

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT ANTI CORRUPTION
DIVISION KAMPALA
CR. SC. NO. 167/2010**

**UGANDA:..... PROSECUTOR
VERSUS
KENNETH KAAWE:..... ACCUSED**

BEFORE: HON.LADY JUSTICE CATHERINE BAMUGEMEREIRE

J U D G M E N T

The accused, Kaawe Kenneth, is charged with the offence of Embezzlement contrary to s. 19(b) ii of the Anti-Corruption Act 2009.

Kaawe Kenneth was employed by the United Bank of Africa (here-in-after referred to as UBA) as Head of Central Cash. He had been head-hunted from Barclays Bank where he was a member of the Customer Care Team at Barclays Prestige Banking. The prosecution alleges that on 13th July 2009 the said Kaawe Kenneth stole USD \$50,000, United States Dollars Fifty Thousand the property of United Bank of Africa which he received on behalf of United Bank of Africa by virtue of his employment.

The case for the prosecution is that the accused who was an employee of United Bank of Africa allegedly stole USD \$50,000 from his employer. As Head of Central Cash of the United Bank of Africa, the accused had a duty to receive and safely store money received on behalf of his employer.

In support of its case the prosecution called ten (10) witnesses whose names are listed below. The accused gave a sworn defence and called no witness.

The Prosecution witnesses were; PW1 Nyakatura Fred, PW2 Tracy Kaggwa, PW3 Opio Steven, PW4 Carol Nakabembwe, PW5 Fiona Mbazira, PW6 Feezah Kyambadde, PW7 Kugonzebwa Juliet, PW8 Aguma Mpeirwe, PW9 Ezati Samuel, and PW10 D/Corporal Malevu Patrick.

PW1 Nyakatura Fred told court that on 10th of July 2009 he sent an email to the accused informing him of the need to repatriate USD \$50,000 from William Street Branch to the Head Office at Spear House on Jinja Road, Kampala, Uganda. In response, the accused informed PW1 that it was not possible to transfer the money on Friday 10th of July but the transfer would be carried out on Monday the 13th of July. Consequently PW1 went ahead to load a crate with Uganda shillings 57.9 Million, USD \$50,000 and all the accompanying documents. Thereafter he sealed the crate containing both the cash and the supporting documents. Their communication is said to have been by phone and email. The email was identified as P ID 1. In cross examination PW1 insisted that the money was loaded into the Cash-In-Transit crates by two bank staff and he showed court the entries which he filled in the delivery notes to certify the particulars of the money.

PW2 Tracy Kaggwa testified that she was physically present when Nyakatura Fred loaded the money into the crates. She stated that she had attended the loading of the money in the crates in her capacity as a supervisor. She stated that she had followed PW1 and one Rita every step of the way to the vault as they loaded the cash into the crates. This witness was equally aware of the email sent to

the accused on Friday. She further stated that she was aware that money was sent on Monday as per accused's request. She witnessed the money being loaded into the crate and it included USD \$50,000. She also confirmed that in total there were three bankers who witnessed the crates getting loaded. In cross examination PW3 stated that the Uganda Shilling amount loaded in the crates was 52 million and not 57.9million as earlier stated by PW1.

The Prosecution also called the Cash-Transit-Officer (C.I.T) who picked money from William Street and delivered it to UBA Head Officer.

PW3 Opio Steven was the C.I.T officer. He testified that he normally transports a sealed crate from one branch to another. He told court in evidence in chief that on the material day he handed the crate to the accused. The accused was alone at the time of delivery. After receiving and opening the crate the accused handed the signed bank documents to PW3. The witness testified that he is never told what is in the crate when he transports it. He identified Kenneth Kaawe's singular signature on a delivery note. The witness further told court in cross examination that he feared to lose his job and told police that two people had been present during the delivery of the crates - Kenneth and Carol. He explained that he did so in order to appear to be compliant with all the banking Policies. However in re-examination the stated that Kenneth did receive the crate alone. He further states that he was surprised to be told by the police that part of the money he delivered did not arrive. This witness struck court as an individual who is not self-assured. During cross-examination the witness appeared terrified and conceded to a self-deprecating suggestion by defence counsel that the witness was a school-drop out. He however appeared forthright in dealing with questions relating to matters within his comfort zone.

PW4 Carol Nakabembwe was Co-custodian with Kenneth Kaawe. Her evidence is that the accused called her on the intercom. The call was made after the accused had received the crates of cash. She stated that she saw the C.I.T officers go out as she went in to see the accused. She could see the C.I.T officers carrying away an empty crate. Nakabembwe stated that when she entered the accused's office she found money already poured on the floor. She saw lodgement papers in respect of 57.9 Million Uganda shillings. She also saw two lodgement forms. 2.9M of the Uganda shillings were mutilated notes. Together with the accused, the witness took this money to the vault. PW4 went on to state that on 16th July '09 she was making usual postings at the close of the day when she typed William Street into her computer. She saw a figure in United States Dollars USD \$50,000 appearing on a suspense or bullion account relating to William Street Branch. This witness stated that she immediately called the accused but he did not answer. She decided to look for him and walked to his office. She found the accused hurriedly leaving his desk and when she asked him about the money he told her to check the lodgement forms. Nakabembwe stated that having failed to find the lodgement forms she decided to call Nyakatura at William Street. Nyakatura confirmed that he had indeed dispatched USD \$50,000. When she repeatedly called the accused he did not respond. PW4 decided to get her bosses involved. She told court that on several occasions the accused received money alone. In cross-examination PW4 stated that she had been asked to resign from the bank following the loss of the USD \$50,000. She also admitted having been subjected to disciplinary proceedings. In cross-examination she also stated that she was the accused's partner in receipt of cash and under the rules they had to receive cash together at all times. She

also admitted that there were times she did not enter cash received in the cash register. Indeed PW4 also appeared terrified under the weight of rigorous of cross examination by defence counsel.

PW5 was the handwriting expert. His role was not challenged because the accused does not deny that the handwriting on the questioned documents is his.

PW6 was the Police officer who carried out investigations in this case and forwarded the documents along with PF17A to the handwriting expert.

The accused Kaawe Kenneth was the only defence witness. He confirmed that he was indeed an employee of the UBA at the material time and admitted having received Uganda Shillings UGX 57.9 Million on 13th July 09. The money transported from the UBA William Street Branch and delivered to him in the presence of PW4 Carol Nakabembwe. He however stated that the USD \$50,000 was neither received by himself nor by PW4.

Kaawe Kenneth insisted that it was Carol who first notified him of the arrival of Cash-in-Transit (C.I.T). He stated that it was Carol who received the money from C.I.T and then invited him to join her. The accused further stated that they both counted the money. The accused illustrated his assertions by drawing a sketch map showing how PW4 used the keys in her possession to access the doors leading to the entrances via which cash was received. The accused further asserted that he did not run away from the bank. He explained that he resigned from the bank because he was being victimised by his immediate bosses and did not see a future in the UBA. He insisted that he never received USD \$50,000 and that the USD \$50,000 was never received by the Bank.

The Law of Embezzlement

The offence of Embezzlement with which the accused is charged is defined under the Anti Corruption Act 2009 the (ACA).

S.19 (b) ii of the ACA states as follows:

“A person who being... an officer or employee of a company or corporation...

Steals a chattel, money or valuable security...

Received or taken into possession by him or her for or on account of his employer, company or corporation commits an offence and is liable to a term of imprisonment not exceeding fourteen years or a fine not exceeding three hundred and thirty six currency points or both.”

Therefore in order to prove the offence of Embezzlement contrary to S.19 (b) ii of the ACA, the following ingredients must be proved beyond reasonable doubt:

1. That the person is an employee of a company or corporation
2. That the person steals a chattel, money or valuable security
3. That the person receives or takes into his possession by himself such chattel, money or valuable property on account of his employment.

There was no contention that Kenneth Kaawe was an employee of UBA at the Material time. Learned State Attorney Bisamunyu appearing for the State urged court to be guided by s.19 (b) ii of the Anti-Corruption Act. He submitted that the evidence of PW4 Carol Nakabembwe was compelling since she was the first to notify the UBA of USD \$50,000 showing on the Bullion Account of William street Branch. He further submitted that whilst William Street Branch

records showed that USD \$50,000 had been loaded on a bullion van for onward delivery to the Bank; it was the Carol Nakabembwe intervention that revealed the fact that the Bank had not received the money. The Learned State Attorney further submitted that once Kaawe Kenneth realised that the disappearance of USD \$50,000 had been discovered he hurriedly submitted a letter resignation and left the UBA. The Learned state Attorney then alluded to the accused conduct just before and immediately after the discovery of the loss. He submitted that having assured PW4 Carol Nakabembwe that the USD 50,000 was in the vault, the accused disappeared as soon as money was reported missing. All attempts to contact the accused were fruitless as he never answered his phone. The Learned State Attorney submitted that Kaawe's behaviour after the loss was discovered was not that of an innocent mind. He asked Court to find that all the circumstances led to the conclusion of guilt against Kaawe Kenneth. He therefore prayed that court do convict the accused as charged.

In his submission, Learned Defence Counsel, Oine Ronald contended that this was mainly a case of great suspicion against his client. He argued that apparently all the prosecution witnesses had developed suspicion against his client. He further put forward a hypothesis that money may never have been delivered to UBA and questioned whether the William Street Branch of UBA actually sent USD \$50,000 at all.

Successful objection to the use of Close Circuit Television (CCTV) footage as part of prosecution evidence did not deter the defence counsel from turning around and suggesting that in fact CCTV should have been used or produced to prove the existence of the USD \$50,000. Equity would not look upon this manner of advocacy kindly. I will now proceed to discuss the law of embezzlement.

One of the earliest interpretations of the law of Embezzlement under the Penal Code Act Cap 120 was laid out in the case of Blasio Sengendo and Anor v Uganda HCCA No. 27 of 1990 reported in 1994 KALR 133. The Learned Judge in holding no.2 stated and I quote:

‘Embezzlement is committed by an employee when he steals property of the employer before the employer acquires either actual or constructive possession of the property. In the present case (Sengendo) the property alleged to have been stolen was already in the custody of the employer and therefore the offence of embezzlement was not committed.’

A similar decision was reached in the case of Uganda v Pattni Manish 1996 KALR 100 in which Katutsi J as he then was stated thus:

‘The offence of embezzlement was created to address this situation. If through a fellow employee, he (accused) had received money only remitted for his company by some stranger as is claimed.., he can commit embezzlement of his money; for it has not yet reached the company’s possession, but stopped by him whilst on the way to the company. But once the money has been put in the company’s till as it would appear is what happened in the above case, his subsequently taking it out again and appropriating it would be a theft not embezzlement.’

However the holdings in the cases above were premised on the presumption that embezzlement could only be inferred if the item(s) alleged to have been stolen were still in transit and not yet in possession of the employer. If applied this principle would absolve a huge number of employees who commit theft of the employers’ property along the various points of the employer’s transmission chain of property ownership. It is well known that many employers

are inanimate, non-living corporate or governmental structures and rely on their employees to hold and manage the employers' property in trust and stewardship. It would be absurd if the law of embezzlement did cover theft of property by an employee simply because the property is already at one stage of possession by the employer or another. Indeed very few employees would fit the bill. Narrowing the interpretation of the offence of embezzlement would only benefit one group of people - the thieving employees.

Indeed this concern has been addressed by recent decisions and developments in the law. The case of Teddy Sseezi Cheeye v Uganda Criminal Appeal no.105 of 2009 supports this assertion.

In concurring with the learned trial Judge, the Court of Appeal had this to say and I quote:

“In the instant case (Teddy Cheeye Sseezi v Uganda), the prosecution proved beyond reasonable doubt that the appellant withdrew the money in question from his Company's account. It is incumbent upon him to tell us where the money went since the matter is especially within his knowledge. After the appellant missed the opportunity in the High Court to explain what happened to the money, his Lordship Justice John Bosco Katutsi wondered:-

“Now the question is: where is the money? Is it reasonable to suppose that the accused who was the sole operator of UCA account does not know where the money went?”

In the case before court now, the prosecution submitted that Kaawe Kenneth, who was an Employee of UBA, received USD \$50,000 on behalf of his employer. According to the prosecution only Kaawe

would know where the money and the documents relating to the United States Dollars went.

The case of Cheeye marks a significant development in the way embezzlement is interpreted by our courts of law and is a clear departure from the old rule. This case injected new life to S.19 (b) ii of the Anti-Corruption Act by acknowledging the appellant withdrew money from the employer's bank. This meant that Appellant who took money which was already in custody of the employer could still be found guilty of embezzlement. Naturally learned defence counsel did not take on board this development and argued that technically Kaawe Kenneth could not have committed the offence of embezzlement. But in fact even if we were to apply the old 'in-transit rule' which states that embezzlement could not take place unless the money had not yet reached the employer, we would have come to the same conclusion. This money was equally cash-in-transit. I am satisfied that on the material day Cash in Transit left William Street but it did not reach and was not entered in the books of the main branch. The money was stolen while it was in transit. The proposition that in fact money was not stolen is simply claptrap. The Case of Nuuhu Kalyesubula and 2 others v Uganda Cr Appeal No. 70 of 2008 (Court of Appeal) is instructive in this matter. See also Bwanika Godfrey and 2 others v Uganda Cr Appeal 7 of 2007.

Resolving of Issues:

There is no contention whatsoever that Kaawe Kenneth was an employee of the United Bank of Africa (UBA) at the material time. This is the only issue upon which both parties were agreed.

On the issue whether embezzlement was committed this court finds that there is overwhelming proof that the William Street Branch of UBA expatriated money including USD \$50,000 by C.I.T (Cash in

Transit). This money was meant to arrive at the UBA Head Office at Spear House Jinja Road. There is overwhelming proof that having transmitted this money they set up a Bullion or suspense account reflecting the transaction. There is further proof that this money was never received by the UBA Head Office. This court finds that this money was taken away with the intention of never returning it to the bank. This is an act of theft. This court hence finds that there is overwhelming proof of embezzlement. The question is who stole this money? Before I resolve the-who-did-it question it is important to handle the issue of contradictions raised by the learned defence counsel.

Learned Defence Counsel contended that the prosecution case was fraught with contradictions. The defence further alluded to what they argued were gaps and inconsistencies in the prosecution case and that they were listed as follows:

1. That the email sending money was not copied to PW5.
2. That there was no lodgement form for the 50,000 USD.
3. That there is no evidence that cash crate was handed to accused. This is not a contradiction.
4. That PW3 recorded an addition statement 1year and 4months later.
5. That no direct evidence was available of someone who saw accused take the money.
6. That it was a contradiction that PW5 denied talking about Jesus to the accused.
7. That PW10 claimed he kept the exhibits but in fact the bank had them.
8. That PW1, 2, 4 and 10 were not truthful.

The State submitted that the contradictions were minor and were attributed to the fear of loss of jobs and human error. I will now deal with the above contradictions as follows:

1. I have carefully considered the fact that the initial email sending money was not copied to PW5. However according to PW1 a combination of email and phone communication was deployed in instructing the transfer of funds. The accused was the key contact on the Bank's side and indeed set the date when the CIT would be delivered. All parties worked within the accused's timeframe including the change of transmission date from Friday to Monday. He took control of the process of cash delivery from the start. I therefore find the omission to copy in PW5 in the email communication minor.
2. Similarly, having taken full control of the receipt of the CIT at the Bank, the disappearance of the supporting documents including the no lodgement form for the 50,000 USD naturally flowed from the accused's conduct. There could not be a lodgement form for USD 50,000 since the person who stole the money made sure the forms disappeared. Exh P1 (3) is a certified copy of the Cash-In-Transit form that the bank retrieved from their CIT after the theft. Again I am unable to see a contradiction worth of merit in this instance.
3. I will deal with points 3, 5 and 7 together. The argument of the defence in point 3 was that there was no evidence that cash crate was handed to accused. In my view this is not a contradiction but a fact that would have been desirable to have. The same applies to Defence argument number 5 which calls for an eye witness. The prosecution argued aptly in view that this case was hinged on circumstantial evidence. Circumstantial evidence is evidence of surrounding

circumstances and it can be a basis for a conviction if it is adduced with arithmetic accuracy. If indeed the accused arranged and carried out the theft of cash as alleged and as I find, he would have made sure that he carries out the offence in the absence of the prying eyes of his colleagues. I am therefore satisfied with the quality of the circumstantial evidence adduced to show that the accused stole cash from his employer.

4. That PW3 recorded an addition statement 1year and 4months later. Court warned itself of the dangers surrounding such evidence and cautioned itself of this witness but in all found this witness truthful. It is possible that in the immediate aftermath of the event punitive action was going to be taken against a large number of employees in the affected section of the Bank as was the case with Carol. This man is truthful when he testified that a year later after the turbulence had settled, he was willing to tell the truth.
5. That it was a contradiction that PW5 denied talking about Jesus to the accused. I do not see the relevance of this.
6. That PW10 claimed he kept the exhibits but in fact the bank had them. This is not a major contradiction since the Bank ensured that court had the documents when it needed them.
7. That PW1, 2, 4 and 10 were not truthful. The evidence of these witnesses has been evaluated critically and where necessary court had cautioned itself of the danger of relying on some of their statement but on the whole has found their evidence truthful.

Court finds that it must depart from the Assessors opinion. Both assessors assigned to this case unilaterally advised court to acquit the accused citing these numerous contradictions which were

pointed out by the defence lawyer. Indeed the defence lawyer laid a lot of emphasis on the contradictions and inconsistencies they came across in this case. In my view the treatment of such contradictions was like turning a mole hill into an insurmountable mountain. They appeared so grave and irrefutable when viewed through the magnified lenses of the defence. Granted there might have been malpractice in the UBA such as non-observance of dual-control mechanisms in cash movements. The presence of such omissions does not in itself exculpate a worker who steals. On the contrary it could be said that such a worker took advantage of the operational and compliance weaknesses of his employer to engage in criminal acts. Such a person cannot blame his offending on the bank or its employees. Court finds as a fact that there were some contradictions but they can be explained without creating a serious doubt in the prosecution case and indeed court is alive to the fact that it needs to warn itself about the evidence of PW3 and PW4. This however does not mean that these witnesses were completely discredited. On the contrary, these two witnesses confessed to their weaknesses in a remorseful, forthright and contrite manner. PW3 said he told a lie in the first statement so as to save his job. PW4 said indeed she was disciplined by the grievance committee of the bank for ill-deeds in the bank. She was forthright and never lied that she was 'holier-than-thou'. Indeed the level of honesty exhibited by these witnesses is commendable and courts and society would be better served if witnesses owned up to their weaknesses the way these two did. Having said that, this court still warns itself of the danger of only relying on the words of these witnesses. Also the Carol's evidence was spontaneous and unabashed:

“On 13th July Kenneth called me...Via intercom...He told me CIT has brought money, come and we count...I went up. While I

was going to his office I saw the CIT officer coming out...I went to Kenneth's Office and found the money, Uganda shillings on the floor. He had already received it. So we counted it..."

Later, while working on her own, Carol is the one who first discovered an anomaly which she brought to the attention of the Bank. Here is what she said in her evidence:

"On 16th of July 2009, I think, it was the close of the day. I remember I was posting my usual things because given that my work is routine I know the accounts that all the branches hold... I just typed in the account number for William Street branch for US Dollars because all these currencies have different accounts. So I typed in the Dollar account and realised there was money on the suspense account. (this I did because money is (usually) held on a suspense account until it is transferred onto the head office account....I realised the money was still on the bullion (suspense) account and it was reading 13th of July..."

It's through her whistle blowing that efforts were made to find Kenneth Kaawe. Indeed frantic efforts were made to the extent that a police notice was filed in the National Newspapers. Carol may have had many faults but her evidence conveyed truths which cannot be denied. The fact that she saw an officer walk out as she walked in is not a fact that can easily be reconstructed. The fact that she already found money lying on the floor is another fact which is evidence of spontaneity. This court is cautious of Carol's past conduct and warns itself of Carol's evidence since the defence pitted her against the accused as though she was a co-accused. In contrast to Carol's evidence, the accused's, defence appears cunning, coached and calculated to confuse. His defence does not show that he is a

truthful. Besides the evidence of a warning letter by PW2 sent to accused on 14th is very telling and provides corroboration. She warned accused of failing to keep the bank regulations and handling cash alone. See Exh. P2. This evidence corroborates what Carol saw. In a letter dated 14th July 2009 Fiona Nambaziira Luswata wrote;

“Today evening, after updating the reserve book, you did not give the second custodian, who was posting entries to sign but locked your office and left the work station, leaving your co-custodian searching for you....”

The Letter of caution Exh P2 points to the accused's behaviour. It appears that the accused had already shown signs of weakness and he may have been conducting a dry run of what he would eventually do on the 16th- escape and never return. The evidence of PW1, PW2 and PW10 was not controverted on cross-examination and remained unchanged. PW1's evidence was that he sent money to the main branch. He was not broken down in cross and his evidence was irrefutable. I do not see how the evidence of PW1, 2 and 10 can be unduly questioned. Indeed court finds that there is evidence that money was sent from William Street Branch to Head Office and that it included USD \$50,000. Court also finds that that money was stolen on arrival at the Head Office of United Bank of Africa, Spear house, Jinja Road, Kampala.

Issue no. three:

Whether it is the accused, Kaawe Kenneth, who received or took into possession, by himself, money, on account of his employer?

Indeed court has found that money belonging to UBA was stolen between its William Street Branch and the Head Office at Jinja Road.

The Big question is who stole USD \$50,000. The defence advanced a number of theories including one that money was never sent from William Street. I find this codswallop and ignore it accordingly. There is overwhelming proof that money was sent from William Street. Exh P1 (3) says as much and corroborates what PW1, PW2, PW3 and PW4 said. The evidence of money seen on a Bullion or Suspense account is further evidence that this money existed somewhere but did not arrive at its destination. The money was sent but was stolen. This money was not stolen by the CIT team (PW3) because this man showed that he was too timid to have stolen money. He liked his job too much to risk it. He is the type. The circumstantial trail of this case points to only one person. Kaawe Kenneth. I therefore depart from the assessor's opinion in this regard. Kaawe Kenneth does not deny that he was an employee of United Bank of Africa on 13th July 2009. He received or had possession of money belonging to UBA by virtue of his employment. He was Head of Cash at the Head Office, an empowered position. He was cunning enough to tell William Branch to hold onto the money till Monday when the Branch had been ready and prepared to send it on a Friday. The inference here is that the accused probably needed preparation time to make the money and documents disappear. He made sure he received the CIT officer alone so that when he put away the dollars, no one else saw where he had put this money. Remember he was head of cash and get in and out of the vault as he willed. Between 13th and 16th when the discovery was made, he had enough time to sprint this money away. The act of the money being removed from the crate and taken away is an act of theft. Court makes a finding of theft. Kaawe's behaviour after the money did not arrive was not of an innocent man. He was shifty, lacked concentration and appeared to want to run and indeed on the 16th once Carol blew the whistle on the bullion account, Kaawe disappeared. He walked out never to return, hurriedly putting

in a resignation. Court finds that resignation from his role was an afterthought and another of Kaawe's calculations intended to divert attention from his misdeed. Kaawe's disappearance caused panic and that is further evidence that he did not leave in peace. His continual disappearance led the bank to issue notices of "WANTED" such as the one in Exh. P10 and Exh P11. These actions show that something went horribly wrong and Kaawe was not man enough to face it. Court finds that indeed Kaawe Kenneth literally, physically, run out of the United Bank of Africa on realising that he was about to be found to have stole USD \$50,000. How he took this money out or where he hid it is a question only Kaawe can answer. The fact remains and court finds as a fact that Kaawe singularly and in utter disregard of bank rules received money including USD \$50,000 on 13th July 2009. The purported involvement of Carol Nakabembwe in counting the Uganda Shillings cash was a sham cover up. This court finds that the prosecution has proved beyond reasonable doubt that Kenneth Kaawe, being an employee of United Bank of Africa stole money USD\$50,000 the property of UBA which he received by virtue of his employment. Indeed court finds Kaawe Kenneth guilty of the offence of Embezzlement contrary to section 19 (b) ii and convicts him accordingly.

Signed 17th May Year of Our Lord 2011

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HON.LADY JUSTICE

CATHERINE BAMUGEMEREIRE

JUSTICE OF THE HIGH COURT

