

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**CRIMINAL APPEAL 08 OF 2021**  
**ARISING FROM CASE NO. HCT-00-AC-C0-00112/2015**  
**Stephen Owachgiu :: Appellant**  
**Versus**  
**Uganda:::Respondent**

**Judgment**

**Before Hon. Lady Justice Margaret Tibulya**

This is a judgment on an appeal from the judgment and orders of a Magistrate Grade One Court sitting at Kololo. The appellant was convicted of Embezzlement of **22,496,991/=**, and was sentenced to **18 month's** imprisonment, with an order that he refunds the **22,496,991/=**. He was also disqualified from holding a public office for a period of ten years from the date of his conviction.

**Six grounds of appeal were laid as follows:**


1. The Trial Magistrate erred in law and fact in admitting evidence of a second investigating officer sanctioned long after disclosure of documents had been ordered and made to the Accused thus causing a miscarriage of justice to the Appellant.
2. The Trial Magistrate erred in law and fact in admitting the evidence and opinion of the Handwriting expert long after disclosure of documents had been ordered and closed hence causing a miscarriage of justice.
3. The Trial Magistrate erred in law and fact in relying on the plain statement of the Accused /Appellant thus causing a miscarriage of justice.

4. The Trial Magistrate erred in law and fact in holding that the prosecution proved all the ingredients of the offence of embezzlement thus causing a miscarriage of justice.

5. The Trial Magistrate erred in law and fact by failing to subject the evidence adduced to adequate assessment, evaluation and scrutiny occasioning a miscarriage of justice by convicting the Appellant of the offence of embezzlement.

6. The Trial Magistrate erred in law and fact in sentencing the Appellant to jail term of eighteen (18) months in prison, ordering the Appellant to refund the sum of **shs.22, 496, 991 (Twenty-two million, four hundred ninety-six thousand and nine hundred ninety-one shillings only)** in six (6) months after service of custodial sentence and ordering the Appellant not to hold public office for ten (10) years from the date of his sentence thus causing a miscarriage of justice.

It is now settled that the role of a first appellate court is to re-appraise the evidence and subject it to an exhaustive scrutiny before drawing its own conclusions bearing in mind that it did not see the witnesses testify, (**Kifamute Henry Vs Uganda (Criminal case No 10/1997)**).



The prosecution bears the burden of proof, and must prove all ingredients of each offence beyond reasonable doubt.

**Grounds 1 and 2** which relate to the lower court's having allowed the state to adduce the evidence of **Pw8 (A/IP Kyenda)** and **Pw9 (Erisa Ssebuwufu)** after what counsel refers to as the **post disclosure stage**, were jointly argued.

In **Soon Yeon Kong Kim & Anor v Attorney General (Constitutional Reference 6 of 2007)**, the *locus classicus* on this issue, the Constitutional court was "**unable to**



give any hard and fast rule as to the time of disclosure because the circumstances of each case differ". The court however guided that "essentially, disclosure should be made before the trial commences depending on the justice of each case and on which documents to be disclosed. This is within the discretion of the trial court." (emphasis added)

At the hearing, counsel objected to the reception of **Pw8 (A/IP Kyenda)** and **Pw9 (Erisa Ssebuwufu)**'s evidence. In over-ruling counsel, the court received the impugned evidence on the ground that the case had been handled by several prosecutors. The current prosecutor who was allocated the file after two witnesses had testified recommended further investigations which resulted in the need to call the two witnesses. The state pointed to the fact that the documents which they sought to adduce (**and were adduced**) through the two witnesses were disclosed on 19th February 2020.

Premising his argument of **Article 44(c) of the Constitution which provides for the right to fair hearing and Article 28(3)(c) which provides that an accused person be given adequate time and facilities** for the preparation of his defence, counsel for the appellant maintains that for the court to have received evidence which the state disclosed two years after the last state witness had testified amounted to enabling the state to patch up weakness in their case which had been exposed through cross-examination of state witnesses.

This court is called to determine whether the learned magistrate exercised his discretion judiciously when he received **Pw8 and 9's** evidence under the circumstances laid out above.

The sole reason advanced by the prosecutor for ordering for more inquiries was that he was allocated the case after many other prosecutors had handled it. The mere fact that

a prosecutor is allocated a case under those circumstances is not reason for the ordering of further inquiries. The more plausible reason for the decision must have been that the prosecutor perceived that more evidence was required to prove the case. This coming after the hearing of all the state witnesses who been disclosed to the defence leaves no other explanation than that the state wanted to bolster its case. It therefore lends credence to the appellant's assertion that the further inquiries and the resultant evidence of **Pw's 8 and 9** amounted to enabling the state to patch up weakness in their case which had been exposed through cross-examination of state witnesses. This would be a direct affront on the principle of equality of arms which the requirement for disclosure sought to preserve.

I find that the trial court did not exercise its discretion judiciously when it received Pw8 and 9's evidence. **Grounds 1 and 2 of the appeal therefore succeed.**

### **Ground 3**

**The Trial Magistrate erred in law and fact in relying on the plain statement of the Accused /Appellant thus causing a miscarriage of justice.**

The learned magistrate cited excerpts of the appellant's police statement to support his decision. (*see par 1, page 8 of lower court judgment*)

The lower court record is however clear that **Pw8 (D/AIP Kyenda)**'s sole interest in the impugned statement, the reason it was exhibited, was the accused's signature therein, which Pw8 sought to use as a non-request sample for purposes of establishing the authorship of some other documents.




That the Learned Magistrate based his reasoning on the other contents of the statement was clearly erroneous. The admissibility of the statement as a document which represented what the appellant told the police was never tested.

**I agree with the appellant that the Trial Magistrate erred in law and fact in relying on the impugned statement. The third ground of appeal succeeds.**

#### **Grounds 4**

**The Trial Magistrate erred in law and fact in holding that the prosecution proved all the ingredients of the offence of embezzlement thus causing a miscarriage of justice.**

Based on the particulars of the offence and on the matrix of evidence on record, the court determines that the following issues were to be resolved;

- 1. whether the Accused was an employee of a company,**
  - 2. whether he stole Shs 22,496,991=,**
  - 3. whether the money came into his possession by virtue of his employment as Assistant Manager of his employer Company.**
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As counsel for the appellant rightly observes, the fact that **M/s Rock Global Oils (U) Limited** exists, and that the appellant was an employee of **M/s Rock Global Oils (U) Limited** is not disputed and therefore proved.

***Whether the accused stole the Shs 22,496,991/= as alleged.***

It was argued for the appellant that the prosecution witnesses contradicted themselves over the actual amount stolen as follows;

- **Pw2** (Walter Anyolitho) stated that he used the Appellant's report book against the pump attendant's books and the cash he failed to account for, to

arrive at **Shs 20,678,215/=** (see last 5 lines on page 25 of the record of proceedings) as the stolen amount.

- **Pw1** (internal auditor) on the other hand states that cash (**not fuel**) totaling to **Shs 21,118,048/=** was unaccounted for. In his report however, he does not indicate which days and amounts the accused stole per day.
- **Pw7** (external auditor) came up with a figure of **Shs 22,496,991/=** as the stolen amount. **Table 1 (at page 6)** of his report (**Exhibit P 5**) shows that only **Shs 1,352,141=** out of **Shs 22,496,991/=** was stolen, and that the rest was the value of unaccounted for fuel.

Counsel maintained that these contradictions are grave being that they relate to the core issue of alleged theft of the money and cannot be explained away.

The respondent however maintains that the narrative about contradictions is a misapprehension of facts. According to them, the Auditor's evidence was that the pump attendant's report books indicated that more fuel than what the appellant reported had been sold, and yet the Appellant's book was generated from the pump attendants' report book after sale of fuel. According to the respondent other evidence was that the appellant would receive cash from the pump attendants but proceed to capture lower quantities of fuel than what will have been sold. He would then deposit less proceeds in the Bank and steal the rest. It is the cumulative shortage in the banking of the proceeds in that period, that constituted the subject matter of this prosecution.

The respondent also seeks to rely on **Pw's 1 and 2's** evidence that the accused's record book revealed that he had a list of fictitious customers registered as debtors.



The amount in fictitious debts totaled to **1,378,850/-**. The fictitious debt was for purposes of avoiding detection by management.

The court notes that the respondent did not address the issue of contradiction in the amount of money allegedly stolen by the appellant, choosing to confine their response to the evidence that money attributable to the appellant went missing.

The court agrees with the respondent that there is no contradiction in evidence that there were financial losses attributable to the accused. The following evidence supports this position;

- **Pw1 (Stephen Abamako)**'s uncontroverted evidence (**page 16 of the proceedings**) that while the appellant and the pump attendant were supposed to have one metre, the appellant always had a different meter from that of the pump attendant,
- **Pw1 (Stephen Abamako)**'s evidence (**page 17 of the proceedings**) that the difference between the appellant's meter and that of the pump attendant was always treated as stock,
- On **2<sup>nd</sup> April 2015**, based on the appellant's report that he had **8048 litres** of fuel, a client who sought to buy **5000 litres** of fuel was sent to get that amount of fuel from the appellant's station. The client however only found **2600 litres** of fuel and the accused could not explain where the rest of the fuel he had reported that he had went,
- **Pw2's** uncontroverted evidence was that when the appellant took over office on **31<sup>st</sup> December 2013**, the company procedure which involved ascertaining the stock being handed over to the incoming member of staff was followed, and that there was no short fall that time. (**page 26 of the proceedings**) While the discrepancy was discovered on **2<sup>nd</sup> April 2015**, the appellant had taken

over the management of that station from **Pw2 (Walter Onyolitho)** on **31<sup>st</sup> December 2013**. This rules out the possibility that the appellant inherited the discrepancy from Pw2,

- **Pw5 (AIP Julius Masendi)**'s evidence that when the appellant was allowed time to confirm the loss, he confirmed a loss of 19 million shillings (**page 47 of the proceedings**),
- **Pw6 (Ismail Adole)**'s evidence that the appellant used to instruct them (Pump attendants) to report that there was more fuel in the tank, and he would make sure that they balanced to nil. (**page 63 of the proceedings**)

The above evidence rules out the possibility that **Pw2** framed the appellant to cover up his own failures when he was the Manager.

While the state proved that money was stolen by the appellant, the available evidence cannot ground a finding that **Shs 22,496,991/=** or any particular amount of money for that matter was embezzled, since the charge sheet relates to a specific amount of money. Since the prosecution did not explain the contradictions in witness (**Pw1, 2 and 7**) evidence, the contradictions in the exact amount of money stolen is prejudicial to the state case. It was unsafe that the trial court convicted the appellant on the charges as laid.

**Ground 4** of the appeal succeeds, and with it the whole appeal, since any exploration of the complaints in counts 5 and 6 will not serve any useful purpose. The judgment and orders of the lower court are hereby set aside and replaced by an order of acquittal.

**Hon. Lady Justice Margaret Tibulya**

**Judge**

**2<sup>nd</sup> December 2022.**