

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

ANTI CORRUPTION DIVISION

CR.SC 169 OF 2010

UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR

VERSUS

KILAMA DENIS & 10 OTHERS :::::::::::::::::::::::::::::: ACCUSED

BEFORE: HON. JUSTICE P.K. MUGAMBA

J U D G M E N T

Eleven persons are charged with twenty one diverse charges in the indictment. A1 is Kilama Denis, A2 is Okello Charles Okidi, A3 is Opiro Vincent, A4 is Nyero Francis, A5 is Abalo Evaline, A6 is Oola Bosco, A7 is Ocen Jackson, A8 is Opira Richard Asamu, A9 is Lungele Johnson, A10 is Surgical Centre aka Lagony Francis, while A11 is Okello Richard Reeves.

Kilama Denis is accused in counts 1, 2, 3, 4, 5, 6 and 21. In count 21 A1 is charged jointly with others. A2 is charged alone in count 10 but with others in counts 8, 9 and 21. A3 is single accused in count 11 but he is charged with others in counts 8, 9 and 21. A4 is charged alone under count 12 but with others in counts 8, 9 and 21. A5 is charged alone in count 13 but charged jointly with others in counts 8, 9 and 21. A6 is charged alone under count 14 but with others in counts 8, 9 and 21. A7 is charged alone in counts 15 and 16 but he is charged with others in counts 8, 9 and 21. A8 is charged alone in count 17 but is charged with others in counts 8, 9 and 21. A9 is charged alone in count 18 but is charged with others in counts 8, 9 and 21. A10 is

charged alone in count 19 but in counts 8, 9 and 21 he is charged with others. A11 is the sole accused in count 20 but he is charged jointly with others in counts 8, 9 and 21.

Ten witnesses were called by the prosecution to prove its case. PW1 was Margaret Ociti Atek, PW2 was Achen Lucy Oketta, PW3 was Irene Rita Angee, PW4 was Ochan Benson, PW5 was Kilama Geoffrey, PW6 was Ocira Clay, PW7 was Adokorach Miriam, PW8 was D/Sgt Opio John, PW9 was Samuel Ezati, while Paul Victor Oloya testified as PW10.

Save for A7, who gave an unsworn statement in his defence, all accused persons gave their defence statements on oath. In addition A9 called a witness on his behalf. All accused persons denied the charges brought against them.

It is the duty of the prosecution to prove the charges brought against the accused persons beyond reasonable doubt. See **Sekitoleko Vs Uganda [1967] E.A 531**. It is not the duty of accused to prove his or her innocence. In that respect any lacuna in the prosecution case should be resolved in favour of the accused.

Briefly the prosecution case is that A1 was employed by Kitgum Co-operative Savings and Credit Society Limited at all material times. Initially A1 was credit manager between 24th May 2005 and 17th March 2009. Later he was promoted as Senior Accounts Assistant. In the course of his employment A1 was responsible for posting customer cash deposits into respective ledger cards and pass books. He was responsible also for general accounting details associated with efficient operations of Kitgum Co-operative Savings and Credit Society Ltd. During April 2009

A1 was arrested after being suspected of having posted various fictitious cash deposit entries into ledger cards and passbooks of several account holders without necessary cash deposit slips. The ledger cards and passbooks thus credited included those of A2, A3, A4, A5, A6, A7, A8, A9, A10 and A11. It is alleged that after so crediting the accounts A1 would contact the respective account holders to process the withdrawal of hard cash from the accounts so that the resultant hard cash would be shared between A1 and the account holder. In the process over Shs.382,388,000= is said to have been lost to Kitgum Co-operative Savings and Credit Society Ltd. It is for that reason not only A1 but also the rest of the accused persons are indicted.

In count 1 A1 is charged with embezzlement, contrary to section 19(c) and (d)(iii) of the Anti Corruption Act. It is alleged in the charge that A1 stole Shs.382,388,000= belonging to Kitgum Co-operative Credit and Savings Society Ltd which came into his possession by virtue of his office as credit officer of the society aforesaid. In order to prove the offence charged the prosecution ought to prove that accused was an employee of the complainants, that he received or took into his possession the money in issue for or on account of his employer or by virtue of his office and the accused person must have stolen the money in issue. To support this charge the prosecution called the evidence of PW1, PW4, PW5, PW7, PW9 and PW10 amongst others. It was not disputed that A1 was an employee of the Society which is complainant in this case. However no evidence was led to show that A1 received the amount alleged or any on behalf of the complainant or that he stole any money, so as to prove the charge of embezzlement. This court and indeed any court would convict an accused person for embezzlement after being satisfied that accused received the money alleged to have been stolen. Accused must have received the money as a servant or employee and applied it to his own use. There must therefore

be proof of asportation. See **R Vs Davenport [1954] IWLIR 509**. The evidence available does not meet the required standard of proof of the offence. It is nowhere shown accused came into possession of any money meant for his employer. There is no proof of accused applying money meant for his employer to his own use. I agree with the opinion given jointly by the assessors that I find A1 not guilty of the charge under count 1 and acquit him. For the reasons I have given in the course of this judgment, A1 is acquitted on count 1.

In count 2 A1 is charged with Causing Financial Loss, contrary to section 20(1) of the Anti Corruption Act. It is alleged by the prosecution that between January 2006 and May 2009 A1 as credit officer to Kitgum Co-operative Savings and Credit Society Ltd and in the performance of his duties made false and fictitious cash deposit entries totaling Shs.382,388,000= in sundry bank accounts including those of the rest of accused persons, knowing or having reason to believe that so acting would cause financial loss to the society aforesaid. There is no direct evidence of A1 making any of the entries. What the prosecution relies on is the evidence of a handwriting expert (PW9) and his report.

Account no. 1003650 was held by A5, Abalo Evaline. It was prosecution evidence that A1 posted transactions on the ledger card of that account. This was confirmed by the evidence of PW9 and his report. In his defence A1 denied he did any posting on that account, saying the signature appeared similar to his but was not his. In cross examination A5 conceded that A1 would deposit money on her account without her knowledge. She said their mother would send him to do so. She admitted that A1 kept her passbook.

Account 1002461 belonged to Adokorach Miriam. She was a resident of Kitgum when she opened the account. Later she relocated to Gulu and stopped operating the account. Nevertheless someone did operate that account without her knowledge or consent. Testifying as PW7 she said she had stopped operating the account in 2006 but was surprised when she was asked questions by Police in 2009 regarding that account. The ledger card to the account had entries for 1st January 2007 and 11th January 2007. PW9 in his report confirmed that A1 signed the entries.

It is prosecution evidence of PW9 supported by the testimony of A5 that A1 had possession of the passbook of A5. Indeed PW9 goes further to confirm that A1 signed the ledger entries. On his part A1 denies participation as alleged. It is also prosecution evidence A1 signed entries made into the ledger for the account of PW7 although clearly PW7 had stopped operating the account. According to PW1 where withdrawals were to be made by a person other than the account holder there was a requirement for the manager's authorisation. This was not the case concerning A1's entries in the account of A5 and certainly the account of PW7. He certainly knew or had reason to believe that such acts would result into financial loss to the society. No evidence was given to the satisfaction of court regarding the amount of money lost in the many transactions cited in count 2. This was so because the necessary deposit slips were said to have gone missing. In the absence of the same it is hard to say whether or not actual deposits were made. However, the accounts of A5 and PW7 are different in the context. In the case of the account of A5 there is denial by A1 that he initialed the transactions. That denial is shown to be false by the handwriting expert's report and by A5 herself. I believe both A5 who had no reason to testify against A1 and I believe PW9's report and testimony. That A1 went ahead to operate the account of PW7 is indicative of his fraudulent intentions. She had stopped operating the account for

sometime. He certainly expected loss to result to the society when he fictitiously operated it. In the case of A5's account Shs.3,630,000= was lost. In the case of PW7's account Shs.1,950,000= was lost. The assessors advised me to find A1 not guilty on count 2. For the reasons I have given I respectfully disagree with them. I find A1 guilty of causing financial loss and convict him accordingly.

In count 3 A1 is charged with making false documents without authority, contrary to section 355(a) of the Penal Code Act. It is alleged that between January 2006 and May 2009 at Kitgum Co-operative Savings and Credit Society Ltd without lawful authority or excuse A1 made false cash deposit entries and signed in personal ledger cards and bank passbooks of several account holders such as Ocira Clay, Okello Charles Okidi, Acheng Betty, Ocira James, Opio Vincent, Ocan Benson, Oola Bosco, Abalo Evaline, Nyero Francis, Ocan Geoffrey, Ocen Jackson, Surgical Centre, Okello Henry Otto, Oguti Emmanuel, Ocen Christopher, Okello Richard Reeves, Opira Richard Asamu, Omong Denis, Leedras Sam Solomon, Okongo Agnes, Kilama Geoffrey, Odkorach Marriam, Oweka Tonny, Lungele Johnson, Mwaka Paul, Calio Denis, Nyeko Ceaser Publicks, Edmond Pacoto Oblick, Owacgiu Richard, Ocen Jackson Akena, Ogwang James, George Ocan Acaa and Obalim George. It is not contested A1 could make postings in personal ledger cards as well as bank passbooks. This charge concerns making of false cash deposit entries which A1 did endorse in personal ledger cards and bank passbooks of the persons indicated in the count. It behoves the prosecution to show which of the entries were false given that A1 was permitted to make entries in the ledger cards and bank passbooks. I do not find this charge properly framed with particulars clear enough to enable accused to defend

himself. The charge is duplex and therefore defective. I agree with the assessors that A1 should be acquitted on this count.

Count 4 is also against A1. It charges A1 with forgery, contrary to sections 342 and 347 of the Penal Code Act. In the particulars A1 is accused of making false cash deposits into the ledger cards of various account holders purporting the same to have been signed by those various account holders. It is possible what A1 did could be termed fraudulent false accounting, certainly not forgery. The falsity must be of the purport of the document, not its contents. The document must tell a lie about itself. See **Re Windsor, 10 Cox 118**. At page 123 Blackburn J stated:

"Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced into writing"

I find therefore that forgery did not happen in this case. I am further fortified in my finding by the fact that account holders had nowhere to sign in the ledger cards! How then could forgery have taken place? I agree with the opinion of the two assessors and acquit A1 on count 4.

Count 5 charges A1 with forgery, contrary to sections 342 and 347 of the Penal Code Act. The particulars are that between January 2006 and May 2009 at Kitgum Co-operative Savings and Credit Society Limited A1 made false cash deposits into the passbooks of various account holders named in the charge purporting the same to have been signed by the account holders named whereas not. I have dealt with the features of forgery in count 4. The accusations

appearing in the particulars in both counts 4 and 5 are similar except that count 4 relates to the ledger cards while count 5 concerns bank passbooks. I find that in count 5 also the prosecution has not proved forgery for the reasons expressed in count 4. Here again I have to agree with the opinion given jointly by the assessors. I find A1 not guilty in count 5. He is accordingly acquitted.

Counts 6 and 7 were abandoned by the prosecution. A1 is accordingly acquitted on both count 6 and count 7.

In count 8 all accused save for A1 are charged with uttering false documents, contrary to section 351 of the Penal Code Act. That section reads:

“Any person who knowingly and fraudulently utters a false document commits an offence of the same kind and is liable to the same punishment as if he or she forged the thing in question”.

It is imperative the prosecution proves that accused had knowledge that there were falsified entries in the passbooks and that with that knowledge accused went ahead to defraud. None of the accused persons admits to knowing that there was any falsification in the entries to their bank passbooks. While PW4, PW5 and PW6 as well as DW9 testified to having had rather questionable deals with A1 whereby A1 deposited some money on their accounts those relationships can not be extended to all accused persons. The onus is on the prosecution to prove its allegations beyond reasonable doubt. This they have not done regarding count 8. Even concerning A9 there is no evidence to show he knew of any falsification. All he alleges is he was

paid through deposits made to his account by A1. I agree with the joint opinion of the two assessors that A2 - A11 should be acquitted on count 8. They are accordingly acquitted.

Count 9 charges A2 - A11 with uttering false documents, contrary to section 351 of the Penal Code Act. The prosecution abandoned this count. A2 to A11 are accordingly acquitted of the charge in count 9.

Counts 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 charge A2, A3, A4, A5, A6, A7, A8, A9, A10 and A11 respectively with theft, contrary to sections 254(1) and 261 of the Penal Code Act. In their effort to prove the charges the prosecution proffered in evidence an audit report made by PW10 showing different sums said to have been posted to respective accounts of A2 - A11. The report was exhibit P6. Also tendered was exhibit P8 which was a summary of the false cash deposits into respective accounts for A2 - A11. It was stated on behalf of the prosecution that some vital documents such as deposit slips and withdrawal slips had gone missing. The exhibit slips would have the effect of showing the origin of the deposits. All the accused persons claimed the money was theirs. It was a claim of right which the prosecution should disprove in order to establish the charge of theft. On their part the prosecution contends the prosecution did not account for the money on the respective accounts. The burden should not shift. It is for the prosecution to prove that the money did not belong to the respective account holder. In the instant case since the accused said the money belonged to him or her the prosecution should have shown that that money was ill gotten, that accused was aware of that fact and that accused wanted to deprive the society of that money permanently. This the prosecution have not done respecting all the counts 10 through to 20. In the circumstances I do agree with the joint opinion

of the assessors. I find A2 - A11 not guilty on the respective counts under which they are charged with theft. They are acquitted accordingly.

In count 21 all accused persons are charged with conspiracy to steal, contrary to section 390 of the Penal Code Act. According to **Black's Law Dictionary** 8th edition conspiracy is an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective and action or conduct that furthers the agreement. Needless to say conspiracy is a separate offence from the crime that is the object of the conspiracy so that it ends when the unlawful act has been committed. In this count (count 21) all accused persons are charged with conspiracy to steal in spite of the fact that earlier they had been charged with theft supposing that the intended offence had been committed. Be that as it may, no evidence was led to show the alleged conspiracy took place. Indeed the accused persons deny it ever happened. They denied knowledge of each other even. Here again the prosecution has not discharged its onus to prove this offence beyond reasonable doubt. Once again I agree with the assessors' joint opinion that I should find accused not guilty in this count also. Accordingly all the accused persons are acquitted on count 21.

In the result A1 is convicted on count 2 of the indictment. He is acquitted on all other counts. The rest of the accused persons are all acquitted on all counts with which they are charged.

P. K. MUGAMBA

JUDGE

17/05/2011

SENTENCE

I have heard the submissions of both counsel as well as what the convict had to say regarding possible sentence. There certainly was a lot of mismanagement and dubious transactions under his watch. Most of those transactions unfortunately escaped detection which is regrettable. Fortunately there was an opportunity where he was caught off guard culminating in the conviction. I have considered the circumstances of this case with the background of a trusting society in mind. Certainly what the convict did was breach of trust for which he should be punished. I have considered also the period of about 2 years he has spent on remand and the fact that he regrets what he did. I deduct that period spent on remand from the possible sentence. He is accordingly sentenced to six years' imprisonment.

P. K. MUGAMBA

JUDGE

17/05/2011