

3. The learned trial magistrate erred in law and fact when she disregarded the appellant's defence of Alibi which occasioned miscarriage of justice to the appellant.
4. In the alternative but without prejudice to the foregoing the period of 17 months spent on remand be converted into sentence.

When the appeal came up for hearing the appellant said he had written submissions with him which he wished to present on his behalf. For the respondent, the State Attorney then undertook to present written submissions also. The respective submissions were eventually filed and I relate to them as I consider this appeal.

I am mindful of the obligation of the first court of appeal to go through the evidence and the judgment in order that the precipitate conclusion may result there from. I am aware however that unlike the trial court this court has not had the advantage of seeing the pertinent witnesses testify. See ***James Nsibambi V Lovinsa Nankya*** [1980] HCB 81.

The offence of embezzlement on which the appellant was convicted was according to the trial court premised upon proof of the following:

- (i) That the accused person was an employee of Lily Benefit Investments Limited.
- (ii) The accused person stole money US\$ 49,394 being the property of his employer.
- (iii) The money which the accused person had access to by virtue of his office.

Thus far I agree with the statement by the trial court.

Regarding Lily Benefit Investments Limited, it was never in issue that the company exists. In his evidence PW1, Fang Cheng Cai, stated that he was a manager in the company and that the appellant had been an employee of the company, first as a casual worker but later, effective February 2012, as a Branch manager in Kasese. It was the testimony of PW1 in cross examination

that the appellant never signed a contract with him and that the appellant had no identity card of the company. Further PW1 testified that he did not give the appellant any job descriptions. The evidence of PW2, Ruyyema, was that he was a salesman with Lilly Benefits Uganda Limited at Kasese Border, as he mentioned it. I must note here that the business entity PW2 refers to cannot strictly be the same entity PW1 managed and claimed appellant once worked for. Be that as it may PW2 went on to say that he and the appellant worked for the same firm until about 21st June 2012 when the appellant quit work. Remarkably the testimony of PW2 was taken on 12th June 2013 when during his examination in chief he stated that he had so far worked for the company for ten months. During cross examination later that day the same witness said he had completed ten months working with the company. I should at this stage note that if the testimony of PW2 is to be believed he had started working for the company during August 2012. It would then not be true he had worked with the appellant who had allegedly left work during June 2012, two months earlier. Regarding employment it emerged in the evidence of PW2 that he had been given a letter of appointment. No explanation was forthcoming why if both PW2 and the appellant were working for the same entity one should be given a letter of appointment and the other, higher in rank, should get none. Exhibit P.16 was said to be the complainant's business diary. It shows notes of payment purportedly made to the appellant. There is nothing to indicate that the payments were from the complainant. There is nothing to suggest they were payments from employer to employee. In sum nothing shows for what purpose the payments were made. It should be noted that in the absence of a handwriting expert it cannot be speculated that accused himself acknowledged receipt of the various sums. In his defence the appellant denied being an employee of the complainant ever. I must acknowledge also the testimony of PW3 who at page 15 of the record is noted to have testified as follows:

‘My findings were that Mr Faney Cheng Cai engaged Mr Masereka Johnson without any formal documentation or contract. But orally

they agreed on a monthly salary of Uganda Shillings 300,000/= plus a daily allowance of shillings 8,000/= together with accommodation.'

The above is a classic example of hearsay and no reliance should be placed on a statement such as this. A worthy auditor does not engage in surmises such as the above. Suffice it to say that evidence of appellant's employment with the complainant company does not lie thereon either. Needless to say, in his defence the appellant denied ever being complainant's employee. The prosecution bears the burden to prove beyond reasonable doubt that the appellant was at the time material to this case an employee of the complainant, Lily Benefit Investments Limited. With due respect to the trial court this burden was not discharged and a salient element of the offence was not proved.

It was the case of the prosecution that accused stole US\$49,394. The auditor, PW3, said in his assignment he used the sales day book, the bank statement, cash receipts and the Directors business diary. No letter of engagement was exhibited showing the terms of reference for his assignment however. Nevertheless he stated that he matched the receipts of the cash to the deposits made before tallying perpetual stock records to the physical stock count done. The following extract from his evidence at page 16 is revealing:

'The total loss from the unaccounted for cash and sales stock amounted to USD 49,394 Dollars. In my conclusion basing on the findings my opinion was that Masereka Johnson was in charge of the company Branch at Mpondwe with the responsibility of making sales recordings all the transactions, taking care of the company stocks and bank all the sales made intact. Therefore, Masereka was responsible for the loss caused to the company amounting to USD49,394 Dollars.....'

It is nowhere proved that the documents relied on by PW3 for his report relate to the appellant. It would have been helpful for example if in the case of the bank statement there had been a letter appointing the appellant as agent of the complainant so that evidence of the appellant's culpability would be obviated. Valuable assistance to the case would also have been obtained if the various documents in issue had been subjected to examination by a handwriting expert. In the event this was overlooked. My conclusion is that the evidence on record does not reveal anywhere that the appellant stole the alleged money.

Appellant's access to the stolen assets by virtue of his employment would be the third element to consider in this case. Having dealt with the first and second ingredients of the offence and having resolved that they were not supported by evidence on record, it would be moot to be detained by this third ingredient. In the absence of the previous two it cannot subsist.

In the result I find this appeal succeeds. The conviction and sentence are set aside. The orders of the trial court are quashed. It is ordered that the motorcycles that were exhibited at the trial each be returned to its respective owner.

Before I take leave of this case I should express my dissatisfaction with the casual way this case was investigated. If the suspect was admitting responsibility for the offence a charge and caution statement would have been in order rather than a plain statement. Documents collected and suspected to have been written by the suspect should have been subjected to forensic examination. Various persons mentioned in the various testimonies as having assisted in the course of investigations should have had their police statements recorded and called to testify. The premises where the suspect was said to operate in Kasese should have been a subject of inquiry and should have been visited in search of further evidence. Even

the forensic audit should have been worth its name. The one done seemed to rely more on what the complainant expected to be the outcome.

The above observations are of moment to this case and should guide future inquiries.

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PAUL K MUGAMBA
JUDGE
10TH NOVEMBER 2014