THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

CASE NO. HCT-00-AC-CN-0010/2014

KAZIBWE JOHN ::APPELLANT

VERSUS

UGANDA ::: RESPONDENT

JUDGMENT

BEFORE HON.JUSTICE PAUL K. MUGAMBA

10TH NOVEMBER 2014

John Kazibwe appeals the decision of the Chief Magistrate's court delivered on 16th May 2014 whereby he was convicted on embezzlement, contrary to section 19(b)(iii) of the Anti Corruption Act in count I and on causing financial loss, contrary to section 20(i) of the same Act in count II. In consequence the appellant was sentenced to 2 years' imprisonment on both counts. The sentences were to run concurrently. In addition appellant was to refund shs 70,000,000/= to Posta Uganda. This appeal is against conviction and sentence.

Six grounds of appeal were presented. They read as follows:

1. The learned Trial Magistrate erred in law and fact when she failed to properly evaluate the evidence of the prosecution against that of the defence hence reaching a wrong conclusion.
2. The learned Trial Magistrate erred in law and fact when she admitted the tendering of exhibits (P. exhibit 3 and P. exhibit 4) by the prosecution after re- examination which procedure was irregular and caused a miscarriage of justice to the appellant.

3. The learned Trial Magistrate erred in law and fact when she refused to adjourn the matter and ordered the trial to proceed in the absence of Defence Counsel hence denying the Appellant a right to effective legal representation.
4. The learned Trial Magistrate erred in law and fact when she forced the Appellant to cross examine prosecution witnesses hence depriving him of his right to a fair hearing.
5. The learned Trial Magistrate erred in law and fact when she held that all the ingredients of the offences had been proved by the prosecution beyond reasonable doubt.
6. The learned Trial Magistrate erred in law and fact when she sentenced the Appellant to two (2) years imprisonment being a harsh and manifestly excessive sentence.

This is the first appellate court in this matter. As such it is beholden to consider and evaluate the evidence on record afresh in order to arrive at its own conclusion, bearing in mind however the fact that it never saw the witnesses as they testified. See **Nsibambi V Lovinsa Nankya** [1980] HCB 81.

I have looked at the ingredients of the two offences charged as stated by the learned chief magistrate. They are properly set out. As correctly noted by the trial court it is the duty of the prosecution to prove the offences charged against the accused beyond reasonable doubt. See **Sekitoleko V Uganda** [1967] EA 531. It was stated in the judgment of the trial court that in order to prove the charge of embezzlement in count I the prosecution had materially to prove that accused was an employee of Posta Uganda. Prosecution had to prove also that accused stole shs 41,988,296/= the property of Posta Uganda and finally that accused had access to the money he allegedly stole by virtue of his employment.

Concerning the charge of causing financial loss in count II the trial magistrate stated that in order to prove the offence prosecution ought to prove that accused was an employee of Posta Uganda, that accused did or

omitted to do an act knowing or having reason to believe that it would cause financial loss and that loss did occur.

Concerning ground 1 of appeal it is argued on behalf of the appellant that no prequalification process was done at Posta Uganda and that the prosecution ought to have produced evidence that companies Vision Dot Com and Uganda Proper Tyres were companies which were prequalified so as to succeed in their prosecution of the appellant. I note however that the case for the prosecution is that the two firms were never prequalified and as such no evidence of them having been prequalified could be availed anywhere. It was the prosecution case that as a consequence of the firms not having been prequalified they did not merit the disputed payments that were made to them. It is idle therefore to argue as the appellant does that since there was no regular prequalification list in his view payments made to the two companies should not be questioned. It is also argued on behalf of the appellant that the handwriting expert was not given necessary signatures to examine. I find such contention not borne out by the evidence available. Such specimen as were required were supplied to the expert who proceeded to make the report he did. The trial magistrate properly evaluated the evidence available and came to a correct decision. This ground fails.

The appellant argues in ground 2 that exhibits P.3 and P.4 were admitted after re-examination and in the process a miscarriage of justice resulted. I have looked at the record of proceedings regarding this matter. PW2 first testified on 10th October 2011. He was initially examined in chief but when the defence turn to examine him came the defence said they would not cross examine. As is to be expected prosecution said they had nothing to re-examine on. Court had no questions either. It was at that point the State Attorney admitted he had forgotten to proffer the prequalification list in evidence. Court noted that the defence challenged the origin of the list and said it and the adverts should be produced in court and the following day was to be the day when the state would produce the items. Indeed on the

day ensuing the prosecution tendered in the advert and the prequalification list. To this no objection was made. Clearly Exhibits P.3 and P.4 were received without objection from the defence and evidently Mr Mading and Mr Ndegwe proceeded to cross examine PW2. It has been stated on behalf of the appellant that a miscarriage of justice happened in the event. I find the judgment in the Canadian case of **Fanjoy V The Queen**, [1985] 2 SCR 233, 1985 Can LII 53(SCC) of persuasive help. There the Supreme Court of Canada noted inter alia:

> *'..... A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice. It is not every error that will result in a miscarriage of justice.....'*

Article 28 of the Constitution in clause (3) (g) states that every person who is charged with a criminal offence shall be afforded facilities to examine witnesses and to obtain attendance of other witnesses before the court. Doubtless the appellant did benefit from this provision when on 11th October 2011 his two counsel subjected PW2 to cross examination. To my mind even Article 44(c) relating to the right to fair hearing was adhered to. This ground of appeal cannot be sustained and it is dismissed.

In ground 3 the contention of the defence is that court heard the case of the appellant in the absence of defence counsel and resultantly denied him effective legal representation. In this connection the appellant invokes provisions of Article 28 and 44 of the Constitution as well as the Magistrates Courts Act. Article 28(3)(d) of the Constitution states that every person who is charged with a criminal offence shall be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice. Article 44(c) of the Constitution obviously relates to the right to a fair hearing.

Next we turn to the provisions in the Magistrates Courts Act which are being alluded to. Section 137 emphasizes the need for all evidence taken during court proceedings to be taken in the presence of the accused, or, when his or her personal attendance has been dispensed with, in the presence of his or her advocate, if any. Next is section 158 of the Magistrates Courts Act which provides that any person accused of an offence before a magistrate's court may of right be defended by advocate. None of the above provisions both in the Constitution and under the Magistrates Court Act makes representation of an accused by an advocate mandatory. However in offences where the maximum penalty is life imprisonment or capital sentence an accused has a right to be provided with defence counsel by the state where he/she cannot afford one. It is not correct to assert that proceedings held in the absence of defence counsel were not properly conducted by reason of such absence. As a matter of fact the presence of counsel could be dispensed with if the defendant and counsel so arranged as would appear to be the case, given that they had notice of the hearing date. It is noteworthy also that accused was given opportunity to cross examine prosecution witnesses. This ground also lacks merit and is dismissed.
Ground 4 of appeal is similarly disposed of for reason given.

It is further argued by the appellant in ground 5 that the prosecution did not prove the case against the appellant beyond reasonable doubt. I have read both the record of proceedings and the judgment of the trial court. I find no ground to fault the application of the facts to the law by the trial magistrate. The inescapable conclusion is that the learned trial magistrate arrived at a proper conclusion and there is no ground for me to fault her finding that the prosecution did prove the case beyond reasonable doubt. I dismiss this ground of appeal too.

Ground 6 of appeal relates to the sentence handed down to the appellant by the trial court. It is argued on behalf of the appellant that it is harsh and grossly excessive. For the record the appellant was convicted on two counts,

each of embezzlement and causing financial loss. The accused was sentenced to two years on each of the counts with the sentences running concurrently. Maximum penalty on each of the offences is 14 years' imprisonment. I agree with the respondent that the sentences were more on the side of leniency than stiff. This ground also ought to fail.

In the result I find that none of the grounds of appeal has succeeded. The conviction and sentence of the trial court are accordingly upheld.

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PAUL K. MUGAMBA
JUDGE
10TH NOVEMBER 2014