THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

ANTI CORRUPTION DIVISION
CR.CA 07 OF 2010

ARIM FELIX CLIVE :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

BEFORE: HON. JUSTICE P.K. MUGAMBA

J U D G M E N T

Arim Felix Clive aka Oceng appeals against the decision of the Grade 1 Magistrate made on the 31st day of March 2011 whereby the appellant was convicted and sentenced to 60 months' imprisonment for the offence of theft, contrary to sections 254 and 261 of the Penal Code Act on count 1 and convicted once more and sentenced to a similar term of imprisonment on count 2 on a charge of receiving stolen property, contrary to section 314 of the Penal Code Act. Further, court ordered the appellant to pay compensation of US$ 103,060 to the Government of Southern Sudan. The appeal is against conviction and sentence.

The facts giving birth to this case are generally agreed. There was a contractual arrangement between the appellant herein and the Government of Southern Sudan. There is no evidence, however, of payment by the latter to the former despite an undertaking by the latter to effect payment to the former. There is evidence of money credited on the personal account of the former in Kampala Uganda upon the latter's instruction. There was no advice or instruction by the latter to the former concerning the US$ 323,060 credited on the account of the former, the

appellant. Appellant started spending part of the money deposited on his account the way he deemed fit. Thereafter followed charges in the lower court which resulted in conviction and this appeal.

The six grounds in the memorandum of appeal read as follows:

1) That the Learned Trial Magistrate erred in law and fact when she conducted the trial of the Appellant on a defective charge sheet.
2) That the Learned Trial Magistrate erred in law and fact when she convicted the Appellant for both Theft and Receiving Stolen Property.
3) That the Learned Trial Magistrate erred in law and fact when she failed to take into account the Appellant's defence of claim of right.
4) That the Learned Trial Magistrate erred in law and fact when she shifted the Burden of Proof to the Appellant.
5) That the Learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence on record, thereby coming to a wrong conclusion.
6) That the sentence of 5 years each for the offences of theft and receiving stolen property and an order to return US$ 133,060 to the Government of Southern Sudan was harsh and excessive in the circumstances.

This is the first court of appeal and as such it is behoven to painstakingly go through the record in order to arrive at its own conclusion, notwithstanding that it had no opportunity to see the witnesses testify. Of course this brings to mind **Dinkerrai Ramkrishan Pandya Vs R [1957] E.A. 336**.

It is argued by the appellant in count 1 that the charge sheet in the trial court was defective given that the particulars did not disclose where the offence was committed and that ultimately the appellant was not given the opportunity to prepare his defence, whereas Article 28(3) of the Constitution guarantees it. It was contended on behalf of the respondent that at the trial no miscarriage of justice was visited on the appellant herein by failure to disclose the place where the offence is alleged to have been committed. It was further stated that in any case the defence did not raise the concern at the time of trial but introduced it late. It was however conceded on behalf of the respondent that there was failure to disclose the place where the offence took place. Regarding contents of the charge section 85 of the Magistrates' Courts Act states: "Every charge shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

A similar provision, word for word, is to be found in section 22 of the Trial on Indictments Act. In **Uganda Vs Paulo Muwanga [1988 - 1990] HCB 72** while this court recommended that the place where the offence is alleged to have taken place should be mentioned all it had to say concerning failure to mention such place was that such failure would put accused at a disadvantage as it would not provide the defence with sufficient information to prepare. It was added however that an amendment to the indictment would cure the anomaly. I have looked at the proceedings in the lower court of the matter at hand. Concerning the place the offence is alleged to have taken place no disquiet was raised by the defence. Instead both the prosecution and the defence appeared to be reading from the same script. The defence was evidently not at a

loss how to prepare their defence despite the omission and in the circumstances it was not deemed necessary even to make an amendment to include the place host to the offence. Omission to mention the place where the offence took place though admittedly unfortunate in no way prejudiced the defence in its preparation of its case. This ground of appeal fails.

The second ground of appeal relates to accused's conviction on both counts of theft and receiving stolen property. In the charge sheet there is no gainsaying the two offences allegedly arose out of the same facts. In **Justus Bagonza Vs Uganda, Criminal Appeal No. 130 of 1977 reported in [1977] HCB 306** it was held that to prove a charge of receiving stolen property there is need for proof that the thing in issue was stolen and that this could be inferred from the circumstances in which accused received the property. In the instant case it is necessary for the prosecution to prove that money accused is alleged to have received was stolen. Given their kindred disposition theft and receiving stolen goods are commonly charged together, but when this is done they are charged as alternative counts. Needless to say, where offences are charged in the alternative, accused is convicted on one of the counts while no finding will be made on the other. Indeed section 22 of the Penal Code Act underscores this position when it provides against a person being punished twice for the same offence. In **Seifu s/o Bakari Vs R [1960] E. A 338** this position was vindicated. By convicting the appellant on both theft and receiving stolen money the trial magistrate erred given that the two charges had their genesis in the same facts. The role of the prosecution in all this should not go unassailed either. The state should have correctly laid out the offences in alternative counts but this they did not do. Furthermore, charging receiving and retaining together like they did is improper since receiving and retaining are separate offences. In receiving stolen money the suspect receives it knowing it has been stolen, whereas in

retaining stolen money possession of that money becomes unlawful later. Initially possession was lawful. See **David Kalama Vs Uganda, Criminal Appeal No. 103 of 1977 reported in [1977] HCB 314**. The second ground of appeal succeeds.

Counts 3, 4 and 5 were argued together. It was submitted on behalf of the appellant that the trial court did not give due weight to the appellant's defence of claim of right when it arrived at its verdict. Earlier in this judgment the relationship between the appellant and the Government of Southern Sudan was mentioned. Also mentioned was money deposited on appellant's account. The appellant contends the money was part- payment to him on the contract, while the prosecution insists it was money the Government of Southern Sudan sent for Southern Sudanese students in various institutions in Uganda for their welfare.

It is trite law that if an accused obtained property under a claim of right he did not have the intent to steal it. However it must be shown that the accused believed in good faith that he had a right to the money in this case and that he took it openly. Section 7 of the Penal Code Act ordains:

> "A person is not criminally responsible in respect of an offence relating to property if the act done or omitted to be done by the person with respect to the property was done in the exercise of an honest claim of right and without intention to defraud".

In **Rofino Ndaa Vs Uganda, Criminal Appeal No. 143 of 1977 reported in [1977] HCB 308** it was held that the fraudulent intent to steal must be an intent permanently to deprive the owner of his property and that the intent may be formed at the time of the taking or at a later time when the accused forms such an intent to permanently deprive the owner of the property. Intent may be

gathered from the facts or the circumstances surrounding the particular case. Pertaining to the case at hand, it has not been contested that appellant had a contract with the Government of Southern Sudan where he was to be paid Sudanese Pounds 1,450,531 (One million four hundred fifty thousand five hundred thirty one Sudanese Pounds). Exhibit D6 is to effect. Also relevant is exhibit D3 introducing accused to the Uganda Christian University, Mukono. Exhibit D2 is a letter written by the appellant to the Under Secretary, Higher and Tertiary Education, Ministry of Education, Science and Technology, Juba, dated 25th May 2009. It demanded for payment on the contract. Exhibit D7 dated 5th June 2009 is a letter in reply to exhibit D2. It concerns payment to the appellant and promises immediate payment to the appellant. It regrets past inconveniences. Money was sent on 19th June 2009. It was the evidence of the appellant that when he found the money deposited on his account he was in no doubt it was the money he had been promised in the letter dated 5th June 2009, from the Under Secretary. The prosecution challenged neither the contractual relationship nor the correspondence tendered as exhibits by the defence. One has to consider also that that evidence besides, the appellant was given no warning that money other than his entitlement would be deposited on his account. Is it far fetched then that he was guiled to relate the bonanza to the payment he could have deemed due especially since it was from the same source? Given the above and the explanation of the appellant, the prosecution did not prove, as it ought to, that there was intent on the part of the appellant to defraud. Doubtless if the trial court had taken all this into account it would have reached a different verdict. Consequently I agree with the appellant that the prosecution never proved the offence of theft in the case.

Ground 6 of appeal should be considered next. Since the convictions entered against the appellant stand quashed, the sentences imposed in tandem are set aside. The order given is also set aside. Civil remedies belong elsewhere in the circumstances.

This appeal has succeeded wholly and appellant is to be set at liberty forthwith unless he is being held for any other lawful cause.

P. K. MUGAMBA
JUDGE
08/06/2011