THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

ANTI-CORRUPTION DIVISION

HCT-00-AC-CN-0001 OF 2013
(Arising from HCT-00-AC-SC-97/2010)

FLT.CPT.GEORGE M.MUKULA:::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

UGANDA::RESPONDENT

BEFORE: HON. JUSTICE. D. K. WANGUTUSI

JUDGMENT

This appeal arises from the judgment and orders of the learned Chief Magistrate at the Anti Corruption Division, convicting and sentencing George Michael Mukula herein after referred to as the Appellant.

The background of the matter has its roots in a gift given to Uganda as a country that had excelled in implementation of an immunisation programme. The gift was to be spent on things that enhanced immunisation and health generally. The ministry decided that one of the ways this would be implemented was to give out money to organisations which promoted health matters in the country. The First Ladies Office ran such an organisation and did request by letter for some of the money to fund several Health Advocacy Conferences.

The Ministry of Health approved and granted the First Lady's Office a sum of Shs 263 million. It was to be withdrawn and sent to the First Ladies Office through the appellant who had first been contacted for the money. It was withdrawn and documentation showed that it was handed to the appellant to pass it over to the First

Lady's Office. Only Shs 54 million reached the First Lady's Office. Shs 210 is said to have disappeared along the way.

The appellant was charged together with the Minister of Health Hon Muhwezi, the Minister of State for Health Dr Kamugisha and Alice Kaboyo. Ms Alice Kaboyo was convicted on own plea of guilty and was sentenced to a fine in respect of other funds. Hon Muhwezi and Dr Kamugisha were acquitted on a no case to answer.

The appellant went through a full trial. He was convicted and sentenced to a prison term of four years, hence this appeal.

The appeal is grounded on the following;

1. The learned Chief Magistrate erred in law and fact in that she wrongly tried and convicted the appellant on the basis that he was an employee of the Government of Uganda.

   2The learned trial Chief Magistrate erred in law and fact in that she was biased and denied the Appellant a fair trial when she;

   a) believed the prosecution case before hearing the appellant's;
   b) reversed the burden of proof and wrongly imposed it on the Appellant;
   c) put the Appellant on his defence for an expressly specified purpose, only to turn round in her judgment, to the detriment of the Appellant.

   3The learned trial Chief Magistrate erred in law and fact in that she failed to properly evaluate the evidence adduced at the trial, and thereby came to the wrong and biased conclusion that the appellant ;

   a) Received the sum of Shs 210. 000. 000=;
   b) Stole the said sum of Shs210. 000. 000=;
   c) Was guilty of embezzlement.

4)The learned trial Chief Magistrate erred in law and fact in that she wrongly based her conviction of the Appellant on s. 254(2)(e) of the Penal Code Act and s. 114 of the Evidence Act.(Cap. 6)

5)the learned trial magistrate erred in law and fact in the she wrongly held that the prosecution had not departed from the particulars of the offence appearing in the charge sheet.

6)The learned trial Chief Magistrate erred in law and fact that in sentencing the Appellant she regarded a custodial sentence as being mandatory and did not consider the option of a fine.

He sought this court to allow the appeal, quash the conviction and set aside the sentence.

At the hearing of the appeal counsel for the appellant opted to handle ground one and five together and the rest in the order in which they appeared in the memorandum of appeal

Ground One and Five

The first ground was to determine whether it was wrong to convict the appellant on the basis that he was an employee of the Government of Uganda. Counsel for the appellant submitted that the court in proceeding to hear the charges of embezzlement against the appellant on the basis that he was an employee of government was an incurable error because the appellant was not an employee. In this he relied on the authority of the *Constitutional Court Petition No 08 of 2006 Darlington Sakwa and Another versus the Electoral Commission and 44 others.* He also submitted that the Constitutional Court also held that ministers were not government officials. He said public officers were the same as government officers.

He further submitted that even if it was conceded during the trial that being a minister he was an employee of government, the conviction should be overturned as soon as the courts were made aware of the error occasioned by the Chief Magistrate's Court since the concession of counsel did not bind an accused. He relied on the case of

Yasamu versus Uganda (2ooo) 2 EALR 568. He emphasised that one of the ingredients that the prosecution had to prove beyond reasonable doubt was that the accused was an employee and that since this was not proved, the conviction could not stand.

In reply, counsel for the State submitted that the authority of *Darlington Sakwa and another versus the Electoral Commission and Another Constitution Petition No 8 of 2006* relied upon by the appellant was distinguishable from the situation in this appeal. He submitted that that interpretation of article 80(4) was restricted to issues of elections. That the constitutional court held so because to hold otherwise would lead to absurdity in law as this would mean that the President, the vice President, Members of Parliament would resign there seats 90 days before the elections which would leave the Government without a Parliament, a President or Government. That the Ministers were therefore employees in respect of other matters and to have referred to the appellant as employee was correct.

In my considered opinion if the Constitutional Court had restricted itself to only article 80(4) it would have explicitly said so in the judgment. If they had decided restrictively as counsel for the State submitted, the ministers would be employees when doing other things and not employees during election activities.

In my view why their Lordships decided that ministers were not employees is embedded in the type of unenviable terms under which they work. In her judgment the learned Deputy Chief Justice described them in the following words:

> *"Whilst I agree both ministers and State Ministers are referred to in the Constitution as "Ministers of Government", they are not employees of Government. They are not appointed under Public Service but by the President. It is true their appointments are approved by Parliament but the President can revoke them as and when he wishes. They are appointed at his pleasure. He hires and fires them. They can not sue for wrongful dismissal. The minister has no permanent place of work. He may not even have a ministry to head for there are Ministers without portfolio"*

The Hon Justice Twinomujuni considering the meaning of employment was even more elaborate in describing the vicissitudes of Ministerial life. In his words:

> *In my view, none of these definitions applies to Ministers and Army Members of Parliament. Ministers are not "employed"*
>
> *or "employees" of a government department or agency. They have no contracts with any government department or agency. They are appointed at the whims of the President. He alone can and does deploy not employ them. He can dismiss them on radio and they have no recourse to any law court or authority. He can deploy them to hold one, two or several portfolios or no portfolio at all. He can wake them up at 3.00am for duty and he can shift them from right to left (so to say) at any time of day or night. In my view theirs is not "employment". It is "deployment".*

These in my view are the reasons why the Constitutional Court held that Ministers were not employees. The meaning of this is that they were not employees for all purposes and not only at election time.

That it was not restricted to only elections is seen from the words of the Hon Deputy Chief Justice;

> *"It is more appropriate to refer to them as political leaders. It follows, therefore, that in general the regulations for civil servants or public officers, are not applicable to them"*

The court having put them out of the arm bit of the regulations of civil servants and public officers makes it clear that the decision was not restricted to Article 80(4).

From the foregoing I am satisfied by submission of Counsel for the Appellant that Ministers are not employees and that to refer to the minister in the particulars of the charge of embezzlement as employee was an error.

Counsel for the Appellant also submitted that a Minister was not a Government Official because the Constitutional Court had held that they were not Public Officers.

The Constitutional court dealt with the issue of employee and public official but, did not specifically address it self to Government Official. A simple definition of government officer can be got in Oxford Advanced Learners Dictionary; the International Student's 6th Edition at page 916 describes an Officer as a person who is in a position of authority in Government or organisation. This publication specifies government Ministers as such Government Officers. Audio English. Net defines a Government Official as "*People elected or appointed to administer a government"*

While the free encyclopaedia describes a Government Official as;

> *"an official who is involved in public administration through either election, appointment, selection, or employment"*

A Minister may go through in to politics through elections or not but he is surely appointed to the job of administration in government. A Minister is certainly a person who is in a position of authority in Government. While he is not a public officer or employee he is certainly an *Officer of Government.*

The appellant was charged with embezzlement but the particulars in the charge sheet referred to him as an employee instead of government official. Counsel for the appellant submitted that since the appellant was not an employ the conviction should be overturned

Having found that the appellant was not an employee but a Government Official, poses the question must the decision of the learned trial Magistrate be overturned on that ground?

The appellant was charged with embezzlement contrary to sections 268(a) and (g) which provides as hereunder;

> A person who being;
>
> a) *An employee, a servant or an officer of the Government or a public body,*
>
> *Steals any chattel, money or valuable security*

g) *To which he or she has access by virtue of his or her office commits an offence of embezzlement and shall on conviction be sentenced to imprisonment for not less than 3 years and not more than 14 years.*

The general rule that appellate courts use is that they should not consider reversing trial courts decision unless it was in error, say if it incorrectly applied the law, AND that error resulted in unfairness to the appellant.

It's noteworthy to say that even if the trial magistrate makes a mistake, if the appellate court believes that the mistake didn't affect the outcome of the trial, it will still affirm the verdict. However if the trial court made an error which is harmful to the trial, the court will overturn the decision. Not every error is harmful. That error must be deplorable to be presumed harmful. I take comfort in Murimi versus Republic [1967] E. A. 542 whose holding was that the appellate court would only interfere with a lower courts decision if that courts error or anomaly on the charge sheet occasioned a miscarriage of justice. This case is distinguishable from Emmanuel Ziraguma versus Uganda versus Uganda Criminal Appeal No 3 of 1995 which dealt with a situation where the accused was convicted on a different charge from that which appeared on the charge sheet. In the instant case its not the offence the appellant is charged with which is in question, it is the status he was referred by.

The questions posed are, did reference to the appellant as an employee in the particulars of the charge and subsequent trial as such instead of government official result into unfairness to him? Did it affect the outcome of the trial? Was it prejudicial to the appellant? The answer lies in how the matter was conducted.

The charge indicated that the appellant was a Minister of State. The prosecution evidence indicated that he was indeed a Minister of State. It was therefore not in question that that he was a Government Official. The Appellant and his *advocates* put up a spirited fight in that regard. Would his defence have been different if he had been referred to as a Government officer in the charge? I do not think so. The charge would

still have been embezzlement and the defence a consistent *'I did not receive the money'* or as he said *'I did not smell the money'*.

He was fully represented by counsel. He was called upon to plead. He attended court through out. He had opportunity to hear and cross examine all the witness in light of the ingredients of the charge of embezzlement which charge remained the same throughout the trial until conviction. The key ingredients save that he was a government official and not an employee, remained the same. I do not see any where that he was prejudiced by being referred to as an employee or that he misunderstood the charge against him. From what I read and understood in the judgment of the lower court, the decision would have been the same. It is my view that the appellant was not prejudiced and there was no unfairness to him by simply referring to him as an employee. No miscarriage of justice is detected that would warrant the overturning of the lower courts decision.

That as it may be counsel defended the appellant on the understanding that he was an Officer of Government. This is clearly seen in the submissions of the appellant's counsel on page 229 of the record of proceedings in these words;

> *"The ingredients of embezzlement include; that the accused must be Officers of Government which is not in dispute"*

The complaint therefore is not that the appellant was misled. The error only lies in the use of the word employee otherwise the appellant knew all along that he was appearing as a Government Official.

In my view the error complained of is not so deplorable as to presume it harmful enough to cause an overturn of the lower courts decision for those reasons the first ground must fail.

In ground five counsel for the appellant submitted that the trial Chief Magistrate should have found that the prosecution in adducing evidence the way it did, had departed from the particulars of the offence as it appeared in the charge sheet. He submitted that the charge sheet was ambiguous. That while it stated that the theft had

been committed at the ministry headquarters it at the same time said that the theft had been committed at Citi Bank Uganda Limited.

That all the prosecution witnesses denied that theft had taken place at the Bank. He further submitted that since there now existed two interpretations to the particulars one that the theft took place at the Bank and two that it took place at the ministry headquarters, the appellant was put to prejudice. He further submitted that at cross examination the appellant's counsel delved in lengthy questions as to whether the appellant and his co- accused where signatories of the ministry accounts.

In reply Mr Asubo for the state submitted that the prosecution did not depart from the particulars of the charge. He submitted that the trial Chief Magistrates Court had dealt with the matter at length. The appellant was at all time aware of the charges against him. He said that what was meant by the particulars of the offence was that the money that was stolen was withdrawn from the Citi Bank. That the appellant was aware of the case against him from the witnesses' evidence that they had withdrawn the money and given it to him.

The charge against the accused was crafted in these words;

> *Between 11th February and 28th October 2005 at the headquarters of the Ministry in Kampala District stole the sum of Uganda shillings 210 million from Gavi Global Fund Account in the Ministry of Health at Citi Bank Uganda to which they had access by virtue of their respective offices and received the same*

I shall begin with the issue of counsel cross examining at length because they wanted to disprove that the appellant was not a signatory to the ministry account. It seems they did that because they understood the charge sheet to be saying that the appellant and his co accused had gone to Citi Bank and that is where they stole the money from. It would mean that they saw and treated the charge sheet as evidence. I say so because none of the prosecution witnesses ever mentioned that the appellant was a signatory to

the Ministry account. Counsel therefore had no reason of conducting the cross examination the way they did.

I have read the wording of the count several times and the only meaning I get is that the venue of theft was the Ministry Headquarters. That the money which was stolen was drawn from the Gavi Global Fund Account found in Citi Bank. I do not think that it in any way says the appellant went to the bank and stole it from there. The word "stole" is pegged to the words "at the headquarters of the Ministry in Kampala" and not the bank as Counsel for the Appellant would want court to believe. The learned Chief Magistrate dealt with this matter in very clear terms. She wrote disagreeing with counsel for the appellant in these words;

> *With due respect to the learned Defence Counsel, he misinterpreted the particulars of the case. I agree with Mr Asubo for the state that the particulars should be given their natural meaning and the natural meaning is that the accused received the money while at the Ministry of Health Headquarters in Kampala but the money was from the Gavi Global Account at Citi Bank.*

I agree with her interpretation. I find that the charge was not confusing, misleading or ambiguous as *the Appellant's* Counsel contends. Looking also at the evidence for the prosecution, they stood by the particulars of the charge and all testified that the money was stolen at the Ministry Headquarters. The appellant's defence also shows that he understood the charge to mean that the money was stolen at the headquarters. I therefore find that the learned Chief Magistrate correctly found that there was no departure from the particulars of the charge.

This fifth ground of appeal also fails.

Ground Two

In this ground counsel for the Appellant contended that the learned Chief Magistrate was biased and denied the Appellant a fair trial. Counsel for the appellant submitted that while the charge sheet did not mention sub section "e", the learned Chief

Magistrate went ahead and convicted the appellant under it. For ease of reference section 268(e) provides;

> *Being the property of his or her employer, association, company, person or religion or other organisation*

Counsel further submitted that the appellant had denied stealing any money and that even by the close of the prosecution case theft had not been established, but the learned Chief Magistrate made conclusive and definitive statements. He said Court had already made up its mind that the appellant had received the money and was to be put on his defence to show accountability for the money he had received. That by the time the accused commenced his defence court had already made out its mind on the crucial element of the offence. This he concluded prejudiced the Appellant and denied him a fair trial.

In reply counsel for the respondent submitted that the learned Chief Magistrate made statements that were conclusive because she had believed the prosecution evidence. He said it was the essence of what a prima facie case is, because if she did not believe she would acquit. He further submitted that the learned Chief Magistrate was all along alive to the burden of the prosecution to prove the case and at no time did she shift this burden. On the issue of putting the appellant on his defence to show accountability, he justified this on the evidence of PW7 that he who receives the money must account for it. That she was therefore right to make the finding as per the evidence before her. He concluded that in any case the Appellant defended himself beyond the issues of accountability so he did not suffer any prejudice.

In my view the manner in which the learned Chief Magistrate phrased her ruling on a prima facie case at page 277 of the record of appeal, seemed to call the Appellant to enter his defence not to the theft, because she had already concluded that the Appellant had perpetrated the act complained of, but to explain what he did with the money he took. This is the perception which any one reading the ruling of the learned

Chief Magistrate would arrive at. The impugned passage found at page 277 of the record is worded thus;

> "*I agree with Counsel Asubo. It is a fact not in dispute that A2 received and signed for all the money on PExh 6(a) - (c) totalling to Shs 263,855,ooo= for use by the First Lady's Office for Health Advocacy for Conferences including Immunisation, Malaria, Safe Motherhood, HIV/ AIDS among others in various parts of the Country"*

Further **down on the same page** the learned Chief Magistrate concludes in the following words;

> "*In the circumstances, I find that a prima-facie case has been made out against A2 on Count 5 of embezzlement requiring him to make a defence regarding accountability of the 210 million shillings which he received"*

The foregoing paragraphs make it very clear that when the learned Chief Magistrate called upon the Appellant to enter his defence, it was for the sole purpose of showing how the money that he had "received" was spent. She in other words held that the Appellant had received the money, before giving him a chance to defend himself, his plea of guilty notwithstanding. The purpose of putting him on his defence lost meaning in as far as receiving the money was concerned because the learned Chief Magistrate had pre held that the Appellant had received it.

It is trite that a prima-facie case is said to have been established against the accused where the prosecution has adduced credible evidence proving each and every ingredient of the offence which if un rebutted or un explained would warrant a conviction, *Patrick Lwanga Zizinga Versus Uganda CA Cr Appeal No 224 of 2004, Wibiro alias Musa versus R (1960) EA 184.* This in my view means that a prime facie case was one that was sufficient for the accused to be called upon to answer. This means that it must be evidence that can only be overthrown by evidence in rebuttal.

The test in this case at the close of the prosecution would therefore put forward the question;

> *"Is the evidence sufficient to convict the accused if he elects to remain silent?"*

If the accused then remained silent the court would proceed to convict. In the instant case the appellant was alleged to have received Shs 210 million. The prosecution led evidence and tendered Exh P 6(a) - (c) as proof of acknowledgement of receipt the money. The learned Chief Magistrate then as I have said earlier found that "it is a fact not in dispute that A2 received and signed for all the money…" This without first giving the Appellant a chance to explain or rebut the evidence given against him. In my view this was a serious breach of procedure in that it amounted to convicting the appellant un heard. In asking him to come back for his defence with accountability, the court was actually saying to the Appellant "you took the money now show us how you used it". This in my view was asking the appellant to prove his innocence. It was an error.

Now the question that must be answered is whether such error occasioned a failure of justice. Was the defence prejudiced? If it did not, then her error cannot be the basis of overturning the judgment. This principle is well enunciated in the Court of Appeal for East Africa decision in *Murimi versus Republic [1967] EA 542* sited earlier in this judgment, that an appeal court will not reverse a conviction on account of any error by a trial court unless the error has in fact occasioned a failure of justice. This was relied upon in *Ziraguma versus Uganda Cr Appeal No 3 of 1995*

In the instant case the Appellant was given a chance to explain the circumstances under which he was said to have received the money. He was not restricted to accountability but was free to deny ever receiving the money. He gave his defence of denial. The learned Chief Magistrate considered the Appellants defence and rejected it instead believing that of PW5. At page 5 of her judgment she wrote;

"PW5 stated as follows; 'yes I paid to Hon Mike Mukula 136 million eight hundred and ninety thousand only' PW5 went on to say that the accused received cash from her

Therefore apart from the vouchers bearing accused's signature as the receiver of the money, the evidence of PW5 who paid him the money corroborates the documentary evidence. PW4 and PW7 although they are not the ones who paid the accused both testified that he received the money as evidenced by his signature"

The fore going shows that although the learned Chief Magistrate seemed at the stage of no case to answer, to have concluded that the Appellant had received the money she still dealt with the issue after the defence and at the time of writing her judgment. It follows that what seemed to have been an unfair proceeding received relief that in my view removed the injustice that had been perceived at the stage of no case to answer. In the premises since no failure of justice was occasioned this ground can not serve to overturn the decision of the Chief Magistrates Court. Ground two therefore also fails.

Ground Three and Four

In this ground the criticism against the learned chief magistrate is that she failed to properly evaluate the evidence adduced at the trial which resulted into her, to wrongly conclude that the Appellant received and stole Shs 210,000,000=. Counsel for the appellant submitted that it was not the Appellant who had requisitioned for the money, that the requisition had come to him but he passed it on to his senior Minister who then took over the process. That the vouchers Exh P 6(a) (b) (c), were made out in his names because the requisition from the first Ladies Office was addressed to him. That apart from the three vouchers which the Appellant signed there was no other proof that he received the money. He further submitted that he signed the vouchers just to facilitate movement of money to the First Lady's Office. That according to DW2 the Appellant never received the money since he was in Munyonyo attending a retreat. Counsel added that at the time the Appellant signed the vouchers the money was in the Ministry safe. He referred court to submissions of Counsel for the Respondent at

page 295 of the proceedings. Counsel for the Appellant attacked the learned Chief Magistrate's finding that PW5 Birabwa told court that she had handed the money personally to the Appellant. He pointed out that the examination in chief found on page 120 of the lower courts proceedings showed that the witness was simply reporting what was on the voucher and was never asked if she actually paid out the money herself. He referred court to Exh 2D (a) and submitted that the money was never received by the Appellant because it was redirected to the senior minister Hon Muhwezi.

Referring to Exh P11 the statement allegedly made by DW2 and denied in court, Counsel for the Appellant submitted that the only value in the statement was to show whether DW2 told a lie when she said she never made a statement. He said the Chief Magistrate should not have used the text as evidence he sited Zarina Sharif versus Seguna [1963] EA 239.

In reply Counsel for state submitted that the Appellant indeed received the money. He relied on the evidence of Pw4 Lubwama, PW5 Birabwa, PW6, PW7 and PW8. He relied on Exh P6 as proof that the Appellant received the money. He submitted that it was PW5 who actually handed over the money to the Appellant. He said when he put to her the question she said "yes I paid to Hon Mike Mukula 136 million" he submitted that vouchers were the documentary evidence of receipt. He pointed out that DW2 was an unreliable witness who had made a statement and when she appeared in court she denied ever making a statement. He submitted that it was her statement because the age 46 yrs she gave to court showed that at the time she made the statement 6 years ago she was 40.

Counsel also submitted that apart from the vouchers further proof that the Appellant received money came from PW5. Furthermore that the money could not have been lying in a safe in the ministry otherwise it would not have been returned in bits as they did.

In dealing with the issue as to whether the appellant received the money, I shall first deal with the statement of DW2 Lydia Nalwanga. This statement is important because the learned Chief Magistrate in her judgment wrote;

> *"Furthermore the fact that the accused received the money is further proved by P. Exhibit 11, which is a record of interview of DW2 during investigations. While listing money which was refunded, DW2 stated as follows;*
>
> > *Then 210,000,000/= was refunded by Hon Captain Mike Mukula. This was out of the 263,855,000/= earlier advanced to Hon Captain Mike Mukula for Health Advocacy Conferences by the First Lady"*

DW2 was a defence witness who in the witness box denied ever making a statement in respect of the matter. Counsel for the state put in Exh P11 purportedly made by the witness. The putting in of the statement was not to prove its contents. The purpose was to prove that it was made by the witness on a previous occasion and that the witness had said something different from what he or she was saying in court. Such a thing "is intended to lead the court to feel that his or her evidence is unworthy of belief", *Okwong Anthony versus Uganda Cr App No 20 of 2000*. The learned Chief Magistrate therefore erred when she turned the contents of the statement into substantive evidence and used it to convict the appellant.

Turning to the issue of whether PW5 handed to Appellant the money Counsel for the Respondent submitted that when he asked PW5, she said she gave the Appellant the money. The relevant part is on page 120 of the proceedings as follows;

> **Q**. so in the course of your duties during this period did you handle these vouchers for example ID3 (a)
>
> **Ans**. Yes I paid to Hon Mike Mukula 136 million eight hundred and ninety thousand only
>
> **Q**. so that voucher indicates the payee as Mukula.
>
> **Ans**. Yes

Q. so from looking at that or voucher in what form was the money being transmitted cash or cheque.

Ans. Cash.

Q. and from whom was he receiving the cash as per that voucher.

Ans. He was receiving it from me.

From these recordings it is clear that the PW5 was reading what was on the vouchers. What is however not clear from the examination in chief is whether she handed the money to Mukula. This doubt arises from other evidence I shall deal with ahead which points at other likely destination of the money than to the Appellant.

The appellant in his defence denied ever receiving the money. He told court that at the time the money was drawn from the bank he was in Munyonyo in a retreat. That he signed the vouchers that were taken to him by DW2 and Ronah Birungi. He said he signed because the vouchers were in his names. He was supported by DW2 who also told the trial court that she took the vouchers to the appellant on the instructions of her boss the Principal Accountant. She told the trial court that she did not go to Munyonyo with the money due to lack of security. Furthermore that when she returned, she found that the Undersecretary had ordered that the sum of money now be handed over to the senior Minister Hon Muhwezi.

Counsel for state has submitted that Exh P6 a, b and c spoke volumes. That they were conclusive. I do agree with him that the inference one draws from Exh 6 is that the appellant received the money. In my view however signing those vouchers established a prima-facie case but not necessarily a conclusive case. The exhibits are such that if the Appellant had no explanation or rebuttal a conclusion that he took the money would be justified. As I said such written documents can be rebutted by parol evidence. The onus of doing so fell upon the one rebutting. Once done the burden shifts back to the one who intends to rely on the document, *Fakhruddin Mohamedali Jafferji versus Ahamedali Abdulhusein Lukamanji CA No 31 of 1946 and Mohamedali*

Rajabali Khimiji and 5 others versus Ashiq Hussein HCCS No 90 of 2004. When such circumstances arise the court must look beyond the document.

DW2 in her testimony at page 289 of the proceedings told court that instructions to give the money to the Appellant were changed after he had signed. She said the Undersecretary had issued the order of change. This evidence was not given due consideration possibly because she was believed to be a liar since parts of her statement did not tally with what she had said in court. The actual position is that the circumstances under which the statement she had denied was made were never investigated in court. The learned Chief Magistrate accepted only that evidence of DW5 that was against the appellant, but did not explain in her judgment why she rejected that which tended to favour the Appellant. She accepted statement Exh P11 and it influenced her decision as further proof to the receiving of money by the appellant, but rejected Exh D2 (a) to which the prosecution had had no objection. This Exh D2 (a) was a letter from the undersecretary directing that on the instructions of the Minister the money be released to him. It read;

> *The Hon Minister of Health Hon Jim Muhwezi, Major –General (Rd) has directed me to release to him Shs 263,855,000/= (Shs two hundred sixty three million, eight hundred fifty five those only earlier requested by the MS H- GD.*
>
> *This is to authorise you to release the said whole amount to the MHO.*
>
> *He will sign for the money*
>
> *US/MOH*
>
> *18/2/05*

This Exh D2 (a) was received in court on the 13th November 2012 without any objection from the prosecution. In my view while one may debate its weight of evidence, it could not be considered worth less after the person who said she had acted on it had testified to its existence and had been cross examined. Further more while the appellant is said to have taken this money in February 2005, this money was still in the Ministry and the Minister of Health had access to it even in May 2005. That the

money was still in the Ministry Headquarters is evidenced by transactions that took place with some of the money between Ministry of Health and the First Lady's Office. Giving some of the money to the First Lady's Office for Safe Motherhood Conferences to be held in White Horse Inn Kabale the Minister as Exh D2 (b) indcates wrote;

Please receive 54 M (fifty four Million) as per our telephone conversation:

Denomination	*Amount*
50,000	*30 M*
20,000	*20 M*
5,000	*4 M*
Total	*54 M*

Kindly send me acknowledgement of receipt

Thanks

14th May 05

The money arrived at its intended destination because on the same day 14th May 2005 Ms Margaret Lalam, Executive Assistant to the First Lady acknowledged receipt of Shs 54 million, Exh D2 (c) which was followed by accountability Exh D2 (d)

This money was and must have been part of the Shs 263, 855,000/= because while the allegation was that that amount had been stolen by the Appellant, he was only charged with 210,000,000.

Care full scrutiny of Exh2 (b) shows that the money was in front of the Minister when he wrote that letter. I say this because by the time a person writes a letter splitting the amounts in denominations of 50s, 20s and 5s he is most likely not only looking at it but fingering it as well. The money must have been in the Ministry Headquarters under the control of the Minister where he could reach it. If the money that was

supposed to have been stolen in February 2005 by the Appellant was under the control of the Minister in May 2005 the prosecution had a bigger job than they thought.

That the money was still around in May corroborates DW2s evidence that after she was directed to take the money to the senior Minister she did so and the Minister after verification told her to go and keep it in the safe. The evidence also complements Exh D2 the letter of the Under Secretary directing that the money be taken to Hon Muhwezi instead of the Appellant. I believe the evidence that Exh D2 was acted upon.

The sum total is that after subjecting the evidence as a whole to that fresh and exhaustive scrutiny it is my finding that the appellants criticism of the trial Chief Magistrate's Court that it did not properly scrutinize and evaluate the evidence adduced at the trial and by implication that, if it had done so would have rejected the prosecution prayers and accepted the Appellant's instead, justified. For the above reasons this court is of the view that the charge against the Appellant was not proved with the degree of certainty required and that he was on the evidence entitled to the benefit of doubt and to be acquitted. The appeal is therefore allowed. The conviction quashed and sentence set aside. It is so ordered.

……
HON.JUSTICE.MR.D.K.WANGUTUSI
JUDGE OF THE HIGH COURT
13/03/2013

Moving to Ground five counsel for the appellant submitted….