarirwa (PW9) was the handwriting expert who examined the questioned documents that PW8 submitted to him. In short, he testified that he confirmed that the receipts that were submitted to the GAL were signed by the author of the specimen signature in Exh.P12, the appellant. When he was cross-examined by the accused about his identity, or whether it was he that signed specimens that were presented to him PW9 responded that he did not know the appellant. I therefore find that PW9's testimony corroborated that of PW7 and PW8. I also find that he was objective in his analysis because he did not know the appellant. He had no reason to lie about findings relating to the signatures and documents that were submitted to him.

The appellant testified on oath. Although he stated that Articles 40 and 45 of the Articles of Association authorised him to spend money and later account to the board, I did not read that interpretation into those two articles. I have already set out my understanding of Article 45 above. Article 40 provided for the remuneration of directors, i.e. that their travelling, hotel and other expenses properly incurred in connection with meetings or business of the company would be paid. Be that as it may, such expenditure had to be documented with receipts and vouchers for purposes of accountability. The evidence adduced by the prosecution showed that this was not done. The evidence also established that the appellant, and no one else, was responsible for that omission.

When he was re-examined, the appellant stated that between May 2001 and December 2001, about shs 10,000,000/= was collected. That the same was spent on travel, seminars, stationery, registering the company, and shs 1,208,000/= was lent to members. He did not specify the amounts that were spent on each of the items, save lending which was not borne out by the records of the company. He charged that the audit report was not exhaustive but by his own admission, he corroborated the testimonies of PW1, PW2 and PW7 that he submitted accounts which showed that about shs 10m was collected but he failed to account for it. I therefore find that the appellant presented no useful defence to exonerate himself from the offence.

I therefore find that by the evidence on record the prosecution proved all the ingredients of the offence of embezzlement, i.e. that there was a company called Bukunja People's Association Ltd. and the appellant was its Managing Director. That during the period May 2001 to December 2001, over shs 10,000,000/= was collected by the appellant and others who handed amounts collected over to him. The evidence also established that the money was not banked on the company account and that the appellant failed to account to the company how he had spent shs 9,215,200/=. This amounted to theft. Since he was the M.D of the company whose money it was, the offence of embezzlement of shs 9,215,200/= was proved against the appellant without the shadow of a doubt. Ground 1 of the appeal therefore fails.

Ground 2

As to whether the trial magistrate denied the appellant the right to be represented by counsel, the record shows that the appellant was represented by a total of 4 advocates during the course of the trial. At the very beginning he was represented by Lubega Willy of M/s Birungi & Co. Advocates. Mr. Birungi from the same firm represented him on some occasions. On other occasions the appellant was represented by Mr. Galiwango and Mr. Tibaherwa. However, on some occasions the appellant's advocates failed to appear in court. I agree with Ms. Nabisenke's observation that the court was very understanding when the appellant's lawyers failed to attend court. For example on 5/08/04, 19/11/04 the matter was adjourned because the appellant's advocate was not in court. Court also allowed the appellant's advocates to participate in proceedings even when they were inordinately late, e.g. on 2/03/05.

On the occasions when the appellant appeared *pro se* he did not object to the proceedings going on without his advocates. On some occasions the appellant took on his own defence even in the

presence of his advocates. In particular on the 31/08/05 the appellant was represented by Mr. Tibaherwa but he chose to cross-examine PW7. I did not find any instances where the appellant was denied his right to cross-examine witnesses.

The appellant's advocates did not attend court on the 21/02/06 when he was due to make his defence. However, he opted to make his own defence and informed court at the very start of proceedings that he would do so. After he gave his testimony the appellant was cross-examined. Thereafter he was allowed to give clarifications as would happen if he had counsel to represent him. It is therefore an unfounded allegation that the trial magistrate deprived the appellant of the right to be represented by an advocate and ground 2 of the appeal also fails.

Ground 3

It was contended for the appellant that the sentence that was awarded by the trial magistrate was harsh. The general rules on sentencing were re-stated by the Court of Appeal in **Sande Martin v. Uganda Criminal Appeal No. 278 of 2003.** Sentencing is within the discretion of the trial judge. The appellate court will only interfere with the sentence passed by the trial court, if it is evident that the trial court acted on a wrong principle, or overlooked some material factors or the sentence is either illegal, or is manifestly excessive or so low as to amount to a miscarriage of justice. I have no doubt that the same principles applies to trial magistrates.

When passing sentence in the instant case, the trial magistrate considered the minimum sentence for embezzlement (3 years) and the maximum (14 years). She also considered the mitigating factors advanced by the accused in the *allocutus,* i.e. that he was a first offender, 56 years old at the time and with a family to provide for. She also considered the seriousness of the charge of embezzlement and the value of the subject matter.

I therefore find the sentence of 5 years in prison and compensation of the many people whose funds he embezzled by returning the amount embezzled neither illegal nor manifestly excessive. This appeal therefore fails on all three grounds and the sentence is hereby upheld.

Irene Mulyagonja Kakooza

JUDGE

28/07/2010