THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-04-CR-CN-0038-2008

(Arising from Tororo Criminal Case No. 439 of 2007)

UGANDA……..APPELLANT

VERSUS

MUNGOMA JOHN WILLY……RESPONDENT

BEFORE: THE HON. MR. JUSTICE MUSOTA STEPHEN

JUDGMENT

In the Chief Magistrate's Court of Tororo, Mungoma John Willy was charged, tried and acquitted of three counts for a no case to answer.

The three counts were:

Count I: Embezzlement c/s 268 (a) (e) and (g) and S.270 of the Penal Code Act.

Count II: False Accounting by a public officer c/s 326 of the Penal Code Act, and;

Count III: Forgery c/s 342, 345 (d) (i) (iii) and S.347 of the Penal Code Act.

During that trial the State was represented by Kimbugwe for the IGG. The accused was represented by Mr. Dagira. Prosecution was dissatisfied with the decision of the trial court and filed this appeal.

One ground of appeal was raised in the memorandum of appeal that

> "*The learned trial Magistrate erred in law and fact by failing to properly evaluate the prosecution evidence against the respondent and thereby reached a wrong decision*."

The respective counsel were allowed to file their respective written submissions for and against the appeal.

I have studied the lower court's record. I have also considered the respective written submissions. I will start by dealing with what would have been a preliminary point of law but was raised by Mr. Dagira learned counsel for the respondent in the submission that this court has no jurisdiction to reverse or alter the trial Magistrate's acquittal of the respondent. He referred to the case of ***Uganda v. Walimbwa James Cr. Appeal No.438 of 2008 (unreported) and Uganda v. Tigawalana B. Ikoba and 2 Ors Cr. App. No.21/2005*** (Unreported). He quoted a holding that,

> "*Part III of the Criminal Procedure Code Act Cap.116 and particularly sections 35 and 36 of it, which deal with appeals from acquittals and from orders other than a conviction, acquittal or dismissal, do not give this court specific jurisdiction to alter or reverse an acquittal such as the one in the case before court now*."

In reply to this submission, Mr. Mutabule Wycliff submitted that the argument of counsel for the respondent that sections 35 and 36 of the Criminal Procedure Code do not give this court power to alter or reverse an acquittal is ridiculous. That in light of sections 34 and 35, S.36 of the Criminal Procedure Code is repugnant to natural justice.

In my considered view, this court has jurisdiction to entertain an appeal from an acquittal as well as any order made during the trial of an accused person. The powers given to this court under S.35 Criminal Procedure Code and S.36 Criminal Procedure Code are different and concern different decisions made by a trial court. One is a decision of acquittal or dismissal of the case, the other are any other orders.

Under S.35, an appellate court is given power on any appeal from acquittal or dismissal to enter such decision or judgment on the matter as is authorized by law or make such order or orders as is necessary in the circumstances of the case. Such orders may include rehearing of the case or a reversal or affirmation of the acquittal.

Under S.36 the appellate court may on any appeal from any order other than a conviction, acquittal or dismissal, alter or reverse the order. This section refers to other orders given by the trial court other than those mentioned in S.35 Criminal Procedure Code.

The duty of a first appellate is very clear. An appellant in a first appellate court is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh the evidence and draw its own conclusions. Only then can it decide whether the magistrate's finding should be supported. While the first appellate court is doing the evaluation, it should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses and was in a better position to assess their demeanor and credibility in the lower court,

Prosecution adduced the evidence of eleven witnesses.

PW.1 was Emokol Geofrey Obua Senior Accounts Assistant, Health Department of Tororo Municipal Council. He testified that the respondent requisitioned money for a workshop on Malaria. After the requisition process he withdrew shs.2.5 million. That the respondent who requisitioned for the money went to his office with 3 councilors to wit Okongo Okiror, Opio Simon and Oburu and withdrew 2,350,000/= out of the 2.5 million which was paid on voucher No.24/2/06. The respondent was the payee and he instructed PW.1 to retain 150,000/= pending further instructions. That the respondent did not acknowledge receipt of the money because the 3 councilors had put him on pressure. PW.1 further said the respondent promised to sign for the money later. This did not happen but the respondent made accountability which was received by PW.1. The accountability in form of receipts was *inter alia* for stationary, fuel, full board accommodation and a list of attendance. This is comprised in Exh. P.3 (a-i).

PW.2 was Wanagoli Moses a Health Inspector in charge Budama North. He testified that although his name appears on the list of attendance (Exh.P.3) as No.3 he did not attend the workshop at springs of Good hope. He never received any payment.

PW.3 Mutambi Fred, the Manager of Springs of hope Petite Restaurant where the alleged workshop took place acknowledged signing Exp.3, 4 but said he did not enter the details. He did not recall to whom he issued the receipt but knew the respondent as a person who used to attend workshops.

PW.4 was Issa Tigawalama a Vector Control Officer Tororo local government. He testified that at one time around the time in question he received a call from the respondent telling him that there will be a workshop on malaria and funds had been requisitioned. He was however never invited for the workshop and did not know what happened to the workshop. When he was shown exhibits P.1, 3 and 4 and the payment voucher Exh.P.3 (4) his name appeared. The exhibit showed that he, PW.4 received 90,000/= as facilitation allowance yet he never facilitated in the workshop in question or attended the said workshop as a facilitator.

Dr. Okumu David Cyrus on interdiction testified as PW.5.

He said he approved funds for the workshop in question but did not know whether the funds were received. This witness was declared hostile.

PW.6 Obonyo Emmanuel is a Health Assistant Tororo District Administration. At the time of this offence he was the only Health Assistant in Tororo Administration. When he saw the attendance list for the workshop in question his names appeared thereon yet he never attended the workshop. It is indicated that he attended for 3 days and on those days his names appeared as Nos 5, 6and 7 respectively. He is purported to have received 10,000/= as payee No.4 on Exh.9.

Othieno Lucas Health Officer in charge in charge Paya Health Centre testified as PW.7. When he was shown exhibits 1-3 by the IGG officials he told them he never attended the workshop in question although he is indicated as having attended as No.15. That he was never invited for any workshop. Finally that the signature on the payment voucher is not his.

PW.8 Opurong Difas Andrew, Health Inspector in charge West Budama South Health Sub-district told court that on interrogation by the IGG Officers he was shown Exh.P.2 which had his names although miss pelt as Opuron Difas as one of the officers who attended the workshop in question. That he was never invited for the said workshop.

Another witness for the prosecution was Ms. Agnes Nabukwama Binili PW.9, a Health Assistant in charge Nagongera. She testified that although she appeared on Exh.P.2 – P.8 as having attended the workshop in question as No.4, she never attended the same. That she was not invited in the first place.

PW.10 was the Hand writing expert John Baptist Mujuzi. He examined the accused's signature on exhibits 8, 1 to 9 and compared it with Exh.11. He *inter alia* found that the signatures were the same as the ones attributed to the respondent. That the person who wrote Exh.11 is the same who wrote Exh.1 and the 1st and 3rd names on Exh.5, 6 and 7. That the attendance list for the 3 days was written by the writer of Exh.11 as well as the 1st and 3rd names on Exh. 6 and 7.

Further, PW.10 found that the figures in shillings listed on exh.9 were written by the author of Exh.11. The expert evidence was admitted as Exh.11.

The last prosecution witness was PW.11 D/ASP Olwata Moses the investigating officer who helped in recovering all the exhibits in this case. Many of which were exhibited in court and alluded to by most of the prosecution witnesses.

It is the above evidence that the trial magistrate based his decision in which he acquitted the respondent on a no case to answer.

In a Magistrate's court a finding of a no case to answer is made at the close of the prosecution case. Under S.127 MCA if at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused sufficiently to require him to make his defence a finding of no case to answer can be made. In that case the court shall dismiss the case and acquit the accused forthwith. Such a finding is what is called lack of a *prima facie* case. A *prima facie* case is an arguable case or a convincing case on the face of it where a reasonable court properly directing its mind to the law and evidence could convict if no explanation is given by the defence. It is not a case proved beyond any

reasonable doubt. Since at this stage court has not heard from the defence, it cannot fully decide whether the evidence is worthy of credit or if believed weighty enough to prove the case conclusively.

Two conditions are usually considered to reach a conclusion that no *prima facie* case has been made out and these are:

a) When there has been no evidence to prove an essential element in the alleged offence or
b) When the evidence adduced by the prosecution has been so discredited as a result of cross examination
c) or is manifestly unreliable that no reasonable court could safely convict on it.

It is apparent therefore that to conclude that an accused person has no case to answer is a decision which must be made judiciously and elaborate reasons akin to a judgment must be given by the trial magistrate.

- ***WABIRO alias MUSA V. R [1960] EA 184***,
- ***RAMANLAL TRAMBAKLAL BHATT V. R [1957] EA 332***

These and other cases made the law which is followed in the whole of East Africa on when a no case to answer should be found.

In the case under consideration and considering the evidence as I have outlined above, I am unable to agree with the findings of the learned trial magistrate that the accused had no case to answer at the end of the prosecution case. In his ruling the

trial magistrate states that the respondent is a health educator. In my view this workshop fell under his line of duty. PW.1 said the respondent requisitioned for the 2.5 million from the Director Health Services on 28th February 2006 for a workshop and not malaria treatment as the magistrate states. The workshop was for designing a communication strategy and package messages on a new malaria treatment. The money was approved by the Director Health services, the internal Auditor and the Chief Administrative Officer on voucher 24/2/06. The payee was the respondent. Further that when PW.1 got the money, the respondent went for it in company of the three councilors mentioned above but did not sign for the money promising to sign for it later. He left 150,000/= with PW.1 ordering him to keep it until further instructions.

Later PW.1 says the respondent brought accountabilities which included names of several prosecution witnesses who denied attending any workshop or facilitating at the said workshop. These include PW.2, PW.3, PW.4, PW.5, PW.6, PW.7 and PW.8. The evidence of the handwriting expert (PW.10) traced the hand of the respondent in the accountabilities exhibited in court. The investigating officer gave a detailed account on how he conducted it and how the exhibits in this case were gathered.

In my considered view, since the respondent was the focal person in the requisition of these funds as a health educator and the entire prosecution evidence points at him as being at the centre of the loss of 2.5 million, he should have been put on defence to explain what happened regardless of the fact that the Director Health Services who approved the money became a hostile witness.

I am not convinced by the reasoning by the trial magistrate that because the respondent did not sign voucher 24/2/06, it exonerates him on count I. The evidence of PW.1 shows that *prima facie* the respondent got the money although he did not acknowledge it. As in charge of the line expenditure and the one said to have requisitioned for the money, then the respondent ought to have explained why almost all of the people who allegedly attended the workshop and received various payments denied doing so.

Not signing for the money is not enough to exempt the respondent from explaining himself. In any case there are instances when stolen things are not acknowledged in writing but culprits do not go off the hook.

I am not convinced by the reasoning of the trial magistrate in regard to the second count of false accounting. The trial magistrate says that the only people to receive accountabilities in the institution were Mr. Nyaboro or Mrs. Omoit Rose in the Central Accounts office. That because the accountability did not go to them directly then false accounting was not *prima facie* proved at the close of the prosecution case. PW.1 said he received the accountability from the respondent, attached it to the voucher and sent it to the central accounting section after entering the same in the vote book.

Regarding count 3 of forgery, after perusing the evidence of PW.10 and PW.11, I find no basis upon which the trial magistrate dismissed this count. Whereas it is true that usually the best documentary evidence is the original document, there are instances where secondary evidence can be admitted to prove a fact in issue.

Whereas a copy of a document might not be proved without the original or certification it was not for the trial magistrate to adduce his own evidence regarding alteration of documents using modern technology since his expertise could not be tested. He should have looked at the evidence as presented to him and base his finding on it.

Finally I am surprised that the trial magistrate did not make reference to the majority of witnesses who testified in this case such as PW.2, PW.3, PW.4, PW.6, PW.7, PW.8 and PW.9. It is not clear whether he considered this evidence, evaluated it and dismissed it.

Mr. Dagira learned counsel for the respondent made a very elaborate submission in defence of the finding by the learned trial magistrate but it appears the submission is from learned counsel's appreciation of the case not from the ruling of the trial magistrate. The ruling does not bear out the points raised by Mr. Dagira in his defence. In fact the ruling was in itself perfunctorily made.

In the final result, I will hold that a perusal of the evidence assembled by the prosecution indicates that a *prima facie* case was made out against the accused person to warrant putting him on defence. I will therefore allow this appeal.

If this case was going to be tried by the magistrate who made the ruling it would put him in a difficult position in view of his faulty appreciation of the evidence.

An order putting the accused person on defence other than a retrial is made since I am aware that the trial magistrate will not handle the case again. The accused shall be put on defence before another magistrate Grade I to expeditiously complete the trial.

The accused person will continue to be on bail.

I so order.

Musota Stephen

JUDGE

2.6.2010

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Nambozo of IGG for State.

Respondent absent.

Dagira for the respondent in court.

Wanale Interpreter.

Nambozo: The matter is for judgment.

Court: Judgment delivered.

Musota Stephen

JUDGE

2.6.2010