

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO
HCT-00-ACD-SC-NO.0013/2014

UGANDA:..... RESPONDENT

VERSUS

DEGEYA HASSAN:..... ACCUSED

BEFORE: HON.LADY JUSTICE MARGRET TIBULYA

J U D G M E N T

The accused stands charged with two counts of embezzlement, three counts of Forgery and three counts of Uttering False Documents.

The State case is that the accused was employed as manager Safe Way 1, a pharmacy. His appointment letter is exhibit P.6. Sometime in November 2012, the Directors of the company (PW1 Hassan Isabirye and PW3 Mariam Nagawa) started getting suppliers who were demanding payment for drugs supplied to the pharmacy.

When the accused was employed he was instructed never to get supplies from any other supplier other than Safe Way Pharmacy II, the mother company.

Safe Way II was by then demanding payment of 53m/= from Safe Way I, in which the accused was working.

In March 2013 the accused was told to conduct a stock taking exercise. He verbally reputed that he had conducted the exercise and found stock worthy 73m/=. In the mean time, creditors continued to approach the directors (PW1 and 3) demanding for payment.

The Directors conducted a stock taking exercise on 30th/8/2013 in the presence of the accused and found only 4.960.000/= worthy of stock.

It was discovered that the accused was displaying expired drugs, empty packets, other people's drugs and free containers of drugs in the shelves to give a false picture about the stock in the pharmacy.

On 9th/7/2013 debt collectors sent by Astra Pharmacy came demanding payment of 64m/=.

The Directors decided to go to Astra Pharmacy to establish what the problem was. They wanted to go there with the accused but he did not show up and he even switched of his known phone lines.

He disappeared with the Pharmacy keys and PW3 (Nagawa) had to cut the locks to gain access. When she entered the Pharmacy, the company books of record, cash book, debtors' book, creditors book, purchase book, sales summary sheets and salary record book were missing.

At Astra pharmacy, three receipts were disowned- 0.30 for 3m/=, 1898 for 3m/= and 1899 for 7m/=.

These three receipts relate to three cheques issued to the accused by PW1 (Hassan Isabirye) and PW3 (Nagawa). The accused was supposed to have drawn the money and paid it to Astra Pharmacy. According to PW9 (Andrew Mbabazi) of Bank of Africa the monies in the three cheques were drawn by Hassan. PW4 (Hakim Mugabi) said that the accused gave him the three receipts which Astra disowned as proof that he had paid the money to Astra.

Other evidence was that the accused opened an account with Imperial Bank. He instructed PW2 (Kagoya Asha), then cashier in the company to deposit company money in the account which PW2 did sixteen times.

According to PW1 (Hassan Isabirye), a total of 18m/= was deposited in that account.

PW1 (Hassan Isabirye) found out that the accused did not pay salary to PW6 (Katiya Dennis) and PW7 (Namubiru Saldati) Katiya did not get two months' salary totaling to 400,000/= and Namubiru did not get four months' salary (August- November 2011), totaling to 800,000/=.

Namubiru demanded payment and the accused gave 50,000/= and now still 750,000/= in unpaid salaries.

PW3 (Nagawa) asked the accused for a list of creditors which he gave her. According to that list, the company owed 25,492,500/= to creditors. (Exhibit P.7).

Pw10 (Ketan Bosanja) the Financial Controller as Astra Pharmacy testified that they are owed 64m/= but that the receipts alleged to have been presented to PW4 (Hakim Magumba) by the accused did not originate from Astra pharmacy.

PW15 (Chander Singh) a sales person of Astra Pharmacy said that on 4/1/2013, he received a cheque from medline pharmacy for 7,317,600/= and issued them receipt No. 1898.

PW16 (Chetar Vanzaw) of Astra Pharmacy denied the signatures in receipts 1898,1899 and 030 (exhibit P.10). Carbon copies bearing the above receipt numbers show that the receipts were issued to other customers like Kamuli enterprises (a value of 2,000,000) and first pharmacy (a value of 350,500) by Ganesh Dwikar (PW19).

Pw16's further evidence was that the features in the receipts comprising of exhibit 10 differ from those in their receipts. In their receipts, the serial numbers are on the left side and not on the right as in the exhibited receipts. Their serial numbers are in a box.

PW17 (Ezati Samuel) examined the questioned receipts (exhibit P.10) and found that they were not signed by the cashier of Astra pharmacy whose specimen signature was provided- the report is exhibit P.19.

Other evidence was from PW13 (Ennice Asiimwe) and PW14 (Violet Karamagi) both from Bank of Africa, that the accused was the bank agent on the accounts of Safe Way Pharmacy.

An audit was done by PW5 (William Mwesigye) who found that 69,996,453/= was lost by the company. It was PW1's evidence that total loss consisted of the 69,996,453/= plus 1,800,000/= deposited in the accused's account with Imperial bank plus 1,150,000/= un paid salaries to PW6 (Katiya) and PW7 (Namubiru) plus 13,000,000/= not paid to Astra pharmacy all totaling to about 102,146,453/= the total reflected in count 2 of the Indictment.

The accused opted to maintain silence but adduced the evidence of two witnesses. DW1 (Bukonya Sulaiman) said that he came to testify because the complainant has no authority to prosecute the accused. That the company (Safe Way Pharmacy) is an illegal company.

DW2 (Hajji Ahmed Kasule) only gave evidence about his complaint about the ownership and shareholding of Safe Way Pharmacy.

The gist of the defence case is therefore that the company Directors have never passed a resolution to charge / prosecute the accused person.

It is a cardinal principle of our law that the burden of proving the guilt of an accused persons lies with the prosecution.

It does not shift to the accused. – in cases such as this. That burden is only discharged on proof beyond reasonable doubt.

Embezzlement

The state had to prove.

1. That there was a company.
2. That the accused was an employee of the company.
3. That he stole;
 - a) the listed books of account in Count 1, debtors, creditors, purchase books, sales summary sheets and salary records book of the company.
 - b) The 102,831,807 in count 2.
4. That he had access to those property by virtue of his office.

The company

The prosecution exhibited the certificate of incorporation of M/S Safe Way Pharmacy (2003) limited, as exhibit P.1.

There is no evidence to suggest that the status of that company has changed. I find the first ingredient proved.

The accused's employment

An appointment letter in which the accused was appointed manager of the company was tendered in court through PW3 (Mariam Nagawa) and received as exhibit P.6. The second ingredient was therefore proved.

The theft

- a) The company's books of accounts.

It was submitted for the accused that there is not sufficient evidence that the books of account in issue ever existed.

Further that if they existed, there is a possibility that anybody else could have stolen them, since other people had copies of the keys to the pharmacy and yet there were weaknesses in the company's systems.

The state evidence on this issue was that on about the 13th/7/2013 the accused absconded from work. The workers who included Katya (PW6) could not access the pharmacy and so, PW3 (Mariam Nagawa) cut the locks on the doors and opened the pharmacy.

On entering the premises, PW6's evidence was that he could not see his receipt book and the cashier was also looking for the expenditure book. PW6's evidence was that the cashbook, debtors' book, creditor's books and cash sales existed but were not got in the pharmacy that day.

PW7(Saldat Namubiru) also said that the invoices and receipts book were missing when the pharmacy was opened. PW3 (Nagawa) said that she had to buy other books for work to go on.

If Kagoya Aisha (PW2) testified in cross examination that the company had no salary book, that evidence was against the weight of evidence and I did not believe it.

I am convinced on the evidence of PW3 (Nagawa),PW6(Mugabi) and PW7 (Namubiru) that the books complained of existed.

On the possibility of any other person stealing the books, the evidence is that the accused absconded from work, conduct that is only consistent with wrong doing.

Moreover, the fact that when he disappeared there were cash related issues that were being investigated by the company directors does not help matters.

The disappearance of records of accounts at that time would logically be taken to be part of a play to cover up the loss or to disable the investigators from getting to the truth. That the accused was at the centre of the investigations would therefore lead to a logical inference that he was the one who caused the disappearance of the books and so I find it was not incumbent on the prosecution to adduce evidence showing how he executed or carried out the thefts but there is evidence consistent with the accused having stolen the books.

The theft of the 102,831,807/=

It was submitted for the accused that there is no evidence as to how the figure of 102,831,807/= was arrived at.

Further that the monies (13/=) comprised in the three cheques (exhibits P3 and 15) was not received by the accused.

Also that PW2 (Kagoya) said that she paid PW8 and 7 their salaries.

The 18m/= found in the accused's account in Imperial bank was not company money. It belonged to the accused.

Finally, that the audit report findings were based on non-existing documents and unauthentic invoices.

PW1 (Hassan Isabirye) testified that the 102,831,807/= consisted of;

- a) The 69,996,453/= that the auditors found as lost funds.
- b) The 18,000,000/= found deposited in the accused's account in Imperial bank.
- c) The 13m/= in three cheques said to have been cashed by the accused.
- d) The 1,150,000/= unpaid salary of Katiya (PW6) and Namubiru (PW7).

The above amounts however add up to only 102, 46,453/= and not 102,831,807/= as reflected in the indictment.

PW5 (William Mwesigye) who audited the company's accounts testified that key documents were missing but that he worked with existing documents such as stock sheets which bore information on the day to day transactions. He also wrote letters to the company creditors asking them to confirm what the company owed them. Some of the creditors responded and some did not. He made computations on the basis of the available information and came up with a total variance of 69,996,453/=.

Clearly, the finding is not based on nonexistent documents as the defence submitted. Counsel for the accused also referred to the invoices that were presented by the prosecution as unauthentic. I did not believe that the invoices were unauthentic.

The two key issues that were raised with regard to the invoices; the variance in dates and multiple handwritings in some of the invoices were explained by PW7 (Hakim Magumba). He said that at times his colleagues would write in the body of an invoice and he would only enter the date. At times, they would use one invoice for multiple transactions, thereby omitting invoices. This explains why some invoices were not running in sequential order. I was satisfied

with the explanations given and I accordingly believed the auditors finding that 69,699,453/= was missing from the company.

About the 18m found in the accused's account with Imperial bank, PW2 (Kagoya Aisha) said that she was instructed by the accused to deposit company money to that account.

Counsel maintained that the money did not amount to 18m/=. The bank statement (exhibit P.11) however shows a bank balance of 18,685,344/=. Counsel's submission is therefore without merit. On the possibility that the 18m/= belongs to the accused, PW2 (Kagoya) was clear that she was depositing company funds on that account. A quick perusal of the account shows a number of deposits by one "Asha", which confirms her evidence.

I am positive that the 18m/= in the account did not belong to the accused but they were company funds.

The 13m/= in cheques (Exhibit 2 and 15) were written in the accused's names. He was the bank agent of the company accounts (exhibit P.14). The evidence of PW4 (Mugabi) was that he (accused) presented to him three receipts from Astra purporting to be acknowledgment of receipt of monies that had been withdrawn under the three cheques.

There can therefore be no question of another person having drawn the monies in the cheques as counsel for the accused submitted. The accused received the 13m/=.

The nonpayment of the salary of 1,150,000/= (for PW6 and 7), was proved by the evidence of the two witnesses and the evidence of PW1 (Hassan Isabirye). Counsel's submission that Kagoya said that she paid the salary to them is not borne out on the court record. Counsel impugned the credit of Namubiru Saldat (PW7) on the basis that she is a liar.

Her evidence that she was not paid is however supported by that of PW1 (Isabirye) who heard the accused promise to pay her after he had claimed to PW1 (Isabirye) that he had paid her. I therefore believe her evidence in this regard.

On the whole, I believe the prosecution evidence that 69,699,453/= was lost according to the audit report that the accused deposited 18,000,000/= in his account, that he took 13m/= he withdrew from the bank in three cheques and that he did not pay salaries amounting to 1,150,000/=. I find that he caused a total loss of 102,146,453/= to the company under circumstantial amounting to theft of the money.

Whether he had access to the books of accounts and to the money by virtue of his employment

Under the accused's letter of appointment, he was responsible for the day to day running of the pharmacy, he was in charge of managing the creditors and in charge of daily banking and the company personnel.

Counsel submitted that there was no evidence that the accused received any drugs worthy 53,891,000/= (i.e from Safe Way Pharmacy II). But the evidence of Hakim Mugabi was that he used to give the accused the drugs and that since there was mutual trust, he was not requiring the accused to sign for the drugs. I believed Mugabi's evidence because he impressed me as a witness of truth.

The accused does not deny that he was working as manager of the company. PW1 (Isabirye) and PW3 (Nagawa) testified that he was in-charge of banking and the agency documents (exhibit P14) supports their evidence. The prosecution contention that the lost documents and funds came into his possession or that he accessed the items by virtue of his office is therefore well founded.

On the whole I find that the charges of embezzlement in counts 1 and 2 have been sufficiently proved.

Forgery

The three counts of Forgery relate to three receipts (exhibit P10). PW4 (Hakim Magumba) said that the accused took them to him as those issued to him by Astra pharmacy in acknowledgement of receipt of monies reflected in them – i.e 7m/=:3m/=: and 3m/=:.

These monies were comprised in three cheques signed by PW1(Isabirye) and PW3 (Nagawa) in favor of the accused for payment to Astra Pharmacy.

Witnesses from Astra Pharmacy (PW15 Chander Singh) PW16 (Chetar Vanzaw), PW19 (Ganesh Owikar) PW10 (Ketan Basamya), all denied receipt of monies reflected in the receipts the accused gave to Mugabi (PW4).

They all testified that the receipts do not originate from their pharmacy (Astra). They exhibited

copies of receipts bearing the same numbers (18981,899,030) which were issued to their genuine customers- (Kamuli enterprise, First pharmacy and Medline pharmacy).

A handwriting analyst (Mr.Ezati) analysed the signatures on the questioned receipts and compared them with the specimen signatures of the Accountant of Astra pharmacy, Mr. Chetan Vanzara (PW16) and opined that Chetan (PW16) did not write the signatures in the questioned receipts.

I was satisfied with the evidence that the three receipts which are the subject of counts three to six did not originate from Astra pharmacy.

Are they forged documents?

S.342 of the Penal Code defines the offence of Forgery as the making of a false document with intent to defraud or to deceive. S.345 (a) provides that a person makes a false document when he makes a document purporting to be what in fact it is not.

The three receipts purport to originate from Astra pharmacy whereas not. In this regard they are false.

They further purport that Astra pharmacy received the monies reflected in each of them. In this regard they are false.

The receipts are false documents in that they purport to be what they are not.

Who made them?

The state contends that the accused made the receipts. Counsel for the accused argued that in the absence of evidence that the accused physically wrote the receipts the accused is entitled to an acquittal.

There is evidence that it was the accused who gave the three receipts to PW4 (Hakim Mugabi) as proof of payment of a total of 13m/= to Astra pharmacy.

Counsel assailed Mugabi's evidence on the ground that he was contradictory, deceptive and reckless, complaints that are not borne out on the court record. Mugabi in my view testified in a steadfast manner. He did not appear to me to have been deceitful. I believed his evidence that the accused is the one who gave him the three receipts. The basis for my belief is the fact that (as

was the evidence of PW1 and PW3, it was the accused's role to manage the creditors of the company. The three cheques relating to monies which were to be paid to Astra were in fact written in favor of the accused and the evidence is that he indeed withdrew the money. PW4's evidence that the accused gave him the three receipts must therefore be viewed in light of all that background information. Viewed in light of that information, Mugabi's evidence is logical and factually correct and must be believed.

By the accused giving the receipts which he knew were false means he had possession of them in the first place. To me, possession of a forged document with full knowledge of that fact raises a presumption that one forged the document.

The accused maintained silence and did not discharge the evidential burden of how he came by the receipts.

Section 105 of the Evidence Act provides that; when a person is accused of any offence....the burden of proving any fact especially within the knowledge of that person is upon him or her....!!

How the accused came to possess the three receipts is a fact especially within his knowledge but he did not give any explanation.

This leaves the state case that he is the one who forged the receipts unchallenged.

He is the one who forged the receipts.

Uttering the false receipts

The state case is that the accused gave the three receipts to Hakim Magumba as proof of payment and receipt of money by Astra pharmacy.

The word "*uttering*" defined in section 2 of the Penal Code inter-alia means attempting to induce any person to use, deal with or act upon the thing in question.

In this case, the accused induced Hakim Mugabi (PW4) to file the receipts as proof of payment of money to Astra pharmacy.

I have already found that the accused forged the receipts. He therefore knew that they were forged documents.

The fraudulent aspect of the accused's action lies in the fact that he withdrew the money and did not put it to its intended use. It has already been found that he embezzled it.

I find that the accused knowingly and fraudulently uttered the false receipts as contended in counts 6-8 of the Indictment.

There is sufficient evidence to prove that the accused embezzled the documents and funds complained about in counts 1 and 2 that he forged the documents in counts 3 to 5 and that he uttered those documents as alleged in counts 6-8. In agreement with the assessors , I convict him on each of the eight counts as charged.

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**HON.LADY JUSTICE
MARGARET TIBULYA
JUDGE OF THE HIGH COURT
20th/12/2014**

22nd/12/14

Accused present

Representation as before;

PROSECUTION:

No previous record. He is a first offender he wasted government resources. He was not remorseful. He wasted Court's time.

Offence of embezzlement carried maximum of 14 years and forgery and uttering 3 years. Court has discretion to award sentence. We pray you consider;-

1. The entire amount of money the company lost- has not been recovered. We pray for order of compensation.
2. Offence of embezzlement is rampant. We pray for a deterrent sentence.
3. Convict is a young person. He should be taught to earn a living through lawful means'. We pray for a reformatory sentence.

COUNSEL FOR ACC:

The accused is a first offender. The accused is a senior. 6 drop out and is 30 years old.

He is young, with a young family of 2 issues. The accused- this was his first employment and without relevant skills. The accused has been remorseful throughout the trial. Since this was his first employment, he is most likely to reform after this trying moment.

The accused had been detained beyond 48 hours before he was brought to court.

From the appearance of the accused may be he never got the money. May be mismanaged it.

He is the 3rd in the family. He is a bread winner to his elderly parents. Though the case of embezzlement is rampant, I pray the Court to be lenient and sentence him to a non custodial sentence.

The work was technical. He had no skills.

I pray for lenience for him. He is young. Court should be lenient. He can reform. I so pray.

COURT:

Sentence on 31st/12/2014. Accused's bail cancelled and he be remanded till then.

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**HON.LADY JUSTICE
MARGARET TIBULYA
JUDGE OF THE HIGH COURT**

22nd/12/2014

SENTENCE

I have considered all that was said by both counsel in support of and in mitigation of sentence.

It is common ground that the accused is a first offender. I should however point out that there can never be excuses to commit offences, even for the first time.

The offence of embezzlement is one of the most serious economic crimes and it is the duty of the court to send a strong signal that indulging in such offences will be appropriately punished.

The accused is a young man at 30 years but it is surprising that he chose to pursue wealth in the most foul manner. That he lacked skills relevant for the job is not a factor relevant to the issue at hand. He was not accused of failure to execute his duties. He was accused of stealing from his employer. The prayer by his counsel for a non-custodial sentence is therefore misplaced.

Even if I considered other factors brought to my attention, such as the fact that he is a sole bread winner and has elderly parents to look after. I find a custodial sentence inescapable.

I have also considered the amount of money involved-quit a big sum for a small or medium scale enterprise. Crimes such as these must be handled firmly, because they hit at the very nerve of the country's development aspirations.

Considering all that, I have said, I have sentenced the accused as follows;-

1. He will serve 8 years in prison on each Counts 1 and 2.
2. He will serve 2 years in prison on each of Counts 3 to 8. The sentence shall run concurrently.
3. He is ordered to refund the 102,146,453/= to company.

Rights of appeal explained.

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**HON.LADY JUSTICE
MARGARET TIBULYA
JUDGE OF THE HIGH COURT
31st /12/2014**