THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CRIMINAL APPEAL NO. 007 OF 2007

1. **BWANIKA GODFREY }**
2. **LUTAAYA GERALD }:::::::::::::::::::::::::::::: APPELLANTS**
3. **MASABA HERBERT }**

VERSUS

UGANDA }:::::::::::::::::::::::::::: RESPONDENT

[Appeal from the Decision of Her Worship Elizabeth Kabanda

(Chief Magistrate) dated 9th February 2007 in Mukono Criminal Case No. 077 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 in which she convicted each of the appellants for causing financial loss c/t s. 269(1) and 270 Penal Code Act (PCA) and abuse of office c/t s.87 PCA. In addition she convicted the 3rd appellant for embezzlement c/t s.268 (a) and (g) of the PCA. She sentenced all the appellants to 3 years imprisonment on the 1st count and to 1 year of imprisonment on the 2nd count with the option of a fine of shs 1m each. The 3rd appellant was singularly sentenced to a term of imprisonment of 3 years on the 3rd count with the option of paying a fine of shs 2m. The appellants appealed against both conviction and sentence.

That background to the appeal is that the appellants were the employees of Kayunga District Local Government (hereinafter also referred to as "KDLG"). The 1st appellant was the Chief Administrative Officer (CAO) while the 2nd appellant was the Chief Finance Officer (CFO) of the District. The 3rd appellant was employed as an Accounts Assistant and attached to Kayunga Hospital. The case for the prosecution was that sometime in 2001, it was reported to the IGG that some employees in health facilities in Kayunga District had not been paid part of their emoluments and they claimed arrears. That in spite of this certain monies had been returned to

the Commissioner Treasury Office of Accounts (CTOA). The IGG commissioned an investigation in 2002 which revealed that the said money somehow got lost and the appellants were implicated. The report of the IGG recommended that they be prosecuted for the loss to government.

At the trial the prosecution case was that sometime in 2001, it happened that there were unpaid funds on the account held by the District for health workers and such funds had to be returned to the Central Government, specifically to CTOA. It was the evidence for the prosecution that a cheque was prepared to return a total of shs 48 million to CTOA. However, the monies did not get to CTOA but were diverted into the account of the 3rd appellant at Uganda Commercial Bank (UCB) in Mbale, and subsequently the 3rd appellant withdrew all of shs 48 from the account.

The appellants each denied any involvement in the loss of the money. On his part, the 1st appellant claimed he had no knowledge of any loss of money as claimed. That the investigation by the IGG implicated him in the loss of money but he was cleared of any involvement in it by Kayunga District Council and the Public Accounts Committee of the District. The 2nd appellant admitted that he signed a cheque for shs 48m in favour of UCB at Mukono and a draft requisition in favour of CTOA. That he gave them to his secretary to take to the bank and that was where his role stopped. He too claimed the audited accounts of KDLG did not indicate any such loss and thus there was no loss proved. The 3rd appellant denied any involvement in the loss of the funds, generally.

The trial magistrate believed the evidence adduced by the 10 witnesses called by the prosecution and convicted all the appellants and sentenced them as above. They appealed to this court in a joint memorandum of appeal in which they raised 5 grounds of appeal as follows:

1. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence and thereby arrived at a wrong decision to convict the appellants.

2. The learned trial magistrate erred in law and fact when she convicted the appellants by heavily relying on documents which were not tendered in court by prosecution as exhibits but only for identification, vide: IDE1, IDE2, IDE3, IDE4, IDE5, IDE6, IDE7, IDE8, IDE9, IDE10, IDE11, IDE12, IDE13 and IDE14, thereby occasioning a miscarriage of justice.

3. The learned trial magistrate erred in law and fact when she convicted the appellants basing on facts not at all canvassed in evidence at the trial, hence occasioning a miscarriage of justice.

4. The learned trial magistrate erred in law when she convicted the appellants after shifting the burden of proof to the said appellants, thereby occasioning a miscarriage of justice.

5. The learned trial magistrate erred in law when she convicted appellant No. 3 Herbert Masaba for theft c/t s. 254 Penal Code Act, but sentenced him for embezzlement contrary to s.268 (a) and (g) Penal Code Act and passed an illegal sentence, hence occasioning a miscarriage of justice.

The appellants proposed that this court allows the appeal, quashes the convictions and sets the sentences aside.

At the hearing of the appeal, Mr. Nsubuga-Mubiru who represented the 1st appellant abandoned all the other grounds of appeal and addressed court on ground 1 only. In that regard he submitted that the trial magistrate erred when she assumed that there must have been a common intention between all the accused persons to commit the offences charged. He referred to the case of **Alai v. U [1979] HCB 8,** for the submission that the trial magistrate ought to have considered the evidence against each of the appellants separately because criminal liability is always personal. He then submitted that each of the cases against the appellants was different and then went on to address court on the evidence against the 1st appellant.

Mr. Nsubuga-Mubiru first pointed out that the 1st appellant was not the person who initiated the process of paying money back to CTOA because he was then not CAO at Kayunga but Acting CAO at both Mukono and Kayunga. That though he signed the documents that were prepared to have the money transferred to CTOA, the last he knew of the transaction was when he signed a cheque and an application for a draft that was in favour of CTOA and not the 3rd appellant. Further that after that he received confirmation that the money was indeed sent to CTOA because the audit reports for KDLG in 2001, 2002 and 2003 did not indicate that shs 48m was lost.

Mr. Nsubuga-Mubiru also pointed out that court did not consider the evidence that it was the 2nd appellant who confirmed that payment should be made by cheque to 3rd appellant in the absence of the 1st appellant. He submitted that had court considered this evidence it would have acquitted the 1st appellant. He went on to propose that the substitution of payment from CTOA to the 3rd appellant must have been done in the bank. That the 1st appellant was avoided in the whole process after he signed the cheque to CTOA and did not get to know that the money did not go to CTOA but to 3rd appellant till there were inquiries by the IGG. Mr. Nsubuga-Mubiru further complained that the trial magistrate did not address her mind to the IGG's report (**Exh.D2**). He concluded with the submission that there was no evidence to prove that the 1st appellant acted in concert with the rest of the appellants and so he should be acquitted.

Mr. Tumwesigye Louis for the 2nd and 3rd appellants abandoned grounds 2 and 3 of the appeal and submitted on the rest. With regard to the 1st ground of appeal, he submitted that though the 3rd appellant was convicted of abuse of office, the evidence adduced did not show that he was involved in the authorisation of any payment. He said that it was the 2nd appellant who appears to have been involved. He further submitted that though the evidence pointed to the 2nd appellant, he did not authorise any payment of the cheque to the 3rd appellant. Mr. Tumwesigye contended that the authorisation that the 2nd appellant participated in at the bank was for the payment of the money by cheque to the bank and not confirmation of the draft application in favour of the 3rd appellant. He insisted that the cheque was issued in the names of UCB and suggested that it was PW1 who was supposed to fill the draft application indicating the payee and not the 2nd appellant. He then submitted that what the 2nd appellant did was lawful, i.e. authorising and confirming payment of the cheque of shs 48m in the names of UCB. He further contended that it could only be speculated who filled in the 3rd appellant's names in the draft application because according to the testimony of PW1, it was he (PW1) that was responsible for informing the bank about who it should pay. He concluded that it must have been officials of the bank that filled in the names of the 3rd appellant in the draft application form as the payee of the funds.

Mr. Tumwesigye went on to submit that for a conviction of financial loss to stand, there had to be evidence of loss as was defined in the case of **Kassim Mpanga v. U; S/C Criminal Appeal No. 30 of 1994**. He charged that in this case loss was not proved and that the production of a photocopy of a receipt from CTOA by the prosecution showed that the funds had been received. That in the light of the prosecution evidence there was doubt as to whether the money got lost or not. He added that the testimony of the 2nd appellant that the audit reports for KDLG did not

indicate that there was any loss of shs 48m to the district was confirmed by the testimony of DW2 because he stated that the financial reports for 2001/2002 did not show that shs 48m was unaccounted for. He then concluded that the evidence adduced by the prosecution and the defence tallied to show that there was no loss proved and KDLG never lost shs 48m as alleged.

Mr. Tumwesigye went on to submit that in this case the prosecution also had to prove that the money, if it was lost at all, belonged to KDLG and not CTOA. He submitted that even if loss had been proved, the money did not belong to KDLG but to CTOA. He added that KDLG was only responsible for the money but not the owner of it. He relied on the testimony of PW9 to support his submission for PW9 stated that the money was being refunded to the owner who was CTOA. He concluded that the 2nd and 3rd appellants were wrongly convicted.

Mr. Tumwesigye went on to press his point by submitting that it was not proved that after he withdrew the money, 3rd appellant did not take it to CTOA. He stated that it was not disputed that 3rd appellant withdrew money from his account in Mbale but there was no evidence to prove that the money he withdrew from the account was not the same money in respect of which CTOA issued a receipt. He submitted that this aspect of the evidence also created doubt about the loss and this should have been resolved in favour of the appellants.

Mr. Tumwesigye further submitted that it was not clear where the 2nd appellant was at the time of the transaction. He argued so because it was the evidence for the prosecution that he was appointed the CFO on promotion on the 1/12/2002 while the questioned transactions took place between 16/01/2002 and 18/01/2002. He submitted that this evidence showed that the 2nd appellant was not an employee of KDLG at the time the transaction took place and the trial magistrate should not have believed so.

Turning to the 2nd count – abuse of office, he argued that since it was not proved that the money in question belonged to KDLG the alleged acts that were done could not be said to be to the prejudice of KDLG. He further complained that the 2nd and 3rd appellants were denied the opportunity to cross-examine PW8 and that the failure caused a miscarriage of justice. He submitted that cross-examination of PW8 was important because his testimony that there was a blank application for a draft differed from the testimony of PW1 who said that the draft application was filled in favour of CTOA.

Mr. Tumwesigye further complained that the trial magistrate shifted the burden of proof onto the 2nd and 3rd appellant when she said in her judgment that the accused persons said nothing about their signatures on the financial documents. He submitted that the accused persons had no obligation whatsoever to prove their innocence and the effect of this finding by the trial magistrate was to occasion a miscarriage of justice. Similar to Mr. Nsubuga-Mubiru, he submitted that there was no evidence to prove that there was a common intention between the 2nd and 3rd appellants to commit the offences charged. He concluded that the trial magistrate wrongly convicted them on them on the 1st and 2nd count.

Turning to the 3rd appellant who was convicted of embezzlement in addition to counts 1 and 2, he submitted that it was not clear whether he was convicted of theft or embezzlement. He charged that the trial magistrate sentenced the 3rd appellant for theft under s. 269 of the PCA yet she convicted him of embezzlement. He therefore prayed that the convictions be quashed and the sentences be set aside.

In reply, Ms. Sarah Birungi submitted that the trial magistrate properly evaluated the evidence and her findings should be upheld. With regard to the submission that she wrongly found that the 1st appellant acted in concert with each of the other two appellants she said that the 1st appellant was involved in the transaction because he signed the cheque to UCB, as well as the draft application form in favour of the 3rd appellant. That because PW6 testified that the draft application in the names of 3rd appellant and the cheque were presented to the bank together, the 1st appellant must have been aware that the payment was going to 3rd appellant and not to CTOA. Further that it was also proved that the payment was personally confirmed by the 2nd appellant at the bank as “true and correct.” She added that the confirmation letter which went to the bank before 2nd appellant confirmed in person also proved that 1st appellant was aware of a payment to 3rd appellant. She submitted that this all went to show that the three appellants acted in concert with each other to turn a transaction that was originally lawful into a fraudulent one. She concluded that the 1st and 2nd appellant’s defences did not hold water.

With regard to Mr. Tumwesigye submission that loss was not proved she submitted that it was proved that there was money for payment of health staff in KDLG. That they were not paid and they claimed arrears of salaries. Further that the unpaid money was supposed to be refunded to CTOA and was drawn from the account and not sent to CTOA but paid to the 3rd appellant. Further that it was also proved that CTOA did not receive the money because the receipt alleged

to have been issued to KDLG did not exist in the records of CTOA; that this went to prove that CTOA did not receive the money.

Regarding the ownership of the money which Mr. Tumwesigye challenged on behalf of the 2nd and 3rd appellants she submitted that because the money was meant to be for payment of KDLG staff before it was sent back to CTOA, it still belonged to CTOA. That the purported transfer of the money to CTOA did not result in CTOA's receipt of it but into it going into the account of 3rd appellant who withdrew it therefrom; so loss had been proved. She too relied on the decision in the case of **Kassim Mpanga v. U** (supra) to support her submission that the loss was proved.

With regard to the 2nd count, abuse of office, Ms. Birungi submitted that the prosecution proved that acts were done by the 3 appellants that were arbitrary to the interests of KDLG. She pointed out that there was evidence adduced about the duties of all three appellants through the testimony of PW3. She then submitted that by signing a cheque off the account and making of a draft application in favour of 3rd appellant, the three appellants did acts that were prejudicial to their employer KDLG. She invited court to disregard 2nd appellant's defence that KDLG and the Auditor General did not complain of loss because there was evidence to show that CTOA did not receive the intended refund. She pointed out that the loss could not be reflected in the books of KDLG which were audited to result into reports that showed no loss because there was the forged receipt to show that CTOA received shs 48m from KDLG. She relied on the decision in the case **Ignatius Balungi v. U [1988-90] HCB 90** where the offence of abuse of office was defined and submitted that by all the evidence on the record that was adduced by the prosecution, abuse of office was proved against the appellants. She prayed that the convictions and sentences be upheld by this court.

In rejoinder, Mr. Nsubuga-Mubiru for the 1st appellant reiterated his submission that the involvement of the 1st appellant was not proved. He said at the time that the transaction happened the 1st appellant was in charge of 2 districts and could only be briefed about what happened in finance department of KDLG. If 2nd appellant told him that the money had been sent to CTOA and received, he believed him. He submitted that the 1st appellant should have been the 1st witness for the prosecution and not an accused person. That the only evidence that tended to implicate him was that of the handwriting expert. Mr. Nsubuga-Mubiru went on to submit that the evidence of the handwriting expert was not properly handled and should not have been believed because it was only an opinion. He said that the employees of KDLG were the best

people to tell court whether the signature on the documents really belonged to the 1st appellant. He then submitted that the prosecution case was very weak if they only relied on the testimony of the handwriting expert.

In his rejoinder in respect of the 3rd appellant only, Mr. Tumwesigye submitted that whatever he did he did independently. That it was not proved that he participated in the processing and approval of the payments in the bank. That he was rightly convicted of theft and not on counts 1 and 2. That as a result, his conviction on the two counts was erroneous, harsh and excessive.

Mr. Kafuko-Ntuyo who later represented the 2nd appellant filed written submissions in rejoinder on his behalf. He repeated the argument that loss to KDLG was not proved. Further that there was no proof that the three appellants had a common intention as is required by s.20 of the PCA. That the diversion of payment to the 3rd appellant came about after the documents had left the hands of the 2nd appellant. He added that the prosecution indulged in a fishing exercise when they refused to call the government handwriting expert and instead relied on the evidence of a private handwriting expert, which in his view was concocted evidence.

Mr. Kafuko-Ntuyo also said that the 2nd appellant tried to call the government handwriting expert but the witness was frustrated because the report that he made had been handed over to the IGG who denied any knowledge of it. He added that there were *mala fides* in the prosecution of the 2nd appellant and prayed that the conviction against him be quashed and the sentence be set aside.

On a first appeal the appellant is entitled to have the whole evidence submitted to fresh scrutiny so that the 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 the trial court had the advantage of hearing and seeing the witnesses {**Peters v. Sunday Post, [1958] EA. 424**}. I will therefore address the first ground which was to do with the evaluation of evidence generally, but in the process I will address grounds 2, 4 and 5 because they are also complaints about the evaluation of evidence. The advocates for all 3 appellants seem to have abandoned grounds 3 of the appeal completely; I also found no need to address it.

GROUND 1

The first compliant that was raised by the appellants' advocates was that the trial magistrate erred when she assumed that a common intention was proved between all the appellants. It was argued

that criminal liability is always personal, and I agree with that submission but only to a certain extent. In this particular case, the payment in question could not have been made without the complicity of the three accused persons. Each had a role to play and all that had to be proved was that the signatures and/or handwritings on the documents that led to the payment indeed belonged to the three accused persons. I am therefore of the opinion that the presumption that there was a common intention to commit the offences was very much justified. I will therefore first re-evaluate the evidence that relates to the 1st and 2nd appellant who seem to have produced the documents that went to UCB, and then the 3rd appellant alone since he was at the receiving end of the money trail. I will consider the 3 counts charged in chronological order.

Count 1

In order to prove the offence of causing financial loss under s. 269(1) PCA, the prosecution had to prove 4 ingredients, i.e.

i) that the appellants were employees of a public body,
ii) that they did an act or acts, or omitted to do an act or acts,
iii) that they had knowledge that loss would occur to KDLG or to CTOA due to the acts or omissions, and
iv) that the loss actually did occur as a result of their action(s).

According to the testimony of all the witnesses for the prosecution, the 1st appellant was the Chief Administrative Officer of Kayunga District while the 2nd appellant was the Chief Finance Officer. The two did not deny this. District Administrations are included in the definition of public bodies under s.2 of the Prevention of Corruption Act. They therefore fall within the categories envisaged by s.269 (1) PCA. Florence Nattu (PW2) the personnel officer for KDLG produced the appointment letters for both the 1st and 2nd appellant and they were admitted in evidence as **Exh.P3** and **Exh.P4**, respectively. **Exh.P3** showed that the 1st appellant was appointed the CAO on 2/01/2002, while the 2nd appellant was appointed the CFO on 1/12/2002.

It was argued that it was never clarified whether the 2nd appellant was an employee of KDLG because his letter of appointment (**Exh.P4**) showed that he was appointed CFO on 1/12/2002, several months after the money was paid. However, before 1/12/2002, the 2nd appellant was the Acting CFO for KDLG. **Exh.D2** was a letter dated 10/01/2001 from the Ministry of Local Government to the Manager UCB, Mukono Branch informing him/her that the signatories for the

accounts for KDLG would be the 1st appellant as Acting CAO and the 2nd appellant as the Acting Chief Finance Officer. The prosecution therefore proved without the shadow of a doubt that both the 1st and 2nd appellants were employees of KDLG at the time that the offences occurred.

As to whether the 1st and 2nd appellants did any acts or made any omissions that resulted into loss to KDLG or CTOA, it is important to first of all clarify that it did not matter in this case whether the monies that were lost belonged to KDLG or to CTOA. I say so because s.269 PCA names the categories of bodies that it applies to as: Government, a bank, a credit institution, an insurance company or public body. Now CTOA is an employee of the treasury (government). KDLG may be referred to as a public body as opposed to government but the line between CTOA and KDLG in terms of difference is very thin. I say so because s.269 (2) provides that the term "public body" for purposes of the provision has the same meaning as that assigned to it by s.1 of the Prevention of Corruption Act. In particular, s.1 (e) provides (in part) as follows:

> "(e) "public body" ***includes the Government,*** any department, services or undertaking of the Government, the East African Community, its institutions and corporations, the Cabinet, Parliament, any court, ***district administration***, a district council and any committee thereof, an urban authority, a municipal council and any committee of any such council, any corporation, committee, board, commission or similar body whether corporate or incorporate established by an Act of Parliament for the purposes of any written law relating to the public health or public undertakings of public utility, education or for promotion of sports, …"

As to whether monies that are held by DLGs on account of salaries for their staff can be said to be monies of the DLGs or monies held on behalf of treasury, we must look to the Constitution of the Republic and the Local Governments Act. The staff of local governments are public officers by virtue of Article 257 (1) (y) of the Constitution which defines "public service" as service in a civil capacity of the Government or of a local government. Because they are part of the traditional public service their emoluments are drawn from the Consolidated Fund or provided for by Parliament, according to Article 257 (2) (i) (a) of the Constitution. Article 193 (1) (a) of the Constitution provides that the President shall for each financial year, in accordance with this Constitution, cause to be presented to Parliament proposals as to the monies to be paid out of the Consolidated Fund as unconditional grants. Article 193 clause (2) defines "unconditional grant"

as the minimum grant that shall be paid to local governments to run decentralised services. These include health services whose part of the unconditional grant is in issue in this case.

If the monies had not been spent and had to be accounted for by returning them to CTOA, it means they were still part of the Consolidated Fund which is managed under the principles of the Public Finance Act. On the other hand s. 269 (1) PCA in its totality provides that:

> **" (1) Any person employed by the Government, a bank, a credit institution, an insurance company or *public body*, who in the performance of his or her duties, does any act or omits to do any act knowing or having reason to believe that such act or omission will cause financial loss to the *Government*, bank, credit institution, insurance company, public body or customer of a bank or credit institution commits the offence of causing financial loss and is liable on conviction to a term of imprisonment of not less than three years and not more than fourteen years."**
>
> {**Emphasis supplied**}

So it did not matter whether the money belonged to KDLG or CTOA (the treasury/government). Any person who caused loss of it could be held liable under s.269 (1) of the Penal Code Act.

But before I continue with the re-evaluation of the evidence it is important to note, that the draft application form, **IDE2** was the main document that was capable of proving that all the three appellants participated in the offences charged. However, **IDE2** was never admitted into evidence as an exhibit but the trial magistrate still referred to it in her judgment as though it were formally proved and admitted. One then wonders whether evidence relating to it could be employed to convict the appellants in this case. A complaint about **IDE2** and several other documents had been raised in ground 2 of the appeal but it was never canvassed by the advocates in the appeal. Nonetheless, I will throw some light on why I relied on **IDE2** and the oral evidence relating to it though it was never admitted as an exhibit.

In **Des Raj Sharma v. R (1953) 20 EACA 310,** the Court of Appeal for Eastern Africa held that there is a distinction between exhibits and articles marked for identification. That the term 'exhibit' should be confined to articles which have been formally proved and admitted in

evidence. This was affirmed by the Supreme Court of Uganda in **Okwanga Anthony v. U; Criminal Appeal No. 20 of 2000,** and that is the general presumption of the law.

It should be noted that in the instant case, **IDE2** was identified by several witnesses for the prosecution. The first witness was PW1 through whom it was tendered for identification. He identified the signatures in the document as belonging to the 1st and 2nd appellant. The next witness that identified **IDE2** was PW3, the handwriting expert. He said it was the draft application form that was submitted to him with other documents for his analysis of signatures and handwritings. He also referred to it extensively in his report which was admitted in evidence as **Exh.P7,** and his most important findings were based on it.

With regard to the same document PW6, the Branch Manager at UCB Mukono said that the 1st and 2nd appellant applied for the draft as signatories to the KDLG account and they both signed the application. That when the bank received the cheque for shs 48m in its favour together with the draft application in favour of Masaaba they confirmed from the 2nd appellant whether they should pay. That the 2nd appellant then personally went to the bank and he confirmed that the draft application was “true and correct” by signing on it.

The Accountant at UCB Kayunga was PW7 and he too testified about **IDE2**. He identified it as the draft application form that had come to the bank alongside the cheque for shs 48m. He said it was signed by the 1st and 2nd appellant as signatories of KDLG. He further testified that the 2nd appellant went to the bank and assured them that the draft application was true and on the basis of his assurance they made two drafts in favour of the 3rd appellant. In cross-examination he said that he was present when Ssonko (the 2nd appellant) signed to reconfirm the transaction. That when he was asked about the transaction he said he knew about it and he signed on the draft application to confirm that he did.

In addition to the two witnesses from the bank, the investigating officer Victor Acidri (PW8) identified the same instrument as the draft application form that he retrieved from UCB at Mukono. All the witnesses that I have mentioned above were cross-examined about **IDE2** in some detail. It is my view that at the points when PW3, PW6, PW7 and PW8 identified the document, Mr. Odumbi for the prosecution could have applied to have the same admitted in evidence but he neglected or forgot to do so.

In **Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634,** the Supreme Court of Uganda considered a situation that was similar to the one at hand. The appellant had sued the respondent in the High Court in Kampala, claiming special damages and costs it had incurred to repair its semi trailer. The semi trailer had been damaged in a collision between the semi trailer and the respondent's train at a railway level crossing. The suit was founded on alleged negligence by the respondent's locomotive driver, for which the respondent was alleged to be vicariously liable. For some reason, though the police accident report was annexed to the plaint and relied upon by both parties in the suit, the document was never admitted in evidence. However, the trial judge relied on it to come to his findings.

On appeal, counsel for the appellant complained that the trial judge erred when he did so and that the Court of Appeal erred when it did not consider his compliant about the failure to admit the document in evidence as an exhibit. Oder, JSC (RIP) who wrote the lead judgment for the court, in which the 4 other Justices concurred, had this to say:

> *"The case of **Sharma v Regina** (supra) states the general principle of law that there is a distinction between exhibits and articles marked for identification. The term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. That general principle, in my view, does not apply to the police accident report and sketch plan in the instant case because the manner in which the parties here relied on the two documents in their pleadings; referred to them in their respective evidence and in the closing address of the Appellant's learned counsel at the trial were all on the apparent assumption that the documents in question were admitted in evidence. In my view, the parties are deemed to have accepted the police accident report and the sketch plan as evidence. The provisions of section 56 of the Evidence Act apply to the instant case. In the circumstances my view is that the Learned trial Judge rightly relied on the two documents in arriving at his decision to prefer the evidence of DW1 to that of PW1 regarding how the accident occurred."*

I am mindful of the fact that the decision that I have cited above was in respect of a civil dispute and the standard of proof for such cases is lower than that for criminal cases which is beyond reasonable. However, in arriving at his decision, the honourable Justice of the Supreme Court had recourse to decisions of the criminal courts. I am therefore convinced that the principle

above can safely be applied to the facts at hand. Therefore, in the light of the decision above by the highest court in the land, I reviewed the submissions presented by the state and those on behalf of the 1st and 2nd appellant, which were all presented in writing. They all seemed to have considered **IDE2** as a document that had been admitted in evidence. None of them complained that it remained an identification item. In addition, there was ample oral evidence about the document on the record, as well as **Exh.P7**, which meant that even if it had been expunged from the record, the oral testimonies of witnesses who identified and testified about it would remain intact. Little wonder that the trial magistrate referred to it as though it were admitted in evidence as an exhibit. I therefore find that the trial magistrate made no error when she relied on **IDE2** in coming to her findings and that disposes of ground 2 of the appeal.

Going on then to the 2nd element of the offence of abuse of office, PW1 testified that he signed the cheque and the draft application form that was meant to transfer shs 48m to CTOA. The 1st appellant did not deny this but his advocate argued that when the two documents were taken to UCB at Mukono, some person(s) substituted the instructions in the draft application form to make the payment in favour of the 3rd appellant instead of CTOA. Mr. Nsubuga-Mubiru contended that the 1st appellant was not involved in this at all.

However, the testimony of the handwriting expert (PW3) was to the effect that the substituted draft application form had the 1st appellant's signature as well. There was also the testimony of PW8 that the draft application form that the 1st and the 2nd appellant signed was blank and that it was filled in at the bank and it was contended that this contradicted the testimony of PW1. The testimony of Haji Haruna Ssekalumba (PW1), a sub-accountant attached to the Health Department of KDLG in that regard was that he prepared a draft application form for refund of money to CTOA and handed it over to the 2nd appellant for his signature and that of the 1st appellant. He further testified that the document that was shown to him in court as the draft application that was meant to transfer the money was different from the one that he prepared; it was in the names of Herbert Masaba (A3) and not CTOA. He denied that the handwriting in the document was his.

PW1 explained that under normal circumstances, after the necessary signatures he should have taken the cheque and draft application form to the bank, requisitioned for the draft and taken it to CTOA but this did not happen. He said that after he handed the documents over to the 2nd appellant, he did not get them back. The 2nd appellant later told him that the money had been

transferred to CTOA and that a receipt would be brought. The receipt had not been brought six months after the event when he left and went away for further studies. He also said that the 2nd appellant to whom he gave the documents was his boss and he could not pester him for the receipt.

On the other hand, when he was cross-examined about his investigations by counsel for the 1st appellant, the investigating officer from the Inspectorate of Government, Acidri Victor (PW8) had this to say about the draft application form:

> *"Masaba told us that he took the application for draft for the signature of the Chief Administrative Officer and the Chief Finance Officer. In his statement Masaba stated that the Chief Administrative Officer and the Chief Finance Officer signed when it was blank because he needed guidance on other details by the bank. That is why they signed it (a blank form). We could not believe him because it was irregular."*

If it was true that the 1st and the 2nd appellant signed a blank application for a draft accompanying the cheque for shs 48m, then their acts were highly irregular. They left room for any person to fill in the draft application form as he or she wished. Had not this evidence been hearsay, I would have immediately come to the conclusion and held that though the two denied that they participated in the switching of the particulars in the draft application, they were negligent when they signed a blank document in respect of an account they operated for their employer, and that by that act alone they caused financial loss to their employer.

In his submissions, counsel for the 2nd and 3rd appellants complained that they were not given the opportunity to cross-examine PW8. However, the record shows that on several occasions (i.e. 13/10/2005 and 16/2/2006) the 2nd and 3rd appellant's advocates were to cross-examine PW8 but they did not. On the latter date in particular, both advocates were absent. The trial magistrate then allowed the 2nd and 3rd appellant to cross-examine PW8. The 2nd appellant cross-examined him very briefly but the 3rd appellant declined. He said his lawyer would cross-examine at the next hearing. However, this did not happen and it is understandable because at the previous hearing date, being frustrated by the failure of the appellants' advocates to attend court and proceed with cross-examination of the witness the court ordered the accused persons themselves to do so. That stage of the trial could not go on indefinitely.

Going back to the evidence about the draft application form which tended to implicate the 1st and 2nd appellant, John Baptist Mujuzi (PW3), the handwriting expert to whom the questioned documents were submitted to verify the owners of the handwritings and signatures in them testified about them. He said that he received the questioned documents: original UCB cheque No. 037235 dated 16/01/2002, original UCB draft application form dated 17/01/2002, original UCB bank cheque deposit slip dated 18/01/2002, and an original UCB savings withdrawal voucher dated 18/01/2002, for shs 48m. He testified that in addition, he received several documents with specimen handwritings and signatures; among them were 2 sheets of paper bearing the specimen signatures of the 1st appellant. They were later admitted in evidence as **Exh.P14**.

D/IP Olwata Moses (PW10) the person who took the specimens from the 1st appellant also testified about the circumstances under which he took them. He testified that on 28/2/2003 the 1st appellant signed his signature before him and he later submitted it to the handwriting expert together with the questioned documents referred to above. This included the draft application form in favour of the 3rd appellant. In that regard, the handwriting expert (PW3) testified that when he examined the specimens and the questioned documents he came to the conclusion that the appellants wrote their specimens freely and finally and did not try to disguise. He further testified that when he compared the specimen signature that he took from the 1st appellant to the signatures on the cheque and the draft application form in favour of the 3rd appellant, he found that the signature of the Bwanika on the cheque and that on the draft application form was the writing of the same person – Godfrey Bwanika.

Mr. Nsubuga-Mubiru suggested that the best person to identify the signature of the 1st appellant was not PW3 but it should have been someone from KDLG who was familiar with it. I partially agree with his submission because it is consistent with s.45 of the Evidence Act which provides that:

> **"When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person is a relevant fact."**

In that regard, there was testimony from an employee of KDLG that confirmed that the signatures on the draft application form in favour of the 3rd appellant were indeed those of the 1st and the 2nd appellants. When he was cross-examined about the draft application form by Mr. Musaamali, counsel for the 2nd appellant, Hajji Haruna Ssekalumba (PW1) stated as follows:

> *"I do not know the person who filed IDE2. I know the signatures on it, one is of Mr. Gerald Lutaaya, the Chief Finance Officer, and the other is of the Chief Administrative Officer, Mr. Bwanika Godfrey. … This was not for the cheque which I had prepared."*

There were 2 other witnesses who identified the signature of the 1st appellant on the draft application form. Francis William Balyokwaibwe (PW6) was the Manager UCB Mukono Branch at the time the transaction took place. He testified that when the bank received the draft application, it was duly signed by the two signatories to the account for KDLG, Bwanika the CAO and Lutaaya the CFO. He identified the signatures of the 1st and 2nd appellant on the draft application form to court.

PW6 went on and testified that he was involved in the process of confirming the signatures and the contents in the draft application in favour of the 3rd appellant. Further that the 2nd appellant personally went to the bank and confirmed that the transaction was *'true and correct."* He showed court where 2nd appellant endorsed that statement and his signature on the draft application form. He went on to testify that it was on the basis of that document that the bank prepared two bank drafts (**Exh.P12** and **P13**) for payment of a total of shs 48 million to the 3rd appellant.

The other witness from the bank was Ssempebwa James (PW7). He testified that he was the Accountant at UCB Mukono at the time the transactions took place. He too identified the questioned draft application form in favour of the 3rd appellant and the bank cheques that were issued by the bank in his favour. He said the application for the draft came with the cheque and it requested the bank to pay the 3rd appellant in his account No. 1195796-6. Further that they verified that the signatories to the District account (1st and 2nd appellants) signed it and the 2nd appellant personally went to the bank to reconfirm that Masaaba should be paid and he endorsed his signature on the draft application form to reconfirm payment as ordered. PW7 identified the two bank cheques as No. BV 112563 and BV 112564, for shs 30m and shs 18m, respectively. He

also identified his signature on the two bank drafts as the writing in red ink. He also identified the beneficiary, Masaba, in the dock.

When he was cross-examined by counsel for the 1st appellant PW7 said that had not the CFO reconfirmed the payment the bank would not have paid. In cross-examination by counsel for the 2nd appellant he clarified that he was present when the 2nd appellant appended his signature to the draft application form to reconfirm the payment. Also that he had signed the application before and that they had cross-checked the signatures with those on the specimen signature cards for both the signatories for the account to which they had access. When he was cross-examined by the 3rd appellant, he said that he signed the drafts in his favour. He also further informed court that Masaba was the agent for the KDLG account in question. That he was an authorised person, meaning that he could submit to the bank and pick up cheques and other documents in relation to the account in question.

On the basis of the testimonies above, I was not persuaded by Mr. Nsubuga-Mubiru's argument that the trial magistrate solely relied on the opinion of the handwriting expert to come to the conclusion that the persons who signed the cheque in favour of UCB Kayunga were the same persons who signed the application for a draft in favour of Masaba. The signatures on those two documents were identified by 3 other persons, i.e. PW1, PW6 and PW7. The three were persons familiar with the signatures of the appellants within the meaning of s.45 of the Evidence Act. The signatures of the 1st and 2nd appellants were therefore identified by an expert under s.43 Evidence Act and by persons familiar with them under s.45 of the Act.

I was also not persuaded by the attempt to shift the liability to the 2nd appellant alone when Mr. Nsubuga-Mubiru argued that it was he that personally went to the bank to confirm that payment should be made to the 3rd appellant. The 1st appellant was accountable for confirmation of this transaction just as much as the 2nd appellant was because before the 2nd appellant went to the bank to reconfirm payment, the 1st appellant had put his hand onto a confirmation letter that the amount should be paid out of KDLG account. I am of the view that he was not exonerated when he did not participate in reconfirming that the payment should be made because PW7 said that the procedures of the bank were such that any of the two signatories to the account could reconfirm payments. Such was the testimony of PW6 the Branch Manager, and PW7 the Branch Accountant. It should be re-emphasised that PW7 said that had not the 2nd appellant reconfirmed that application to pay 3rd appellant was "true and correct", the bank would not have paid.

The testimony of PW9 also touched on the issue of confirmation of the payment. He said that it was not normal for the bank to pay without the confirmation of the CAO and that the payment should not have been made without the confirmation of the 1st appellant. However, I found that this witness did not consider the fact that the CAO had earlier confirmed in writing that the payment of shs 48m should be paid out of the account. It was also proved that the draft application in favour of the 3rd appellant was presented along with the cheque and the confirmation letter signed by him. I therefore find that the testimony of PW9 did not include or neglected the fact that the 1st appellant had already confirmed payment and 2nd appellant only re-confirmed to the bank that they should pay as originally ordered because the payment was a big one and in favour of an individual. The fact the 2nd appellant went to the bank in person must have convinced the Branch Manager and his Accountant that this was indeed a genuine payment.

I therefore find that the prosecution proved the second element of the offence of causing financial loss against both the 1st and 2nd appellant. By signing the cheque in favour of UCB Kayunga, a fact they did not deny, coupled with an application for a draft in favour of the 3rd appellant, the 1st and 2nd appellant performed acts that led to loss of funds belonging to government which were held in trust for payment of employees of KDLG. This was definitely within the ambit of s.269 (1) PCA.

As to whether they had knowledge that the loss would occur, it is clear that they did. Certainly if the money was meant to go back to CTOA and they instead signed a draft application in favour of Masaba, they did it with the intention of diverting a payment that was originally official and turning it into fraudulent one. The intention to defraud is particularly clear from the actions of the 2nd appellant. In that regard, PW1 testified that ordinarily it was he that was meant to take the draft application and cheque to the bank and thereafter collect the draft for transmission to CTOA. His boss, the 2nd appellant supplanted him in this role. It appears the 2nd appellant, or Masaba (the agent for the accounts of KDLG) took the draft and application to the bank. I say so because it is inconceivable that any other person from KDLG would have taken the two documents to the bank because that person would have also questioned why a draft for such a large amount was being ordered in the names of Masaba.

As to whether the loss occurred or not, it was the testimony of PW6 that the two drafts i.e. **Exh.P12** and **Exh.P13** went through and payment was made to the account of the 3rd appellant in

UCB Mbale. The main witness to prove this was Busingye Asaph (PW4). He told court that he was in charge of Mbale Branch of Stanbic Bank, formely UCB. He testified that Account No. 1195766 at UCB Mbale Branch was in the names of Herbert Masaba. He produced a specimen signature card in respect of a savings account and it was admitted in evidence as **Exh.P8**. It bore a photograph of the account holder and the same Masaba Herbert had an old current account in the same bank which he had opened on 10/09/1996.

PW4 also testified about and produced a deposit slip which was used to deposit two cheques into savings account No. 1195766 at UCB Mbale Branch. The deposit slip was admitted in evidence as **Exh.P9**. It showed that the person who deposited the two cheques, i.e. Mukono Drafts No. BV 112563 and BV 112564 was Herbert Masaba. These were the very same cheques that were drawn by PW7 and signed by him and PW6. The two bank drafts were for shs 30m and 18m, respectively. PW4 also produced a savings withdrawal voucher dated 18/01/2001. It was in respect of the withdrawal of shs 48m from Savings Account No. 11-95766 at Mbale UCB Branch. It was signed by the account holder. It was admitted in evidence as **Exh.P10**. He went on to produce a bank statement from the same branch of UCB in respect of Savings Account No 11-95766 and it was admitted in evidence as **Exh.P11**. The statement showed that shs 48m was deposited on the account on 18/01/2002 and withdrawn on the same day. There were no further transactions on that account after that apart from periodic deductions of ledger fees.

There is therefore no doubt that the money went to the 3rd appellant's account and that it was he that banked the two bank drafts on it. In order to confirm this, the prosecution relied on the testimony of PW3, the handwriting expert. He testified that among the specimen documents that he received were a specimen signature card for savings account No. 11-95766 (his Exhibit 16) and 5 sheets of paper bearing the specimen handwriting of Herbert Masaba (his Exhibits 8, 8A, 8B and 8C). The specimen signature documents were admitted in evidence as **Exh.16A, 16B, 16C** and **16D**. In his testimony he repeated what he wrote in his report (**Exh.P7**) about his findings on the documents from the bank as follows:

> *"The handwriting on a UCB cheque deposit slip, Exh13 and on a savings withdrawal voucher Exh14 were examined and compared with the specimen handwriting of Herbert Masaba on "Exh8, Exh8A", and "Exh8C" and I observed striking similarities in letter design, letter proportion, writing skill and writing habits which definitely indicated that Herbert Masaba the writer of the*

specimens was the person who wrote the cheque deposit slip "Exh13" and the savings withdrawal voucher "Exh14"

To wind it all up, there was the testimony of Segirinya Stephen (PW5) who was a Senior Accounts Assistant (Grade 1) in the Treasury Department in Kampala. He testified that he was approached by investigators from the IGG's office in respect of a receipt, Serial No. Y2438511 dated 18th January 2002. He said that he was shown a Photostat copy of the receipt which purported to bear his signature. He testified that he tried to look for a receipt with a similar number in his records but he found none. He also testified that the serial number on the document was not one of those that had been issued by his office at the time stated in it. He confirmed that it was he and he alone that was in charge of issuing receipts on behalf of CTOA at the time and he had not issued any such receipt. He denied that the signature on the Photostat copy of the receipt was his signature.

When he was cross-examined by Counsel for the 3rd appellant, PW5 pointed out an anomaly on the Photostat copy of the receipt that he was shown. He said that while he was in charge of the stamp that was used to verify that a payment had been received by CTOA the words "Commissioner" and "Treasury" in the statement "For the Commissioner Treasury Officer of Accounts had a slash between them. Therefore the statement was supposed to appear "For the Commissioner/Treasury Officer of Accounts." He said that the statement that appeared on the Photostat copy of receipt No. Y2438511 did not have the slash/stroke. He also confirmed that it was he that was in charge of the stamp and there was no other. From his testimony I came to a tentative conclusion that the receipt was never issued in respect of shs 48m from KDLG as was claimed by the 2nd appellant.

Mukasa Joseph (PW9) also testified about the same receipt. He said that he was an Accounting Officer and he was charged with managing the funds of KDLG. He too was shown the Photostat copy of the receipt said to have been issued by CTOA. He testified that it showed that bank drafts No. 112563 and 112564 had been paid to CTOA by the Chief Administrative Officer Kayunga. PW5 also identified drafts No. 112563 and 112564 (**Exh.P12** and **P13**) which were in favour of Herbert Masaba to be banked in his account at UCB in Mbale. He also identified the entry in the Main Cash Book for the Conditional Salary Account for KDLG for 2001/2002. He said that in the cash book it was reflected that Cheque No. 037235 for shs 48 million was drawn for payment of that amount to CTOA. However, cheque No 037235 was **Exh.P2**. It was the same

cheque in respect of which payment was ordered in favour of the 3rd appellant. Subsequently two bank drafts No. 112563 and 112564 (**Exh.P12 and P13**) were drawn out of the cheque in favour of the 3rd appellant at UCB in Mukono to be paid into his account in Mbale. The 3rd appellant personally deposited the two cheques by **Exh.P9** and withdrew all of shs 48m on the same day using **Exh.P10**.

Although the admission of the Photostat copy of the receipt, Serial No Y2438511 dated 18th January 2002, into evidence was effectively blocked by Mr. Bashaija (counsel for the 1st appellant) because he contended it was a forgery, ample evidence had been adduced to show that the money was never receipted by CTOA. It was also proved that what appeared in the Main Cash Book as a payment to CTOA was in fact a cheque the proceeds of which were paid to the 3rd appellant in his account at UCB Mbale.

I therefore find that prima facie, the prosecution proved all four ingredients that constitute the offence of abuse of office against the 1st and 2nd appellants. Although it was not proved that the 1st and 2nd appellant shared in the money, they certainly facilitated the 3rd appellant to get it from his account at UCB Mbale Branch at the end of the trail.

As to whether all ingredients of the offence of causing financial loss were proved against the 3rd appellant, by the testimony of PW2 it was proved that the 3rd appellant was an employee of KDLG. The testimony of PW3 proved that he participated in the preparation of the draft application form to UCB Mukono by filing in the same. In his report (**Exh.P7**) PW3 recorded:

> "*The handwriting on Exh 3 and Exh 4 was examined and compared with the specimen handwriting of Herbert Masaba on Exh8, Exh8A and Exh8C and I observed agreement in letter design and writing habits which clearly indicated that the writer of the specimen handwriting was the same person who filed the application for a draft Exh4."*

The prosecution proved that he did this with knowledge that loss was going to be caused to KDLG or the Government of Uganda. He even prepared for receipt of the money by opening up a new account in UCB Mbale Branch on which to bank the money. He eventually received the cheques and banked them on that account after which he immediately withdrew all the money.

Given the body of evidence on record, I found no merit in the compliant that the trial magistrate erred when she presumed that there was a common intention between the appellants to cause loss to KDLG or to the Government of Uganda. None of the appellants could have carried out this offence alone. The first appellant needed the 2nd appellant to sign the cheque from the District Account in favour of UCB. The same applied to the 2nd appellant, he could not have monies leave that account without the signature of the 1st appellant. The 3rd appellant was the decoy because it would have been highly suspicious if the drafts were made in the names of the 1st or 2nd appellant. He also facilitated the fraudulent transaction by removing the money and taking it to Mbale, further away from the setting of the crime. I thus came to the conclusion that the facts exposed by the prosecution fit properly into the description in s.20 PCA that:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."

Although the 1st and 2nd appellant could have dispensed with the 3rd appellant in their plan, it appears they needed his participation in order to ensure that the monies leave the Conditional Salary Account for medical employees of the District. In that regard, Acidri Victor (PW8) testified that during investigations his team found that the 2nd appellant worked with the 3rd appellant, without the knowledge of the District Director of Health Services, to refund the amount of shs 48 million to the Treasury yet there were employees that were claiming arrears of their salaries. So there had to be some complicity from that department which was achieved through the participation of the 3rd appellant.

Regarding the defences that were proffered by the appellants, I first considered the 1st appellant's defence. The gist of it was that he was not aware of any loss of shs 48m as was alleged in the report of findings of the IGG. He attacked the report where it stated an opinion that the 3rd appellant tried to protect him when he said that it was he (Masaba) who embezzled the money. He said that apart from that part of the report, there was no other reference in the IGG's report that he was involved in the loss of the money. He then went on to state that he was exonerated from wrongdoing by the Public Accounts Committee (PAC) of KDLG and tendered its report in evidence. It was admitted as **Exh.D3.**

I addressed my mind to Mr. Nsubuga-Mubiru's submission that the trial magistrate did not address her mind to the fact that the report of the PAC of Kayunga District Local Council exonerated the 1st appellant from all wrong doing. **Exh.D4** was a resolution of Kayunga District Council dated 4/05/2004. The resolution followed the deliberations of the Council about the allegations of embezzlement and abuse of office levelled against the 1st appellant. It was noted in the resolution that the Council listened to Mr. Bwanika's defence, evaluated the report of the IGG and the PAC of KDLG and then resolved that:

> *"The Chief Administrative Officer be and was cleared of the allegations of abuse of office and embezzlement because it was found that he played no part in causing the loss that occurred.*
>
> *The Chief Administrative Officer be and was advised to be more vigilant particularly with his staff dealing with financial matters."*

The Council then recommended that Herbert Masaba and Gerald Lutaaya be apprehended and prosecuted immediately for embezzlement and causing financial loss. The Council also resolved that legal action be taken against Stanbic Bank for flouting ethics and accepting Mr. Lutaaya's instructions which resulted into financial loss.

At the trial, the 1st appellant in his defence referred to Page 1 of a communication by the Chairperson of the Public Accounts Committee (PAC) to the Speaker of Kayunga District Council (**Exh.D2**) in which it was stated that:

> *"From the interviews made, the Committee noted that the Chief Administrative Officer over trusted his officers and they acted behind his back and changed instructions in the bank.*
>
> *The Committee also noted that the bank officials did not act according to standing orders and instead accepted the change of instructions from Mr. Lutaaya who is not the Accounting Officer.*

The members also noted that Mr. Masaba Herbert and Lutaaya had a predetermined mind to swindle the money without the consent of the Chief Administrative Officer. They also noted that Mr. Ssekalumba Harunah had no basis for raising the requisition for shs 48m, since there was no written instruction from the Chief Administrative Officer."

While it is true that KDLG PAC exonerated the 1st appellant, it is also notable that there was a flaw in its findings. The evidence that I re-evaluated above showed that it was not true that Mr. Lutaaya single-handedly changed the instructions to pay CTOA while at UCB Mukono. On the contrary, a glaring fact that came out of my re-evaluation of the evidence was that the 1st and the 2nd appellants, in concert with each other, had the 3rd appellant prepare another application for a draft in his (the 3rd appellant's) favour and they signed it. The draft application in favour of the 3rd appellant and the cheque No. 037235, which both the 1st and 2nd appellant admitted they signed, was taken to the bank with a confirmation to pay according to the application for bank draft. The 2nd appellant only went to the bank to re-confirm that the transaction was "true and correct," which convinced the bank officials, who had hitherto been hesitant, to prepare bank cheques in favour of the 3rd appellant. If PW6 and PW7 erred they only did so because the 2nd appellant confirmed his earlier written confirmation, to which the 1st appellant appended his signature, to pay the money to the 3rd appellant.

Still with regard to the allegations that PAC exonerated the 1st appellant, it should be noted that the Public Accounts Committee is not a criminal court. Its methods of dealing with complaints sent to it are through interviews of person that appear before it and not through the rigorous procedures of adducing evidence that are required by criminal courts. I highly doubt that the PAC of Kayunga District Council had the benefit of hearing the officials from UCB as the court did. Neither did it have the benefit of hearing the evidence of a handwriting expert as the court did, nor is there evidence that a detailed forensic audit was carried out before PAC sat, and that evidence of its findings were presented to it. Since the findings of PAC did not preclude the IGG from prosecuting the 1st appellant as happened in this case I am of the view that the findings of PAC should fall by the wayside in view of the evidence that was adduced against him in court.

I was also not persuaded by the finding by PAC that PW6 and PW7 flouted the rules when they prepared bank drafts in favour of the 3rd appellant without the confirmation by the 1st appellant. This is because though Mukasa Joseph (PW9) who was the Ag. CAO at the time of the trial

testified that there was an error in procedure in the bank in that the CAO did not confirm that payment should be made and that the bank relied only on the confirmation of the CFO, the 2nd appellant, this witness was not a banker. He did not produce any laid down procedures for the district that showed that the CAO had to be involved in reconfirmation of payments at the bank even after he signed a written confirmation.

On the other hand, PW7 testified that he had been employed by UCB for 17 years as a customer consultant. He was the Branch Accountant Mukono Branch at the time he testified. He testified about the procedures for confirmation and re-confirmation of payment of large payments as follows:

> *I have seen this document. It is a payment confirmation advice letter from Kayunga District. It is addressed to the manager Mukono Branch. It states that the payee is Uganda Commercial Bank Mukono. Its purpose is to confirm that the cheque in question had been issued by Kayunga District. A cheque would follow the document. This is the one (Exh.P2). …*
>
> *The cheque came with an application for draft. We found that it was o.k. This is the application for a draft. It came along side the cheque. It was to be made in favour of Masaba Herbert on account No. 1195796-6. It was applied for by the signatories i.e. Chief Administrative Officer and Chief Finance Officer of Kayunga. …*
>
> *The manager had to ring to reconfirm. He called the Chief Administrative Officer, he did not go through and then he called the Chief Finance Officer. It was to re-confirm the transaction because it was a big amount. The Chief Finance Officer confirmed on the application by signing. He came personally to the branch at Mukono. We went ahead to prepare the draft.*

When he was cross-examined, PW7 said that it was normal not to use the principle signatory to reconfirm. That it was normal to reconfirm and if the CFO had not re-confirmed the bank would not have honoured the payment. That they paid because CFO reconfirmed. He had earlier identified all the three accused persons and he said that he saw the 2nd appellant put his signature on the draft application form when he appeared in the bank to reconfirm payment.

I therefore concluded that the 1st appellant participated in the transaction by signing the draft application from in favour of the 3rd appellant. If his signature on that application was a forgery, the 1st appellant's advocate's cross-examination of PW3 did not in any way allude to that fact. His testimony was therefore not shaken in that regard. I therefore find that when the trial magistrate noted in her judgment that the appellants said nothing about the appearance of their signatures on the questioned documents, she made no error.

Mr. Nsubuga-Mubiru complained about the evidence adduced through the handwriting expert. He submitted that the evidence of the handwriting expert was not properly handled and should not have been believed because it was merely an opinion. Mr. Kafuko-Ntuyo for the 2nd appellant said that the evidence of the handwriting expert was "concocted." It is therefore pertinent at this point to go into a brief discussion of the role of a handwriting expert in a criminal trial.

The province of a handwriting expert was laid down in the case of **Hassan Salum v. Republic [1964] 1 EA 126,** where the High Court of Tanganyika (Spry, J.) ruled that the most that an expert on handwriting can properly say, in an appropriate case, is that he does not believe a particular writing was by a particular person or, positively, that two writings are so similar as to be indistinguishable. It was further held that the handwriting expert should point out the particular features of similarity or dissimilarity between the forged signature on the questioned document and the specimens of handwriting. The court referred to a passage from the summing-up of Lord Hewart in the trial of William Henry Podmore (the Famous Trials Series), which received approval of the Court of Criminal Appeal in **R. v. Podmore (2)** where he said:

> *"Let me say a word about handwriting experts. Let everyone be treated with proper respect, but the evidence of handwriting experts is sometimes rather misunderstood. A handwriting expert is not a person who tells you, this is the handwriting of such and such a man. He is a person who, habituated to the examination of handwriting, practised in the task of making minute examination of handwriting, directs the attention of others to things which he suggests are similarities. That, and no more than that, is his legitimate province."*

In the instant case, regarding the signature of the 1st appellant PW3 testified as follows:

"The signature of Godfrey Bwanika which was marked "B" on the cheque and also "B" on the application for a draft were found to have been written by Godfrey Bwanika."

PW3 had more detail about the signature of the 1st appellant in the findings in his report (**Exh.P7**) at page 3 (clause 4.2.1.) where he stated as follows:

"The signatures marked "B" on UCB cheque No 037235 "Exh 3" and on the application for a draft "Exh 4" were examined and compared with the specimen signature of Godfrey Bwanika on "Exh 6", "Exh 6A" and "Exh 10", "Exh 11" and "Exh 12" and I observed similarities in letter design, letter proportion, size, writing skill and habits which definitely indicated that the signatures marked "B" on "Exh 3" and on "Exh 4" were written by the writer of the specimen signatures."

PW3 therefore pointed out the similarities in the specimen handwriting and signature of the 1st appellant as is the established practice in the courts. He then expressed his opinion on his findings at the conclusion of his examination and analysis.

In **Nguku v. Republic [2004] 1 EA 188**, the Court of Appeal of Kenya held that the handwriting expert is not restricted to merely pointing out the features of similarity or dissimilarity between a forged signature and specimens of handwriting. He is entitled to express without argument an opinion on whether two handwritings are the product of the same hand. If the opinion is a confident one, and is not challenged in cross-examination, the court is entitled to accept the opinion of the expert; (**Onyango v Republic [1969] EA 362**, followed).

Regarding the credibility of the witness, all three advocates for the appellants cross-examined PW3. They questioned his qualifications and the state in which the documents were when he received them. He then said that the documents were not sealed when he received them though they were supposed to be. He confirmed that he was qualified to do the work and had been employed by the Government of Uganda between 1967 and 1998, a period of 31 years. That he only left the civil service because he reached the age of retirement. (He was 63 years old when he testified).

The credibility of PW3 was also challenged by the 2nd appellant when he called Samuel Ezati (DW4) as his witness. Ezati testified that he was from the police and an examiner of questioned documents holding a certificate in Forensic Examination of Handwriting and a postgraduate diploma in the same discipline. He said he did some work for the IGG in respect of some cheques and documents from Kayunga District but he did not recall what date that was. He said he handed the report of his findings to the IGG and therefore had no copy thereof. Counsel for the 2nd appellant, Mr. Kafuko-Ntuyo then applied to court to order the IGG to produce the documents.

Mr. Odumbi for the IGG objected to the application. He said that the testimony of DW4 was speculative because he did not specifically name the documents in question and state which case it was in respect of which he examined documents for the IG. Mr. Kafuko-Ntuyo then prayed that the whole matter be adjourned in order to follow up and produce the report. The witness was ordered to return to court on the 14/11/2006. On 14/11/2006 Mr. Ezati did not show up at court. The 2nd appellant then informed court that Mr. Ezati failed to trace the copy of the report that he had intimated about. The 2nd appellant seemed to have abandoned that line of defence and closed his case, stating that he had no further witnesses to call.

However, during the hearing of this appeal the 2nd appellant renewed his interest in having the report that he claimed to have been prepared by Ezati produced in court. This came at the tail end of the submissions on his behalf when he engaged Mr. Kafuko-Ntuyo to take on his defence instead of Mr. Tumwesigye who had hitherto represented the 3rd appellant and him. At the time he fired him, Mr. Tumwesigye had concluded the submissions on his and the 3rd appellant's behalf. Court advised the 2nd appellant and his advocate that no further submissions could be entertained on his behalf because Mr. Tumwesigye had already presented arguments for him. However, court ordered that the record of the court, to that point, be prepared to enable Mr. Kafuko-Ntuyo to prepare a rejoinder to the submissions of the respondent's counsel, after perusing the arguments that had been raised on the 2nd appellant's behalf by Mr. Tumwesigye.

Mr. Kafuko-Ntuyo had the benefit of perusing the submissions. But before he could make his rejoinder, he filed Criminal Misc. Application No. 007 of 2009 in which the 2nd appellant sought to adduce additional evidence. It was alleged that the additional evidence that he sought to adduce was not available at the time of the 2nd appellant's defence. In an affidavit that he deposed in support of the application, Mr. Lutaaya Gerald stated that the during his trial at Mukono, he

called DW4, Ezati Samuel but DW4 could not produce a report that he made in respect of the questioned documents because he handed it over to D/AIP Olwata. He averred that the evidence of DW4 regarding the report was vital to his defence because when he talked to him, Ezati told him that the report that he made absolved him (the 2nd appellant) of any wrong doing. He also averred that he was sure that the report was in the custody of the IG but the IG had opted to conceal it in favour of the report of PW3, a private examiner of documents, which was contrary to findings of Ezati who was employed by government. He thus prayed that court allows him to produce the report.

However, there was no evidence in the application to show that the 2nd appellant had now found the report that he sought to produce. He had not prayed that court order the respondent to produce the report. In view of the principle that applications to adduce additional evidence, especially when it is in writing, should demonstrate that the evidence is available to be produced, court sought to find out whether the 2nd appellant had the report. The 2nd appellant had not obtained the report. The application dragged on from the 12/03/2009 when it was filed to the 28/08/2010. By that date the 2nd appellant had yet another advocate, Mr. Ivan Balyejjusa. He told court that he could proceed in the application in the absence of Mr. Kafuko. After court granted him a short adjournment to enable him prepare for the proceedings, he returned to court and did so by withdrawing it.

As a result, I considered the appeal with respect to the alleged report by Ezati on the basis of the rejoinder that was filed on behalf of the 2nd appellant by Mr. Kafuko-Ntuyo on the 9/04/2009. In it Mr. Kafuko still challenged **Exh.P7** as having been concocted and favoured another report that he alleged was prepared by Ezati. I did not believe that the IGG concealed the report made by Ezati though it was alleged that the report and the questioned documents were received from him by D/AIP Olwata Moses. This is because it had come to my attention from the pleadings in Misc. Application No. 007 of 2009 that the only evidence that the 2nd appellant sought to rely on to prove that a person from the IG received the report was a Photostat copy of a single sheet of paper that had a list of names. It bore the entry ***"5802, 20/06/03, IGG, the name D/AIP Olwata and his signature, as well as the date 20/06/03,"*** among many other persons, and had been attached to the affidavit in support of the application. It had no heading and did not indicate from whence it came. It did not refer to any report either. But the 2nd appellant averred that the piece of paper was evidence that proved that D/AIP Olwata received the report he sought to produce as additional evidence from the Government Analyst.

Now, D/AIP Olwata Moses testified in the lower court as PW10. Mr. Kafuko-Ntuyo who represented the 2nd appellant cross-examined him. During that process, Mr. Kafuko made no mention of any other report other than the one that was prepared by PW3. All his cross-examination of Olwata focused on the process of transmitting the questioned documents and specimens to PW3 and on the resultant report (**Exh.P7)**. I thought that it was at this point that Mr. Kafuko should have questioned D/AIP Olwata about the report that he got from Ezati, and perhaps challenged him to produce it, if it did exist at all. I therefore came to the conclusion that an opportunity was availed to the 2nd appellant to have the report, which he thought was in his favour produced but it was ignored. That could not be blamed on the prosecution for they had no obligation to make out the accused's defence on his behalf. I think it was for that reason, among others, that the 2nd appellant's advocates decided to withdrawal his application to produce additional evidence.

The Court of Appeal of East Africa held in the case of **Muzeyi v Uganda, [1971] 1 EA 225** that the credibility of an expert witness is to be decided by the court, but lack of rebutting evidence was not a factor. I therefore considered the testimony of PW3 and the notes in **Exh.P7** about the signature and handwriting of the 2nd appellant on the questioned documents. At page 2 of the report he noted:

> *"The signature of Gerald Lutaaya marked "A" on a UCB Cheque No. 037235 "Exh 3" and on the Application for a draft "Exh 4" were examined and compared with the specimen signatures of Gerald Lutaaya which are found on "Exh 7", "Exh 7A", "Exh 7B", "Exh 7C", "Exh 10", 11" and "Exh 12" and I found agreement in letter proportions, size, and line quality which definitely indicated that the signature marked "A" on the UCB Cheque "Exh 3" and on the Application for a Draft "Exh 4" were written by the writer of the specimen signatures.*

PW3 repeated his findings in his testimony in court, after he identified the documents that he had examined to come to these findings. Mr. Musaamali who represented the 2nd appellant cross examined him about his qualifications as a handwriting expert and he confirmed that he had been a handwriting expert for government since 1967. That though he was also a firearms expert he had worked as a handwriting expert for which he did not require a license.

Although I did not have the opportunity of observing PW3 testify, the fact that his testimony about his findings were not challenged, I thought he was a credible witness and the trial magistrate made no error in judgment when she believed his testimony.

However, it was still necessary to consider the un sworn statement that was proffered by the 2nd appellant in his own defence. The main thrust of his defence was, impliedly, that he had no part in applying for a draft in the names of the 3rd appellant. That he gave the draft application in favour of CTOA and the cheque for shs 48m in favour of UCB Mukono to his secretary Katana and that is where his involvement in the matter ended. He went on to say that he later received a receipt from CTOA acknowledging receipt of the refund of shs 48m. He added that he received the audited accounts from the Auditor General for KDLG for the year 2001/2002 and they did not reflect the loss of shs 48m.

The 2nd appellant further complained that he was not consulted in the investigations that were done by the IGG, meaning that the IGG did not give him a hearing. That he was arrested though the District made no complaint against him; neither did the Auditor General or the Treasury. He therefore denied that he caused loss of the funds in issue and abused his office. He went on to challenge the qualifications of PW3 who he said was a firearms expert and not a handwriting expert.

The 2nd appellant called Nsamba Samuel (DW3) to testify in support of his case. DW3 also testified that he was not aware of the loss of shs 48m in the accounts of KDLG. He relied on the Auditor General's Report for this assertion. Further evidence in support of the 2nd appellant's defence was the testimony of Ezati Samuel who claimed to have examined the questioned documents and come to findings that were different from those arrived at by PW3. However, he did not produce the report that he referred to. It was even not proved to have been taken from him by PW10 because though he testified in court neither the 2nd appellant nor his advocate put him to task to produce the report.

I therefore came to the conclusion that the 2nd appellant's main defence that the money reached CTOA was rebutted by the body of evidence that was adduced before by the prosecution. By their evidence the prosecution proved that the receipt that purported to have been issued by or on behalf of CTOA did not exist in the records of the Treasury. Though it appeared in the Cash

Book for KDLG to indicate that shs 48m was returned to CTOA, that was not so. In order to come to the conclusion that there was no loss the auditors who compiled the Audit Report that DW3 produced must have relied on the entries in the Cash Book and the receipt whose existence in government records was denied by PW5. Moreover, the prosecution also proved that the proceeds of the cheque alleged to have been used to remit the money to CTOA ended up in the 3rd appellant's account by the ministrations of the 1st, 2nd and the 3rd appellant. I therefore came to the conclusion that the 1st count was proved against the 2nd appellant as well beyond the shadow of a doubt.

The 3rd appellant's defence was that he was not involved in the transaction at all though he came to learn that shs 48m was lost by the district. He denied having taken a bank draft and draft application form to the bank for the said monies and that was all. However, the testimony of PW3 proved that it was he that prepared the draft application form in his own favour for shs 48m. It was also proved by the testimony of PW4 and the bank signature specimen card (**Exh.P8**) which bore his photograph that the 3rd appellant had a savings account at UCB Mbale. Further that on 18/01/2002 the 3rd appellant deposited the two bank drafts No. BV 112563 and BV 112564 which were the same drafts that were issued in his favour by UCB at Mukono. It was also proved that on the same day he immediately withdrew all of shs 48m from that account by **Exh.P10**. In the light of this evidence, his blanket denial served no purpose at all to defend him. I therefore came to the conclusion that the prosecution proved the 1st count against the 3rd appellant beyond reasonable doubt.

In conclusion, the trial magistrate's evaluation of the evidence with regard to the first count in respect of all the three appellants cannot be faulted. She arrived at the correct decision that they were each guilty of the offence of causing financial loss to KDLG/GOU and that they acted in concert with each other to achieve the end they desired.

Count 2

In order to prove the 2nd count against the appellants, the prosecution had to prove that they were employed by a public body and that they did an act or acts that were arbitrary to or prejudicial to the interests of their employer in abuse of their offices.

There is no doubt in my mind that the evidence adduced by the prosecution as evaluated above proved all three ingredients against each of the appellants. The acts that they did in concert with

each other were prejudicial to KDLG who was their employer, or in the alternative to the Central Government on whose behalf KDLG employed them.

PW8 testified that the investigation against the appellants began as a result of claims by employees of Kayunga Hospital that they had not been paid parts of their salaries and that some monies had been returned to the Central government as surplus from the district. These employees were entitled to their pay which was the money that the appellants purported to return to the CTOA. The prosecution proved that the money did not get to CTOA yet the employees of the district still claimed their entitlements. As a result, though the money was lost, the employees could still continue to claim their arrears from government yet CTOA did not receive the money that the appellants alleged to have returned to him.

There is therefore no doubt in my mind that the acts that the appellants perpetrated were arbitrary to the interests of their employer and that they were perpetrated in the course of their employment. The 2nd count was also proved against all the appellants beyond reasonable doubt and the findings of the trial magistrate are upheld.

Count 3

With regard to the offence of embezzlement, the trial magistrate found that it was not proved against the 1st and 2nd appellants. She also found that it was not proved against the 3rd appellant because in her view the money that was represented by the cheques that the 3rd appellant banked on his account in UCB Mbale belonged to CTOA and not KDLG, his employer. In that regard she ruled as follows:

> *"Relating the evidence to the law above, the money was intended for Commissioner, Treasury Office of Accounts. Kayunga District Local Government the employer of A3 were not therefore the owners of the said money, the excess of medical workers salaries according to PW1. A3 cannot then be said to have stolen from a body that was not his employer for embezzlement to stand. Neither did he receive the money on account of Kayunga District."*

The trial magistrate was also of the view that for embezzlement to be proved against an accused person, the prosecution had to prove that the money stolen was in transit from someplace to the employer of the accused person. In her view, the money that went onto the 3rd appellant's account

was not in transit to KDLG but to CTOA and therefore the offence was not constituted against the 3rd appellant. She therefore found the 3rd appellant guilty of theft, a lesser charge to embezzlement, and sentenced him under s.261 PCA.

I considered the complaint by counsel for the 3rd appellant that the trial magistrate occasioned a miscarriage of justice in her conviction of the 3rd appellant for theft and in the sentence but it did not add up to what actually happened. Had she properly acquitted him of the offence of embezzlement I would have had no quarrel with her finding that he was guilty of the lesser offence of theft, and the sentence that she awarded him.

However, I have already ruled that it mattered not whether the money that was the subject of the offences charged herein belonged to CTOA or to KDLG. The money belonged to the Government of Uganda of which KDLG was just a part resulting from the decentralisation of the functions of government to facilitate easier access to services by citizens. It was only being held in trust by KDLG and that is why there was this hoax that it was being returned to CTOA who had for Government conditionally advanced it to KDLG to pay salaries of its employees. The money was therefore in transit from a representative of the government of Uganda i.e. Kayunga District Local Government back to the government accountants "the Treasury Office of Accounts," the main administrator of all accounts of government.

If the 3rd appellant appropriated the money while it was in transit between the two he was guilty of embezzlement; he stole from his employer, the government of Uganda, represented by KDLG in Kayunga. I say so because though an employee of KDLG the 3rd appellant was a public officer within the meaning of Article 257 (1) (y) of the Constitution and part of the traditional public service whose emoluments are drawn out of the Consolidated Fund by virtue of Article 257(2) (a) (i). He was indubitably an employee of the Government of Uganda and KDLG and therefore guilty of embezzlement as charged. Ground 5 of the appeal therefore fails.

As to whether embezzlement was similarly proved against the 1st and 2nd appellants, though the state did not raise any compliant against the trial magistrate's finding that both were not guilty, it is the duty of this court to correct any errors of the magistrates courts under the provisions of s.48 of the Criminal Procedure Code Act. It is for that reason that my concern was raised and I now proceed to rectify that error.

There is no doubt that the 1st and 2nd appellants were proved to be employees of KDLG/GOU. I am of the view that when theft was proved against the 3rd appellant, it was proved against them as well. I say so because s.19 (1) PCA provides for principle offenders as follows:

> **"(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it—**
>
> a) **every person who actually does the act or makes the omission which constitutes the offence;**
> b) **every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;**
> c) **every person who aids or abets another person in committing the offence."**

If the 1st and 2nd appellant had not signed a cheque in favour of UCB for shs 48m together with a draft application form in favour of the 3rd appellant payable to his account in Mbale, the money never would have left the account of KDLG. The actions of the 1st and 2nd appellant no doubt fell within the ambit of s.19 (1) (b) and (c) PCA.

That being the case, s. 19 (2) PCA provides that any person who procures another to do or omit to do any act of such a nature that if he or she had done the act or made the omission the act or omission would have constituted an offence on his or her part, is guilty of an offence of the same kind. Though it was the 3rd appellant who withdrew the money from his own account, the 1st and 2nd appellant did acts that enabled him to get the money to his account. They are therefore as guilty as he is of embezzling government funds and to the same punishment as if they had withdrawn the money from his account together with him.

In the end result, the convictions and sentences on counts 1 and 2 against all 3 appellants are upheld. I also hereby set aside the 3rd appellant's sentence and conviction for theft and substitute it with a conviction for embezzlement as charged. The acquittal of the 1st and 2nd appellant for embezzlement is also hereby set aside and substituted with a conviction for embezzlement as charged. The appellants shall each serve a sentence of 5 years for the 3rd count, to run concurrently with the prior sentences on counts 1 and 2.

In addition to the above, s. 270 PCA requires a court that convicts an accused person under s.268 and 269 PCA to order in addition to any punishments thereunder, that the accused person compensates the aggrieved party for the loss. The requirement appears to be mandatory. For that reason, the appellants shall each pay shs. 16 million, which is the equivalent of one-third of the sum of shs 48m that was lost, back to the CTOA for the people of Uganda. I think that would be sufficient compensation to assuage a tinny proportion of the haemorrhage of funds that the Government of Uganda suffers through the manipulation of accounts by persons such as the appellants here, much to the detriment of employees such as those in health facilities in Kayunga District. And a result, their clients - the patients suffer the consequences of poor health facilities and recalcitrant health workers.

In view of the above, the bail that was granted to all three appellants by this court on 17/04/2007 is also hereby cancelled.

Irene Mulyagonja Kakooza
JUDGE
7/10/2010