THE REPUBLIC OF UGANDA

HIGH COURT OF UGANDA, ANTI CORRUPTION DIVISION

HOLDEN AT KOLOLO

CRIMINAL SESSION CASE 2 OF 2017

UGANDA .....PROSECUTOR

VERSUS

1. JEFF LAWRENCE KIWANUKA
2. JAMAL KITANDWE
3. BERNARD KAMUGISHA } **ACCUSED**

BEFORE GIDUDU, J

JUDGMENT

Jeff Lawrence Kiwanuka, Jamal Kitandwe and Bernard Kamugisha hereinafter referred to as A1, A2 and A3 respectively are jointly charged with Embezzlement C/S 19(b)(iii) ACA, 2009.

The three are accused of stealing UGX 4,969,295,000= between 18th June 2014 and January 2015 money belonging to former employees of ISO. The three are said to have accessed the money while they served as directors of a company called UVETISO which had been incorporated for the purpose of receiving terminal payments for former ISO employees.

Once the accused deny the offences the burden of proof rests upon the prosecution throughout the trial. It does not shift to the accused. All the essential ingredients of the offence must be proved beyond reasonable doubt.

The prosecution case is that the three accused beingdirectors and officers of a company called UVETISO ASSOCIATION Ltd received 10 billion shillings on behalf of the members. These members comprise former employees of ISO who had been retrenched between 1992 and 1995. They had successfully sued government for their benefits in **civil suit 164 of 2004, Henry Waibale and Ors V AG** and obtained adecree for**UGX 72,434,466,660=**

Government negotiated for a reduction in the decretal sum with Lawyers and the accused representing the beneficiaries. The decretal sum was reduced to **UGX 39,189,499,715= by a consent order dated 17th March 2014 as per exhibit P.7.**This money was to be paid in installments starting with **UGX 10,000,000,000=** in FY 2013/14. See MOU dated 12th May 2014 in exhibit P8.

Upon receipt of the first installment, the prosecution submits that the three accused went on a spending spree. They paid 117 members only out of more than 1000. They also paid their lawyer**2,000,000,000=** and the rest of the money amounting to **UGX 4,969,295,000=** was not accounted. The prosecution submits that this money was stolen by the accused since they were the signatories to the bank account. This money was also withdrawn at various times in cash which facilitated its theft.

The accused chose to keep quiet as their defence. In their submission the defence conceded that the three were directors of UVETISO Company and received money by virtue of their office. The first two ingredients are proved on admission. **Exhibits P3, P4 and P5** are evidence that the three managed the company as its directors. The bank statements, waste cheques and instructions to pay comprised in **exhibits P10, P11 and P12** confirm receipt of the money.

The defence, however, denied charges of theft. It was submitted by the defence that the case had not been proved beyond reasonable doubt because once the money was paid to the company it became company property. The accused who are directors of UVETISOASSOCIATION Ltd could only be charged with embezzling company money but not that of employees of ISO.

Further, it was submitted that PW1, PW2 and PW3 are not members of the company. They could not, therefore, complain against the company directors.

It was the defence submission that payment was at the discretion of the accused. It was they to decide who gets paid first or last and on which installment. Further, that this being a debt owed by the Attorney General to the beneficiaries, the issue of accountability did not arise until the last installment was paid. It was argued that any complainant should have gone to the civil court and not to the police

Did the accused steal UGX 4,969,295,000= or not? Was this company property or not? Was the complaint premature or not? Are the accused accountable for this money or not?

The prosecution contends that this money was stolen by the trio because they have never explained where they put it after withdrawing it. Evidence from witnesses such as Katuramu (PW1) and Ngira (PW2) is that they have never been paid their share of the money. While others like Ssembegere (PW3) received 20 million but A2 demanded to be given 4 million leaving him with 16 million. He believed for the five years he worked he should have got 30 million.

Several lawyers such as PW7, Sam Mayanja, PW9, John Mugisha and PW11, Sam Bitangaro all claimed to have played different roles in pursuing payment but have never been paid despite having remuneration agreements with the accused persons. It was the view of the prosecution that only the accused know where this money went and if they cannot account then it means they stole it.

To prove embezzlement, the prosecution is required to prove the following elements beyond reasonable doubt.

(i) That the accused were directors/officers of a company.
(ii) That they accessed the money by virtue of office.
(iii) That the accused stole the money.

It is conceded by the defence that the accused were directors/officers of a company and received this money by virtue of office. These two ingredients have been proved beyond reasonable doubt. I had already dealt with these admissions when stating the defence submissions above.

The main issue is whether the accused stole the money stated in the indictment or not? To steal one must take with fraudulent intent to permanently deprive the owner of the thing to be stolen.

It is important to note that moving money from one account to another amounts to theft provided one does so with fraudulent intent. It is irrelevant even if one wants to repay the money afterwards.

The accused admit receiving this money but through a company and contend that it was at their discretion to pay and that until the last installment was paid, it was premature for the complainants to accuse them of theft.

Court awarded the money to the **1078** beneficiaries but when negotiations were held to reduce the amount, it was agreed to pay the money to a company. It was the company under the stewardship of the accused supposed to pay the beneficiaries. Payments were to follow the terms of **paragraph (a)**of the consent order in **exhibit P.7** and in compliance with **SI 305-1** which concerns the terms and conditions of service of Security Organizations. It is therefore, with respect not correct to state as the defence submitted that payments were to be at the discretion of the accused.Payments were to follow the spirit of the consent order wherein the beneficiaries had abandoned all claims relating to medical, transport and leave allowance. It is my view that by signing the consent order of 17th March 2014 which they filed in court, the beneficiaries opted to be paid according to Regulations **15(3) and 34(5) of S I 305-1.** These provisions have a payment formula based on their monthly salaries.

Before I decide if there was theft or not, I want to dispose of the issues of whether this was company money or not and if the accused were accountable for it in criminal law or not.

It was submitted for the state that UVETISO was formed in 2013 before the consent order of 2014. It was the view of the prosecution that by the accused fronting UVETISO as the recipient of funds in the meeting of 12th May 2014, they designed a scheme to steal the money since UVETISO was not a party to the suit. This accusation was not responded to by the defence.

By introducing a company to receive benefits of members when it was not a party to the suit an attempt was being made to hide under the veil of incorporation. This is because of the different legal personality of a company from that of its members.This specific money paid to UVETISO ASSOCIATION LTDwas held in trust for members. It was not company money. It was not company revenue or grant from a donor to the company. It was the only money this company got. It was specific to pay known beneficiaries. The veil of incorporation would be lifted to inquire into the acts of the directors of the company. It was simply a vehicle through which members would be paid their benefits. This money was not its property in the strict sense under company law. It was money held in trust. The company through its directors who are the accused were, therefore, accountable to members for all these funds.

Membership to this company comprised all founding members, all former employees of ISO retrenched between 1992 and 1995 plus all other former employees of ISO including their next of kin and administrators (See Articles of Association paragraph 4 comprised in **exhibit P.3**)

The import of these provisions in exhibit P.3 is that the company was formed as a vehicle to receive and pay out terminal benefits received from government pursuant to the Memorandum of Understanding. Membership was open to all former employees of ISO. There was no registration or share certificate issued by the company. One just needed to be a retrenched staff of ISO between 1992 and 1995. It is therefore, with respect not correct to submit that PW1, PW2 and PW3 were not members since there were no share certificates issued by the company.

It is my opinion that if benefits were fully paid; this UVETISO Company would be wound up because it would have no other business to exist. It is my finding that UVETISO did not own the 10 billion released from the treasury for payment of members. It was a conduit through whom members were to be paid. Failure to execute that mandate raised the call for its directors to account. This accountability could be by way of civil suit or by criminal proceedings. The existence of a civil remedy does not preclude criminal proceedings on the same facts if a criminal offence is disclosed.

This is a proper case where because of allegations of fraud the court is empowered to lift the veil of incorporation to ask the directors to account on the basis of the MOU they signed with the Permanent Secretary/ Secretary to the Treasury (PS/ST) as shown in **exhibit P.8.**

Section 20 of the Companies Act, 2012 is instructive:

20. Lifting the corporate veil.

The High Court may, where a company or its directors are involvedin acts including tax evasion, fraud or where, save for a singlemember company, the membership of a company falls below the statutory minimum, lift the corporate veil.

Although this money originated from a court process, it was actually paid due to an understanding in an MOU dated 21st May 2014. It was signed by the PS/ST who testified as PW4, Counsel for UVETISO ASSOCIATION LTD who testified as PW8 and A1 as Chairman. It follows that the Treasury had a contract with UVETISO ASSOCIATION LTD through its directors to pay these benefits and had every right to demand accountability. This was public money from the Treasury. If it is not disbursed to the right people, government would still be exposed to liability. The provisions of section 6 of the then Public Finance Accountability Act 2003 applied to this case.

The Common Law also provides for holding directors of a company liable by lifting or piecing the veil of incorporation in appropriate cases. **Lord Denning in the case of HL Bolton (Engineering) Co Ltd. V TJ Graham & Sons Ltd(1956) 3 All ER at P.630** explained the relationship between the company and directors in the following passage.

"A company may in many ways be likened to a human body. They have a brain and a nerve center which controls what they do. They also have hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of

these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company.....So also in the criminal law, in cases where the law requires a guilty mind as a condition of a criminal offence, the guilty mind of the directors or managers will render the company themselves guilty"

The law in Uganda and the Common Law empower court to require directors of a company to account where allegations of fraud are raised such as in this case. Once fraud is alleged, a court of law will inquire into that allegation. Once evidence is adduced to support charges of fraud the veil of incorporation will not shield the directors from inquiry. It is, therefore, my conclusion that the accused are legitimately answerable to the charge in criminal law. The view taken by the defence that the accused are immune to this inquiry is with respect not tenable. This was money paid to a stranger called UVETISO ASSOCIATION LTD. Its directors were the accused. They are liable to account to the Treasury for money received under a memorandum of understanding they signed. The accused had waived their rights under the debt the Attorney General owed them by signing an MOU on 21st May 2014. They received money under that understanding.

Was money to the tune of **UGX 4,969,295,000= stolen or not? If stolen who stole it?** It is not in dispute that this money was received and disbursed by the accused persons who were the Directors of the company.

The defence however challenged the allegations of theft on grounds that the 10 billion that was received was just the first installment. It was their view that until the last tranche of money amounting to **29 billion** was paid the accused could not be said to have stolen the money.

Of course during the trial the accused opted to keep quiet. That is their constitutional right and cannot be faulted for doing so. However the prosecution evidence is that except for 5.1 billion which is traced to the **117** beneficiaries, and counselMatovu John, the rest of the money cannot be traced to anyone except to the accused persons who withdrew it in cash. They took this cash out of the bank. No one except the three signatories in the dock know where this money is.

I have at great length explained that the mind of the company is the mind of the accused persons. I have not found any explanation against the allegations that the accused persons took this money to themselves.

I am fully aware that the accused persons are also beneficiaries. I am also aware that under the terms of the memorandum of understanding there was no schedule of payments indicating who would be paid how much and when.

In other words the accused persons negotiated an open cheque with the treasury to receive billions of cash and spend it without a schedule of payment.

Although the MOU requires that the money follows the terms of service in **S.I305-1**, there is no evidence on record to show that any attempt was made to follow the law.

It is also not clear how the **117** members were identified or how their pay was determined. All these are questions that the accused persons are the only ones who can answer.

With respect, it would be dangerous to say that more public resources should be given to this company directed by the three accused persons before finding fault with them. That argument would be dangerous to the management of public finances. Common sense dictates that risks such as these be nipped in the bud in the bird before more loss occurs.

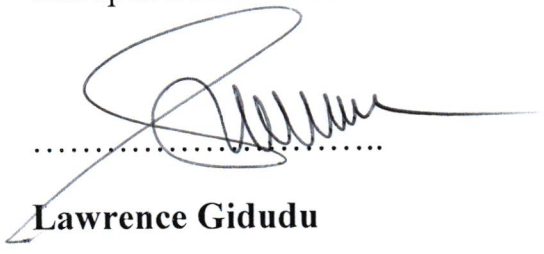
Even if the accused persons were beneficiaries, they are not amongst the **117** and the lawyer who was paid. There are complainants such as PW1, and PW2 who have never been paid. It is also true that hundreds of others have not been paid. It cannot be said that the **4.9 billion** is money due to the three accused persons alone. In absence of any explanation from the defence as to where this money is, I am left with no option but to conclude that the accused persons stole it.

This money was fraudulently taken and converted to the use of the accused persons thereby permanently depriving the beneficiaries of their benefits. This court would not accept the defence submission that more money from the Treasury should be poured into this company before it has accounted for the first tranche of 10 billion. To put more money would be ignoring the risk that has occurred to the first installment.

The submission that those complaining should file a civil suit against the accused persons, or against the company, is with respect not tenable because the execution process in this case took a different turn when the accused abandoned their original judgment and negotiated a new arrangement. They introduced a company that was a stranger to the original civil suit to receive money to distribute to beneficiaries. By so doing the accused persons were trying to hide under the veil of incorporation in order to have a free hand on public resources.

I have already pierced the veil of incorporation. The prosecution has adduced uncontroverted evidence that the accused set up a company. They introduced this company to government to receive money on their behalf. They were the sole signatories. They withdrew it in cash. Nobody except they know where it is. It is my conclusion that it was stolen. The accused are liable to account and there being no explanation at all against the evidence adduced by the prosecution, I find each of the accused persons guilty of embezzlement of **4,969,295,000/=.**

I am in agreement with the lady and gentleman assessors that the prosecution has proved the charges against each of the accused persons beyond reasonable doubt. I find each of the three accused guilty. I therefore convict each of the accused persons of the offence of embezzlement contrary to section 19(b)(iii) of the Anti-corruption Act 2009.



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Lawrence Gidudu

Judge

10/ December/ 2018

Three accused in court

Mr. C. Katumba for the accused

Mr. J. Namatovu for the state

Rita clerk

Judgment received in open Court.

18/12/18

3 Accused in Court.

C. Katumba for Accused present

Pros. Stephanie Namatovu

Rita clerk

Namatovu

- No previous record
- They appeared in court 14/12/15. They were granted bail.
- Convicts 3 spent 22 days on remand.
- A1 - 59 yrs of Age
- A2 - 50 yrs " "
- A3 59 yrs " "

Judgment received in open Court.

REASONS AND SENTENCE

The convicts are first offenders aged 59, 50, and 61 respectively. The money at stake is 4.9 billion shillings which belongs to former ISO employees that were retrenched between 1992 and 1995.

The state has asked me to impose a severe sentence on the convicts and order them to compensate the victims of that money.

The reason for asking for a severe sentence is that the convicts planned and executed the scheme to steal this money hiding under a company called UVETISO.

It was submitted that the money involved is so colossal that it should attract a severe punishment. It was the view of the state that there are no mitigating factors in favor of the convicts and that the court should impose a punishment of 10 years imprisonment each.

On the other hand, Mr. Crysestom Katumba who appeared for the convicts asked for leniency contending that the convicts are first offenders with family responsibilities that include aged dependants and young children who are still in school.

He also submitted that the convicts are of advanced age and should not be given a long prison term.

It was his view that the allegation that UVETISO was formed for purposes of stealing money is not correct because UVETISO was formed in 2013 and the Memorandum of understanding was signed in 2014 before money was released. He asked court to impose a minimum sentence of 2 years imprisonment.

I gave each convict opportunity to speak from their heart and give reasons why I should not impose a severe sentence asked by the prosecution. All convicts echoed the testimony of their lawyer John Matovu and stated that they had to "oil the system" in order to have more funds released. They seem to state that they are carrying a cross for being leaders of the former employees of ISO.

I have considered paragraphs 41, 42, 43, and 44 of the Sentencing Guidelines and also considered part 6 of the third schedule of the same guidelines. As the prosecution indicated in their submissions, it is difficult to find mitigating factors except those relating to the family responsibilities such as being primary care givers under paragraph 49 of the Sentencing Guidelines.

The accused indicated that they did not eat all this money because they had to "oil the system" in order to process more funds. This is not verifiable at this stage because the convicts kept quiet in their defence. It would be speculative except for the testimony of Mr. John Matovu who testified as PW8 to tell how much of the 4.9 billion went to who and why. For now the convicts as leaders have to carry the cross and take the punishment for the actions they did which amounted to the offence of embezzlement.

Persons aged between 50 and 61 would ordinarily have family responsibilities and it is reasonable to say that they are the sole bread winners of those families. I take this into account in the convicts favor. I have, however, to balance these mitigating factors with the fact that hundreds of beneficiaries have gone unpaid because of the actions of the convicts. It's not clear to me how those that asked for kickbacks would want to take almost half of the first installment, thus depriving hundreds of retrenched staff of monies legitimately due to them. Remember this money was reduced from 72 billion to 39 billion and yet was never paid to the beneficiaries except for the 117 plus the convicts and other criminals along the corruption chain who received kickbacks. This system of payment by Government to companies who were not parties to the court case is subject to abuse and should be condemned. Government should have worked out a schedule to pay each beneficiary on the account by EFT instead of tempting the convicts with the idea of carrying money in bags and running around town like money launderers.

I have to take into account that the families of these beneficiaries have suffered and continue to suffer because of the reckless actions of the convicts. The convicts were the leaders of the group, they were the signatories to the account, and exercised their discretion poorly in deciding how to pay this money.

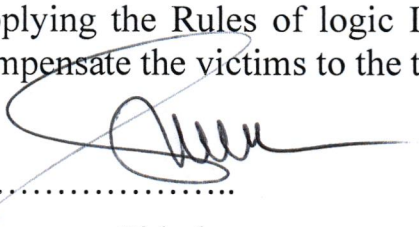
Doing the best I can in the circumstances, and taking into account the submissions of both the prosecution and the defence, and considering that the starting point under the Guidelines is 7 years, I have not found serious reasons to bring down the sentence from the starting point under the Guidelines.

Since the maximum sentence provided under the law is 14 years, for the reason I have considered, I sentence each of the convicts to 7 years imprisonment. Corruption is a serious crime and a convict who has stolen 4.9 billion shillings would not be given a fine, unless there are extreme circumstances that militate against a custodial sentence.

I was also asked to consider the provisions of Article 126 of the Constitution and Section 126 of the TIA and Order compensation to the victims. I am not sure if the convicts have 4.9 billion or its worth in cash or assets. From the testimony of PW8 it would appear that those in charge of paying these money received kickbacks

along the way. I do not know who these people are and how much each one took, but I am persuaded that the convicts did not take all the 4.9 billion to their homes.

Applying the Rules of logic I order that the three convicts jointly and severally compensate the victims to the tune of 2.5 billion.



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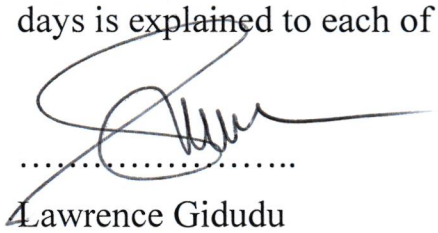
Lawrence Gidudu

Judge

13th /December / 2018

Right of appeal against conviction and sentence to the Court of Appeal within 14 days is explained to each of the accused persons.



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Lawrence Gidudu

Judge

13th /December / 2018