REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT THE ATI-CORRUPTION DIVISION

CRIMINAL SESSION CASE 22 OF 2014

UGANDA……PROSECUTOR

VS

KISEMBO MOSES BAHEMUKA & 3 ORS……ACCUSED

BEFORE HON. JUSTICE LAWRENCE GIDUDU

JUDGMENT

The four accused persons are government employees. A1-Kisembo Moses is a chief Administrative officer, CAO, A2- Kocho Mark is a chief finance

officer,CFO, A3 Ilukol Jobs Lomenen is a deputy CAO and A4 Ogobi Lillian is a commercial officer. They are alleged to have committed the offences mentioned in the indictment while they were employees of Nakapiripirit District Local Government hereinafter referred to as NDLG.

A1, A2 and A3 are jointly charged with causing financial loss in count 1, Neglect of duty in count 2 and Abuse of office in count 3.

A4 is singularly indicted with Embezzlement in count 4, Abuse of office in count 5 and conflict of interest in count 6.

They each denied the charges hence this trial.

The evidence against them though presented in long winding stories can be summarized as below.

The government of Uganda through the Ministry of local government disbursed Community Driven Development (CDD) Funds to districts including NDLG to empower communities to engage in economic activities to fight poverty and improve livelihoods. These funds were to be accessed by organised groups in each sub-county. Each group would submit a business proposal which would be appraised by the district planning team and if found viable, would be approved.

NDLG received a total of 175,000,000= from 2009 to 2011. Seven sub counties of Kakomongole, Namalu, Moruita, Lolachat, Lorengedwat, Nabilatuk and Loregae plus one town council of Nakapiripirit mobilized and trained groups to access the CDD funds.

NDLG disbursed the funds totaling 115,000,000= to the seven sub counties and the town council bank accounts in Stanbic bank Mbale branch.

A1 directed A4 to identify a SACCO through which the CDD funds would be disbursed to the groups. It was a requirement under the CDD guidelines that CDD funds be disbursed through a financial intermediary.

A4 recommended Nakapiripirit Teachers SACCO as the financial intermediary. The groups were then required to open membership accounts with the SACCO before accessing their funds.

In the meantime, an MOU was drawn to manage the disbursement process with the SACCO. The sub counties and the town council were required to transfer the funds to the SACCO which would then pay the various groups.

At the end of the disbursement, only Kakomongole Sub County and Nakapiripirit town council groups had accessed the funds under this arrangement. The other six sub counties did not get their money totaling 88,480,000=.

The matter came to light when A4 reported that she had been robbed of 50,000,000= from Mbale. She had withdrawn this money to deliver it to the SACCO. It is then that it transpired that A4 was sole signatory to the SACCO bank account. Investigations revealed that out of 115,000,000= transferred to the SACCO, a total of Shs. 88,480,000= was unaccounted for. The accused were arrested and charged.

Each of the accused denied the offences.

A1 denied any wrong doing. It was his defence that he acted within the CDD guidelines. He instructed A4 to source the SACCO because she was the district commercial officer responsible for SACCOs. He trusted her recommendation of the SACCO in question. He signed the MOU because he believed it was a good management tool to guide the contracting parties.

It was his defence that if the SACCO failed to keep its part of the bargain then he should not be blamed for it. The SACCO was chosen because literature from the Ministry exhibit (D6) permitted them to be used where there is no bank. It was a requirement of the CDD guidelines (page 22 of exhibit D5) that the cost of operating the accounts be kept low and since Nakapiripirit had no bank, it justified the choice of a SACCO as a financial intermediary. He concluded that if he had known A4 to be the sole signatory he would not have approved the SACCO.

A2's defence is similar to that of A1. He denied neglecting his duties or participating in corrupt activities. He maintained that the SACCO was functional and legal. His role was to disburse funds and wait for accountability.

The SACCO was to act as financial intermediary and the MOU was the instrument to regulate the relationship between the SACCO and the beneficiaries. He also maintained that it was not possible for the sub counties to pay groups directly. It was his testimony that if the MOU had been followed then there would be no problem. He denied receiving money from A4 on his Stanbic account.

A3 like the other two denied the charges. His participation was by virtue of being deputy to A1. He signed the MOU (exhibit P12) on behalf of A1. He also signed the letter of 5th May 2010 (exhibit P9) to A4 on behalf of A1. He only came to know about A4 being sole signatory while in court. He believed the signatories were the chairman, secretary and treasurer. He also supported the MOU as a useful management tool because the SACCO was supposed to write to the district giving details of accounts opened before disbursing funds.

However, the SACCO went ahead to disburse funds without the approval of the district and the matter would not have come to light if A4 had not informed them money had been stolen from her.

A4 also denied embezzling money, abusing authority of her office or having a conflict of interest. She insisted her involvement in the SACCO was on account her duties as district commercial officer who supervises SACCOs.

The instruction to engage a SACCO was not her idea but instructions from A1. It was her evidence that the SACCO was viable. She only assisted PW3 and one Jennifer to draw money as sole signatory because they wanted to reduce costs of going to the bank. Like the others she insisted the chosen SACCO was viable and operational and had capacity to manage the disbursement.

It was her evidence that she signed the MOU as commercial officer. She explained that she withdrew money as follows: 19 million on 20th July 2011; 5 million on 2nd August 2011; and 9.4 million on 9th August 2011. She gave this money to the SACCO manager to pay out.

Disaster struck when she withdrew 50 million which robbers stole from her in Mbale town. She was so traumatized that she travelled to Kampala where her mother was and it is the reason she withdrew another 32 million from IPS branch which she took to Nakapiripirit and handed to the SACCO manager in the presence of Kobore (PW3).

She reported the loss of the money to Mbale police but when she went back to check on the progress of the case, she was arrested and taken to court in

Nakapiripirit. The DPP later withdraw the charges of theft against her advising the police to charge her with embezzlement.

Once the accused deny charges, the prosecution has a burden of proving all the essential ingredients of the offence beyond reasonable doubt.

On this indictment, the prosecution must prove the following essential ingredients.

Count 1: Causing financial loss

(i) That the accused are government employees

(ii) That in the performance of their duties, they did an act knowing or believing that it will cause financial loss.

Count 2: Neglect of duty

(i) That the accused had a duty to perform.

(ii) That the accused neglected that duty.

(iii) That as a result, damage was caused to the prejudice of the complainant.

Count 3: Abuse of office

(i) That the accused are government employees

(ii) That the accused did an arbitrary act prejudicial to the interests of the employer.

(iii) That the accused abused the authority of their office.

Count 4: Embezzlement

(i) That the accused is a government employee.

(ii) That the accused stole money.

(iii) That the accused received the money by virtue of her office.

Count 5: Abuse of office

(i) That the accused was a government employee.

(ii) That the accused did an arbitrary act prejudicial to the interests of the employer.

(iii) That the accused abused the authority of her office.

Count 6: Conflict of interest

(i) That the accused is a government employee.

(ii) That she had a direct or indirect interest in the matter.

(iii) That the accused knowingly failed to disclose the nature of the interest.

(iv) That the accused participated in proceedings.

COUNT 1: Causing financial loss

It is not in dispute that the three accused were employees of **NDLG** and got involved in this matter by virtue of their employment. All the accused conceded to this ingredient which has been proved beyond reasonable doubt.

However, the prosecution asked me to find that the accused knowingly or had reason to believe that their actions would cause financial loss and should be found guilty.

The prosecution contended that the act of A1 writing to A4 a letter in exhibit **P9** which was signed by A3 requiring A4 to identify a viable SACCO to manage **CDD** funds already on sub county accounts was calculated to cause loss.

Further, Mr. Kinobe from the IGG argued that the letter in exhibit **P11** written by A1 requiring sub counties to sign an **MOU** with the SACCO was also calculated to cause loss of funds. He contended that once the funds had reached the sub counties, the next step was to have the money transferred to the groups' accounts in commercial banks by the sub counties. He asked me to find that the accused

acted with intent to cause financial loss when they engaged the sub counties in an **MOU**.

The defence did not agree with Mr. Kinobe's submissions on culpability of the accused. Ms Nyakechwo who appeared for A1-A3 contended that the requirement for the sub counties to sign an **MOU** was perfect in order to obligate each party to the business. Further, it was her submission that A1 was entitled to rely on his officers such as PW3 and A4 to believe that the selected SACCO was viable and up to the task. Besides he had seen it operate at the district.

I should point out from the outset that all witnesses from Nakapiripirit who testified were subordinate to the accused. None of them was in a position to know the limits or powers of the accused. The bulk of the submission by Mr. Kinobe on several issues in count 1 is not based on evidence adduced by on a perception from the bar.

A1 in his defence testified that the money to the groups had to go through a financial intermediary and A3 was explicit that **CDD** funds could not be paid directly to the groups by sub counties. Further, the accused in their defence which was identical testified that the **CDD** funds guidelines required that the cost of operating the accounts by the groups be minimized by using a financial intermediary nearest to their localities. They also justified the use of a SACCO

because exhibit **D6** permitted it since there is no micro deposit taking institution in Nakapiripirit.

Mr. Kinobe disputed this evidence with a submission from the bar. No witness was presented to dispute the accused's choice of a SACCO or to challenge exhibit **D6**. The investigating officer who testified as PW9 was cross examined on exhibit **D6** and denied ever seeing it. It was his evidence that the accused should have used a bank because that is what the **CDD** guidelines provide even when the district community development officer had told him there was no bank in Nakapiripirit district. No witness was presented to testify that money could be paid to the groups directly from the sub counties. No witness was presented to testify that the accused knew that A4 was the sole signatory to the SACCO account. What I have are submissions from the bar.

It is trite that evidence given on oath cannot be challenged by submissions from the bar on factual issues. Such submissions must be restricted to points of law but factual issues should be challenged only by other evidence or by discrediting it through cross examination. At the end of the trial, the court is able to choose which version is more credible.

In this regard, evidence of Ministry officials responsible for **CDD** funds or the permanent secretary in the ministry of local government would have been

essential. The sub county chiefs and the sub county **CDO**s paraded in court were not in a position to support the charges of causing financial loss because they operate below the accused persons in the **CDD** funds management chain.

The investigating officer attempted to fault the accused but his evidence was based more on his opinion because functionally he was not positioned to know how **CDD** funds are operationalised. Indeed when he tendered excerpts of pages 14, 15, 16 and17 from the **CDD** guidelines, see exhibit **PE 26**, he said he down loaded them from the Ministry Website. He did not interview the ministry officials that disburse those funds to get a clear picture of what went right or wrong.

A perusal of the guidelines on pages 22 and 23 of exhibit **D5** reveals that money from the sub counties is to go **to the accounts of the groups in a bank or MDI nearest to their localities in or to minimize the costs of operating those accounts.** (Emphasis is in the guidelines.)

The accused testified that in view of the fact that the district had no bank and the nearest banks were miles outside the district, they called in aid exhibit **D6** which permitted them to use SACCOs where convenient. Exhibit **D6** is titled **CDD** financial management of projects. It is issued by the Ministry of Local Government as **CDD** Brochure series 5. The relevant paragraph reads thus:-

Bank Accounts for CDD Funds

The Higher Local Governments and the Lower Local Governments are required to open up separate bank accounts for CDD grants. Similarly community groups whose projects are approved for funding must have bank accounts to which approved funds are transferred. The community groups can open accounts with duly registered Micro deposit taking institutions or savings and credit cooperatives as may be convenient to them. However, community groups should open accounts with SACCOs that have accounts with commercial banks.

It is clear from the above excerpt, that the insistence by the prosecution to fault the accused for having used a SACCO does not have any justification. It would be illogical to require these groups which according to A2 were 90% illiterate to open accounts with commercial banks in Mbale or Moroto which are over 90 kilometers away just to access less than 2 million allocated to each group. Some groups were allocated 15 million to share. There were eight to ten groups per Sub County which means each group would get 1.8 million. Does this justify opening an account miles away? Logic and common sense say no.

Consequently, in absence of evidence to the contrary given in the witness box, I find that the version given by the Accused 1-3 unchallenged in regard to the requirements needed for the groups to access **CDD** funds.

The instruction to A4 to source a SACCO was in my view logical and legal in view of exhibit **D6**. Nakapiripirit district has no bank from which the groups could receive money. Indeed the evidence on record is that **CDD** funds for Nakapiripirit were in Stanbic bank in Mbale town. If the groups were asked to travel to Mbale over 90 kms away, to open accounts in order to access their funds, such a requirement would defeat the purpose of minimizing costs as required in the **CDD** guidelines at p.22.

The **MOU** is an agreement which set out the obligations of each party. Contrary to the submission from the bar that it was used as a tool to transfer money from sub counties to the SACCO, a perusal of it shows that the accused persons were protecting the funds for the groups by requiring the SACCO to first submit a work plan and the accounts of each group before funds are disbursed. Paragraphs **3.6** and **2.1,2 and 3** of the **MOU** protect the groups from being cheated by the SACCO. It required the SACCO to use the funds received from **CDD** to the groups' activities only. No loophole was made for the accused to fleece the money or cause its loss. In fact the existence of the **MOU** made it possible for **NDLG** to hold the SACCO liable if money got lost. The accused rather than being commended were hauled to court on charges against which no evidence has been adduced.

The **knowledge** that money would be lost has not been proved. Instead the defence has adduced evidence to prove that they committed the SACCO to an **MOU** so that

a contractual relationship is made to protect the groups from loss. The SACCO is liable for the loss and not A1, A2 or A3.

The letters in exhibit **P9** and **P11** are legitimate management tools by the office of A1 to operationalise the disbursement of **CDD** funds. The two gentlemen assessors advised me to find the three accused not guilty on count 1. I agree. No crime was committed by the three in count one.

But before I leave count 1, there is an issue which Ms Nyakechwo raised which merits consideration. It was also raised by A2 in his defence. The issue is in regard to the particulars in count 1 which state that A1, A2 and A3 recommended the transfer of CDD funds from account **014/00/446023/02** to the SACCO account **041/00/245447/01** held in Stanbic bank Moroto.

It was the prosecution evidence in exhibit **P5** that account number **0140044602302** belongs to the district **and not** the Sub counties. The Sub counties' **CDD** accounts are different and are also contained in exhibit **P5**. The particulars in count 1 tell a naked lie to say that the accused transferred money from the district account to the SACCO.

I brought this to the attention of Mr. Kinobe but he did not have an answer. Money to the SACCO was not transferred directly from the district. It was via the various Sub County and Town council accounts as is contained in exhibit **P20**. Technically

speaking the particulars in count 1 are contradicted by the evidence adduced by the prosecution.

In law, evidence must be adduced to support the particulars in an indictment in order to prove the case. If the evidence adduced is at variance with the particulars of the offence, then the charges are not proved. In this case the evidence is at variance with the particulars and the accused are not guilty on the indictment in count 1. It was the desire to charge the accused that perhaps led to the importing of the district account into count 1.

The SACCO received eight transfers from the seven Sub Counties and one Town Council which operated eight different bank accounts. It did not receive any money directly from account **0140044602302** as indicated in count 1. This same error is repeated in count 3.

COUNT 2: Neglect of duty.

The first three accused are faulted for neglecting to ascertain ownership, financial and registration status of the SACCO before authorizing CDD funds to be deposited there thus resulting in loss of Shs.88,480,000=

Mr. Kinobe submitted that the three accused should have vetted the SACCO identified by A4 before directing funds to be committed there. It was his further

submission that they knew that A4 was sole signatory but went ahead to sign an with it.

I should point out that apart from Mr. Kinobe who was a prosecutor in this case no witness told court that the fact of A4's sole signatory status was common knowledge to the three accused. On the contrary, evidence on oath by A1 and A4 is that that fact was known only to A4. Besides, the fact of sole signatory was according to evidence of PW3, an afterthought by A4. At the time of signing an MOU, the sole signatory was not in place. Consequently, the submission from the bar cannot challenge evidence on oath of factual issues.

The accused persons denied being negligent in their duties. They each testified about their role in this saga.

A1's role was to task the relevant officers below him such as A4 to identify a SACCO that would manage the CDD funds. A2's role was to sign off the funds and await accountability. A3's role was to deputise A1.

Ms Nyakechwo for the accused dismissed the charges of neglect. She submitted that the accused performed their duties fully that is why money reached the financial intermediary. She argued that indeed Kakomongole Sub County and Nakapiripirit Town Council received their funds. What happened to the rest of the funds was out of the control of the accused.

Neglect of duty c/s 2(i) was made an offence of corruption in 2009 with the enactment of the Anti Corruption Act, 2009. It exists in the Penal Code Act as an offence in section 114 thus:-

114. Neglect of duty.

(1) A person who, being employed in a public body or a company in which the Government has shares, neglects to perform any duty which he or she is required to perform by virtue of such employment, commits an offence and is liable on conviction to imprisonment for a term not exceeding five years.

This section was not repealed by the 2009 Act. Section 69 of the 2009 Act which repealed some provisions of the Penal Act does not mention section 114.

In my view, section 114 gives the context of what constitutes neglect of duty. There must be a duty which the accused is employed to perform which he/she neglects to discharge.

Neglect is defined in Black's Law dictionary,8th edition, as the **omission of proper attention to a person or thing whether inadvertent or negligent or willful; the act or condition of disregarding**.

The same dictionary defines ***negligence*** as **the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm**.

From the context given in section 114 of the Penal Code when read together with the definitions of *neglect* and *negligence* in Black's Law dictionary, it is clear that the prosecution must prove that the accused were mandated to perform a duty or duties which they omitted to perform either inadvertently or negligently by failing to exercise prudence of the holder of such office.

In a civil matter, this would be a tort of negligence. A tortfeasor owes a duty of care. If he/she breaches that duty and as a result of which a victim suffers injury, loss or damage, then the tortfeasor is liable.

The prosecution asked me to find the accused culpable in neglect of duty because they failed to perform due diligence on the SACCO which led to loss of funds. It was submitted that the SACCO was not registered, did not have good management and had a sole signatory which exposed the funds to risk of loss.

The defence asked me to find that the act of directing A4 to find a viable SACCO was sufficient discharge of that duty. Further, the SACCO was already registered and had been operating long before **CDD** funds were deposited there. It was the

defence case that the fact of A4 being sole signatory was not known to A1or A2 or A3. Indeed A4 testified on oath that she did not disclose to A1, A2 and A3 that she was sole signatory. A1 testified that if he had been made aware that A4 was sole signatory, he would not have signed the **MOU**.

As I noted earlier, the prosecution did not adduce evidence of the supervisor of particularly A1 to tell court what duty he neglected to perform under the **CDD** guidelines. The prosecution relied on the evidence of the investigating officer, PW9, whose knowledge of the duties of a **CAO** was misconceived. When he investigated the case he did not seek to know what the duties of the **CAO** are in regard to the management of **CDD** funds.

Be that as it may, it was the prosecution case that A1 wrote to A4 as district commercial officer to identify a suitable SACCO to do the job. A4 complied and made a report to A1. According to A1, he believed what his officer had done and prior to this, he had always seen this SACCO doing business. Its chairman was Korobe, PW3 and one Jennifer also working in NDLG was the treasurer. Were A1, A2 and A3 required to go through the registration status and vouch the management and financial capability of the SACCO to manage Shs 115 million?

In absence of direct evidence from the witness box, I am not persuaded by the prosecution argument for this proposition. If A1, A2 and A3 were to do a due

diligence on the SACCO in the terms proposed by Mr. Kinobe, what then would be the role of A4 and the district community development officer? A1 is **CAO** who manages huge resources of the district through officers below him. He is the head of civil servants in **NDLG**. If he was to assign them duties and then later do what they are supposed to do, that would be absurd and impossible. **CDD** funds are a very tiny fraction of the funds a **CAO** manages in a district. A **CAO** signs many documents and contracts prepared by officers below him/her. If he was to indulge in micro managing the district services, he/she would fail?

A1 went out of the way and caused an **MOU** to be signed with the SACCO which in my view was an act intended to minimize risk of **CDD** funds. The terms of the **MOU** are in favour of the beneficiaries.

The two gentlemen assessors found that there was no further duty which the accused one to three failed to do. The two also found that the **MOU** was a good management tool to protect the funds and to assign responsibility. I agree with them.

There was no negligence on their part. The three acted responsibly. Indeed when A4 informed them that funds had been stolen, A1 caused an urgent meeting to discuss the matter. He reported to the police at Nakapiripirit and even made a follow up with them. He interdicted A4. Even when A4 returned to office by some

twist of events, A1 prevented her from discharging any duties until the missing funds had been recovered. Exhibits D7, D8 and D8 support the above conclusions.

As regards A2 and A3, the charge is simply misplaced. A2 as **CFO** was not required to source a financial intermediary. He is a technical person only instructed to disburse funds. The fact that he signed the **MOU** was on instruction. The **MOU** was a management issue. A3 signed it because A1 was not present and as deputy **CAO** his actions are not independent but complementary to A1. He should not have been charged. The investigation was by an officer whose knowledge of the public service is clearly limited. If he had interviewed the Ministry of Local Government officers, he could have got a better view of this matter.

COUNT 3: Abuse of office.

It is the prosecution case that the three accused committed the offence of Abuse of office when they unlawfully facilitated , approved and recommended the transfer of 109,880,000= from account number **0140044602302** to the SACCO account number **0140024544701** without ascertaining the financial and registration status of the SACCO which was an arbitrary act prejudicial to the interest of the employer.

Ms Nyakechwo for the accused again raised a red flag in regard to the particulars in count **3**. The district account is stated as the account from which money flowed

to the SACCO whereas not. The prosecution had no explanation for this anomaly. The truth is that money to the SACCO was transferred from the sub counties and the Town council. My holding in count 1 in regard to this mismatch applies here with equal force.

There is no doubt that the accused are employees of Local Government. Did they act arbitrarily in abuse of their offices?

Again no evidence was adduced to establish that the accused acted unlawfully to direct the transfer of funds to the SACCO from the sub county accounts. On the contrary evidence from exhibits **D5** and **D6** supports the action of the accused. Sub counties were not permitted to write cheques in the group names which the groups could then go and deposit in their accounts where ever they may be. That seems to be the position of the prosecution unfortunately; there is no witness evidence to support it.

Even where a bank is used, the money is transferred to the bank which then credits the accounts. The choice of the financial intermediary is not the groups' choice as counsel for the state indicated. It was the duty of the district to identify it and contract it to disburse funds. The district leadership through the **CAO** had an obligation by virtue of office to ensure that the funds are managed well to the end

users. It would be irresponsible to merely transfer funds to the sub counties and sit back to wait for field reports.

It is not clear to me why the issue of prior registration was included in the indictment. Exhibit **D10** shows that the SACCO was registered on 5th August, 2010.The funds to the SACCO were effected between June and August 2011. That was not an issue by 2011.

Further, by the time A1 wrote a letter dated 27th April 2011; (**P11**) to sub counties to prepare to sign an **MOU**; the SACCO had been long registered! Besides, A4 who supervises SACCOs testified that the registration was not a requirement for a SACCO to operate and that in fact if it does not operate to demonstrate its competency, the district cannot recommend its registration.

Besides the requirement in exhibit **D6** is that the SACCO must have a bank account. And indeed, it had one in Stanbic bank Moroto. Its registration is not one of the conditions. Again I should point out that the prosecution did not adduce evidence on the issue of prior registration. It was another submission from the bar which cannot challenge evidence on oath. No law in the Cooperative Societies Act was cited to support the state case that SACCOs must be registered first in order to transact business.

The term arbitrary is an English word defined in the 7th edition of Oxford learner's dictionary as:-

" an action, decision or rule not seeming to be based on reason, system, or plan and at times seems unfair or breaks the law".

I have not been availed any evidence on the record that would even suggest that the act of transferring money to the SACCO was illegal, unreasonable or unfair. On the contrary, the accused caused an **MOU** to be signed whose provisions protected the interests of the beneficiaries.

No employer of the accused testified to say the Ministry was prejudiced when the accused did what they did. This is the basis for the charges in count 3. There being no employer prejudiced the charges in count 3 collapse like the others in counts 1 and 2.The two gentlemen assessors advised me to acquit the three accused because they were simply implementing the **CDD** guidelines. I agree.

The charges in counts 1 to 3 were absolutely unnecessary. The accused number 1, 2 and 3 should have been useful prosecution witnesses in a case against whoever stole the money.

Count 4: Embezzlement.

A4 is singularly charged with embezzlement. It is the prosecution case that A4 in her capacity as district commercial officer stole money amounting to shillings 88,480,000= from the SACCO. The money belonged to the government as part of **CDD** funds.

The fact of the accused's employment is not denied. It is admitted. The fact that she was supervisor to the SACCO is admitted. She was the Ag. District Commercial Officer.

In a case of embezzlement, the initial taking of the money or property is not fraudulent like in ordinary theft. The accused must be proved to have received the money in the normal course of her employment.

The accused in her defence admits being sole signatory to the account of the SACCO. She admits withdrawing sums of money. Out of 115,000,000= deposited on the SACCO account as **CDD** funds, only 26,520,000= was paid out to the groups in Kakomongole sub county and Nakapiripirit Town council. The balance of 88,480,000= has never reached the groups.

The accused admits withdrawing and receiving the money. She explains that on one occasion, 50,000,000= was robbed from her in Mbale town while the 32,000,000= she withdrew from Stanbic bank, IPS Kampala was handed over to the SACCO manager whose name she recalls vaguely as Deo. She claims to have

handed over this money in the presence of Korobe, PW3. Korobe was in court but this fact was not put to him in cross examination.

In a nut shell A4 attributes the loss of the money in question to robbers in Mbale in respect of 50,000,000= and the SACCO manager in respect of the balance. A4's counsel, Mr. Deo Byamugisha submitted that the accused did not benefit from the money and is, therefore, not culpable. I should point out that benefitting from the stolen money is not part of the requirement under the law.

A background to leading to the scenario where A4 became a signatory to the SACCO she is supposed to supervise is instructive in resolving this matter.

PW3, Korobe, testified that among the officials of the SACCO was A4 as secretary, one Lolem Jennifer, as treasurer and himself as chairman. It was his testimony that they went to Moroto Stanbic bank to open an account for the SACCO and even did the documentation and left. The account number was **0140546832901**. The signatories were Korobe Raymond as chairman, Lolem Jennifer as treasurer and Ogobi Lillian as secretary. See exhibit **P13**.

Later when A4 reported that she had been robbed of CDD funds, PW3 was instructed by a district team meeting called by A1 to go to Moroto on 13th September,2011 to establish how A4 alone could have withdrawn money from that account.

At the bank, he was told that he and Lolem Jennifer had given A4 a power of attorney to open an account for the SACCO as sole signatory and she could obtain a bank statement on account number **0140024544701** since she was sole signatory.

PW3 was surprised by these developments and denied ever giving A4 a power of attorney to manage the account as sole signatory. He made a report on 13th September, 2011. See exhibit **P13**. He testified that his signature was forged because it shows the letters **R** for Raymond and **K** for Korobe yet when he signs he does not make reference to his names.

A4 maintained that PW3 signed the power of attorney but is just a forgetful person. A4 claimed that PW3 and Lolem asked her to manage the financial affairs of the account because PW3 was sickly and they did not want to spend a lot of money on transport by going three people to the bank every time they wanted to withdraw.

This court examined the signatures of PW3 on exhibits **P12** and **P13** and compared with the one on the power of attorney. There is such a huge and glaring difference. The power of attorney is signed with the letters **R** and **K** prominently inserted while what PW3 calls his real signatures have nothing to do with initials of his names. It does not require a hand writing expert to see the difference between the signatures. It is my conclusion that the signature on the power of attorney is

forged. PW3 denied signing the power of attorney and I believe him because of the obvious difference in the signatures.

I now turn to the defence of the robbery in Mbale. A letter to A1 by the O/CID Nakapiripirit police station (exhibit**D8**) states that both Mbale and Nakapiripirit police investigated the robbery and found that the money was not robbed as claimed by A4.

In fact they charged her in court. The court case was withdrawn by the DPP with advice that she be charged with embezzlement. Before the dust could settle the office of the IGG was informed by a whistle blower that **CDD** funds had not been fully disbursed leading to investigation and this prosecution.

The police finding that no robbery took place as alleged by A4; the glaring variance in the signatures on the purported power of attorney giving A4 sole signatory status; the participation of A4 in SACCO activities yet she was supposed to supervise it; the denial by PW3 of giving A4 powers to manage the financial affairs of the SACCO as seen from his testimony and the report in exhibit **P13** leads me to an irresistible conclusion that A4 stole the money and faked its disappearance.

A4's explanation that she withdrew 32,000,000= from Kampala because she had gone there to get consolation from her mother is doubtful in view of the several

pieces of circumstantial evidence incriminating her in the preceding paragraph. The withdrawals from Kampala was part of the series of acts of theft committed by A4 taking advantaged of her sole signatory status which she had obtained fraudulently.

The evidence of PW3 which is supported by the testimonies of A1, A2 and A3 is that after getting a verbal report about the alleged robbery of 50 million from A4, A1 called an urgent meeting which instructed PW3 to cross check with the bank. During this time A4 had disappeared. She did not appear until she was arrested from Mbale and taken to Nakapiripirit. She was charged in court. It was her testimony that after withdrawing 50 million from a bank in Mbale, she saw two men before her. All of a sudden she saw darkness and when she recovered from the blackout, the money had disappeared from her bag. The two men had disappeared with the money. This story sounds like a poorly conceived plot to explain the loss of the money. It sounds like witchcraft. It is unbelievable.

The accused's conduct is most unusual. If she had lost money through a robbery, she should have reported to Mbale police and immediately reported to A1, her boss. Going to Kampala to get consolation from her mother instead of reporting to her superiors is unreasonable conduct of a government officer.

Even when being consoled from the alleged trauma, she risked withdrawing another 32million. She travelled with that sum of money all the way from Kampala through Mbale and to Nakapiripirit. The same has never been seen. Her claim that she handed it to a manager whose name she does not recall in the presence of PW3 sounds untrue.

PW3 was in court. He was not challenged about witnessing such hand over of money. On the contrary PW3 was emphatic that he did not know what was going on in the SACCO until A4 reported loss of money. PW3 did not know that **CDD** funds had been released to the SACCO because he had not been asked to sign it off to the groups.

After evaluating the evidence for the prosecution and the defence, I have come to the conclusion that the evidence against A4 in regard to the count of embezzlement proves the charge against her beyond reasonable doubt. I find her guilty of the offence of embezzlement **C/S 19(a)(ii)** of the **ACA,2009**. She received the money on account of the SACCO where she was sole signatory and diverted it. She did not deliver to the recipient.

The two gentlemen assessors did not believe A4's version of how the money disappeared. I do not agree either. The money was stolen by A4. She took advantage of her office and positioned herself to participate in SACCO activities

yet she was supposed to supervise it. She took advantage of her position as commercial officer and stole from the SACCO she was supposed to protect.

COUNT 5: **Abuse of office**.

A4 is charged in count 5 with abuse of office. It is the prosecution case that the accused masterminded the registration of the SACCO and positioned herself as sole signatory in abuse of her authority.

It is not in dispute that A4 was the acting district commercial officer for **NDLG**. She is, therefore, a government employee.

The acts she is faulted for committing are the **registration** of the SACCO for transacting monies from CDD funds and positioning herself to become **sole signatory** of the SACCO funds which exposed the money to risk of theft.

There was no evidence adduced by the prosecution as to the schedule of duties of A4. The only evidence on record is from the defence. It was A1's evidence that A4 as district commercial officer was the one responsible for promoting SACCO activities in the district. Her participation in SACCO activities is part of her schedule. It is not A4 who decided that CDD funds be transferred to the SACCO. That was a management decision by A1 and his team.

A4 herself testified that she supervises SACCOs as part of her duties. It was her testimony that she is the one who recommends SACCOs for registration after it has operated for at least a year. It was her evidence that it was her role as commercial officer to take documents for the SACCO to be registered. And that if the group took the documents the registrar of cooperatives would send them back to the commercial officer.

SACCOs are registered under the Cooperative Societies' Act. Cooperative Societies are supervised by government through district commercial officers. A SACCO is not like a private company whose registration is the responsibility of its promoters. The registration of SACCOs requires endorsement of the district commercial officer who signs their registration papers. The involvement of A4 in the registration of the SACCO was wrongly perceived as a crime by a flawed investigation. No evidence was adduced to prove it instead the defence successfully rebutted it.

The second act complained of by the prosecution is that A4 fraudulently caused herself to be sole signatory so that she could misappropriate the money. Mr Byamugisha for A4 asked court to find that no crime was committed because it was PW3 and Lolem who empowered her to sign as sole signatory. That it is PW3 who misled A4 when he abdicated his duties and chose to allow A4 to run the show. This was not an arbitrary act, he further submitted.

The key evidence on this aspect was by Mr. Kobore who testified as PW3. It was his evidence that he together with Jennifer Lolem as treasurer and A4 as secretary went to Moroto Stanbic bank and opened a bank account. PW3 was surprised to learn later from the bank that A4 had become sole signatory using a power of attorney on which his signature had been forged.

A4 conceded that she was a sole signatory but contended that PW3 and Lolem Jennifer gave her powers to be sole signatory to cut costs of the three going to the bank. She dismissed PW3's denial saying he is forgetful.

I have already made findings in regard to the power of attorney in count 4 above. My conclusion was that it was a forged document.

The change of signatures came after it was clear that **CDD** funds were going to go to the SACCO account. A4 was privy to the process of identifying a SACCO, signing the MOU and mobilizing the groups. She was informed and the decision to be sole signatory is not innocent. It was a strategy to get money unhindered because if the reason was to cut costs, she could have just obtained power to be a bank agent in which case she could still get the money alone but after the other two signatories have signed.

I am of the view that she did not want them to know about the amount to be withdrawn that is why she opted for the sole signatory status. It is also surprising

that the bank did not advise her on the use of the bank agency facility instead of allowing her to be sole signatory to a group account! There must have been complicity. This was a scheme she managed to execute because of the laxity of PW3 in keeping an eye on the affairs of the SACCO.

Besides, A4 was a commercial officer responsible for monitoring and supervision of SACCOs. How could she become part of its finance managers except for fraud? It is my conclusion that the departure from the three original signatories was calculated to edge out PW3 and Lolem so as to give A4 unlimited access to the funds in the SACCO.

This was an arbitrary act that contravened A4's mandate as supervisor of SACCOs. The evidence of A1 which A4 concedes to is that she kept this fact a secret. A1 was clear that if he had known that A4 was sole signatory he would not allow CDD funds to go to the SACCO. A4 contended that she did not find it necessary to tell her superiors about her sole signatory status.

I believe she knew that she would be opposed by her bosses. She knew what she was doing is wrong.

On this basis, I am in agreement with the gentlemen assessors that A4 abused the authority of her office. I find her guilty of abuse of office C/S 11(1) & (2) of the ACA, 2009

COUNT 6: Conflict of interest.

A4 is charged with failing to disclose her interest when she masterminded the registration of the SACCO; obtaining sole signatory status and misappropriating money banked in the SACCO account.

The prosecution had a duty to prove that the accused is a government employee, had a direct or indirect interest in the matter, knowingly failed to disclose the nature of that interest and participated in the proceedings.

From the record, there is no direct evidence led by the prosecution on the ingredients of this offence except on the undisputed fact that A4 is a government employee. The accused is faulted for masterminding the registration of the SACCO and making herself sole signatory. These were the interests she is faulted for knowingly not disclosing.

I have already discussed at length in count 5 above that A4 was performing her duty in registering the SACCO. This was not a personal interest but an official duty for which no crime can be committed.

The charge was based on a false perception from the bar that a district commercial officer cannot register a SACCO yet if such an officer does not act, a SACCO cannot be registered. No provision of the Cooperative Societies Act was cited to support the indictment.

The interest in section 9 of the ACA, 2009, must be proven to exist before participating in the proceedings. In other words, interest must exist before the event. If it occurs after the event, then such interest constitutes a separate crime from conflict of interest. The interest must be of a personal nature. The relevant section of the law is reproduced below for ease of reference.

9. Conflict of interest. (1) An employee, or a member of a public body, public company or public undertaking who, in the course of his or her official duties, deals with a matter in which he or she or his or her immediate family has a direct or indirect interest or is in a position to influence the matter directly or indirectly and he or she knowingly, fails to disclose the nature of that interest and votes or participates in the proceedings of that body, company or undertaking, commits an offence and is liable on conviction to a term of imprisonment not exceeding twelve years or a fine not exceeding five thousand currency points or both.

The evidence on record is that the registration of the SACCO was part of her official duty. There was nothing to disclose.

As regards the aspect of becoming sole signatory to the SACCO account, the prosecution evidence is that initially an account was opened with PW3 and Jennifer Lolem as co signatories. The change to sole signatory was done in

December 2010 after the SACCO had been registered in August 2010. This act was an afterthought by A4. It was not an interest that had to be disclosed at the time the decision to approve the SACCO was made. It constituted a separate offence of embezzlement for which I have found her guilty. There was no need to charge her with conflict of interest when a clear offence had been committed.

Perhaps I should add that the interest in section 9 does not include criminal scheming which constitutes separate offences. The Law was made to provide for disclosure of interests in order to promote transparency in the conduct of public affairs. It was not meant to make persons disclose criminal schemes. To require A4 to disclose that she was planning to be sole signatory would be illogical because she was not permitted to be such in the SACCO she is supposed to supervise. With respect, the prosecution got it wrong. Matters to be disclosed must be innocent of crime. You cannot be protected if you disclose the intention to steal. That is not disclosure under section 9 of the ACA,2009.

The gentlemen assessors advised me to find A4 guilty. I respectfully disagree because the registration of the SACCO was part of her official duty and the fact of becoming sole signatory was an afterthought and not an interest that existed at the material time. Acts committed after the **proceedings** constitute separate crimes. They do not form an **interest** because they were not available for disclosure. I,

therefore, find that the prosecution did not prove the charge of conflict of interest beyond reasonable doubt. I find her not guilty of conflict of interest and acquit her.

The result of my judgment is that A1, A2 and A3 are acquitted of counts 1, 2 and 3. I also acquit A4 of count 6. However, I find A4 guilty of embezzlement and Abuse of office and convict her on counts 4 and 5.

Lawrence Gidudu

JUDGE

2nd March 2015.

REASONS AND SENTENCE

The prosecution asked me to impose the maximum sentence on each of the 2 counts as even when the convict is presumed to be a first offender for lack of previous records of conviction.

Learned counsel for the state citing guideline 43(b) and (g) of the Sentencing Guidelines reasoned that a harsh sentence is necessary because the convict committed the crimes for personal gain and that the actions were calculated to deliberately cause financial loss.

Counsel also asked Court to direct a refund of the stolen funds with a further request that those funds be recovered before the convict serves her sentence.

In response Ms. Nyakecho who held a brief for the convict prayed for leniency on behalf of the convict for the reasons that she was a first

offender, a young mother of 36 years with 2 children to look after aged 9 and 3 and a half years.

The convict was also a provider of her old mother who is unable to look after the young children in absence of their father. She asked Court to impose a fine or an order of compensation instead of an order of incarceration.

The convict herself asked for forgiveness on grounds that though the money got lost from her hands she did not benefit from it since it was lost to the robbers and perhaps the SACCO Manager.

She asked Court to consider the fact that she is a single mother without a husband and therefore the sole provider of her two very young children.

The maximum sentence provided in Count 4 is 14 years imprisonment or a fine not exceeding 366 currency points or both. The maximum sentence provided in respect of Count 5 is imprisonment not exceeding 7 years or a fine not exceeding 166 currency points.

While sentencing a convict, Courts are guided by the following guidelines:-

(i) The gravity of an offence and the degree of culpability of the offender determines the sentence. The more grave the offence, the more severe the sentence. The gravity of the offence is usually deduced from the punishment prescribed in the law and the degree of loss or injury occasioned by the crime.

(ii) The offenders' personal family and community background and responsibilities have a bearing on the nature of sentence to be imposed. The more responsible the convict the lesser the sentence of incarceration. The reason being that there are other innocent people who may suffer because of the long incarceration of the convict.

(iii) If the convict is a first offender, he or she will be given a sentence less that the maximum. The logic is that a person

who has offended for the first time need not suffer a full wrath of the law which is preserved for habitual criminals.

In view of the above principles the submission by the state that Court imposes the maximum sentence is not justifiable in sentencing jurisprudence. This is because the convict is a first offender and the amount of money stolen is not so colossal as to call for a very harsh punishment.

The gravity of the matter is that the law imposes 14 years imprisonment on the count of embezzlement. This means the offence is quite serious. The amount of money lost is 88,480,000/= (Eighty eight million four hundred and eighty eight thousand shillings). This money was to go to 6 sub counties in Nakapiripirit District for the benefit of 8 to 10 groups per sub-county.

Though the money is not huge by ordinary standards, as the prosecution rightly pointed out, support to groups in Karamoja however small goes a long way in alleviating the poor standards of living notoriously known to exist in Karamoja.

Taking into account that the convict has ever been on remand for 3 months in respect of this matter, is a mother of 36years old, has two very young children without paternal support, has a dependent mother and above all is a first offender, I am inclined to tamper justice with mercy.

It comes clear to my mind that the mitigating factors tilt the balance in favor of a lenient sentence than the severe sentence asked for by the prosecution.

I consider, therefore that a sentence of four years imprisonment on Count 4 and a sentence of 2 years imprisonment on Count 5 are commensurate with the nature and circumstance of this offence. The two sentences to run concurrently

This court was set up to punish corruption in order to bring the vice under control, we cannot impose sentences that would make the fight against corruption appear ridiculous.

Consequently, I am unable to buy the argument by the defence that I should just caution or impose a fine which would instead encourage

corruption in this country. Persons holding public office need to be aware that if they are convicted of corruption by this Court, they shall not walk away with light bruises.

The convict shall in addition to the terms of imprisonment refund 88,480,000/= (Eighty eight million four hundred and eighty eight thousand shillings) to Nakapiripirit District Local Government. She can only refund the money after she has finished her prison term because the same is recoverable by civil execution.

Further the provisions of section 46 of the Anti-Corruption Act shall apply to the convict. She is disqualified from holding a Public Office from 10years from today.

The convict has a right to appeal to the Court of Appeal in 14 days from the day hereof.

The bail deposit made by the convict be refunded. Bail for the co-accused who were acquitted also be refunded.

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LAWRENCE GIDUDU

JUDGE.

3/3/15