

Embezzlement (S-2574)

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA.

HOLDEN AT MBALE.

CRIMINAL APPEAL NO. 7 OF 1992
(Soroti Original Criminal Case No. 376/92)

FRANCIS RUSANYANTEKO
c/o M/S Natsomi & Wandera APPELLANT
Advocates, Mbale

VERSUS

UGANDA RESPONDENT

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

J U D G M E N T

In the Chief Magistrate's Court at Soroti, the appellant/accused was charged with embezzlement contrary to section 257 (a) of the Penal Code Act as amended by Statute No. 5 of 1987. He was convicted on 25.11.92 and sentenced to 3 years' imprisonment, and in addition, an order for the compensation of one million shillings was made.

It was alleged that the accused (hereinafter referred to as the appellant) during the month of March, 1992 at Soroti Flying School in the Soroti District, embezzled Uganda shs 1m/- (one million shillings) the property of East African Civil Aviation Academy which came into his possession by virtue of his employment. In proof thereof, the prosecution called 5 witnesses.

PW1 testified that their Company had sponsored 4 students for training at the Soroti Flying School for a total fee of 26m/-. On 10.3.92 he paid cash of 1m/- to PW2, a student at the School sent by the appellant. It was part payment of the school fees of 26m/- and the said payment was done in his house. The one million shillings were all in 1000/- bank notes. Neither PW2 nor the appellant issued any receipt by way of acknowledgment. However, the balance of 25m/- was paid by cheques to the School, but later PW2 communicated to PW1 that he had passed the 1m/- to the appellant.

In his testimony, PW2 confirmed collecting the 1m/- from PW1 at Bimbo in Kampala on 10.3.92. He was sent by the appellant and the money was part payment of the students' fees. The 1m/- was in 1000/- bank notes which on his arrival at Soroti Airport within the School, he handed the money to the appellant in the presence of PW3 and PW4.

At the material time, the appellant was in his car together with PW4, but PW3 had just returned with the witness from Entebbe to Soroti. The witness later wrote to inform PW1 that he had passed the money to the appellant.

PW3 who travelled with PW2 from Entebbe to Soroti informed court that while still in the air, PW2 told him that PW1 had given him 1m/- to take to the appellant which money was for the sponsored students' fees. The witness saw the 1m/- in transparent papers in 1000/- bank notes. He witnessed PW2 giving the appellant the money at the School airport just on arrival on 12.3.92. PW4 was also present at the material time and the emphasis was that the 1m/- was for School fees. Similarly, PW4 confirmed that in the evening of 12.3.92 he was at the airport together with the appellant in the latter's vehicle when he saw PW2 produce a bundle of 1000/- bank notes and handed to the appellant. PW3 was also present and the emphasis on the money by PW2 was that it was part of School fees for the sponsored students. The appellant then drove the car to his office where he dumped the money leaving PW4 in the car and thereafter they drove away.

PW5, the investigating officer, testified that when their Headquarters received complaint from the School that the appellant had embezzled School money, he carried out investigations which led to the arrest of the appellant and later charged him accordingly.

In his defence, the appellant gave his particulars as Ex-Director of Soroti Flying School/East African Civil Aviation Academy. He admitted receiving the 1m/- from PW2 at the same venue on 12.3.92. He however denied that the 1m/- was part payment of the said School fees. It was part of a private loan given to him by PW1 in cash otherwise School fees amounting to exactly 25m/- were paid by cheques to the school with covering letters. However, when the 1m/- was given to him there was no covering letter to say it was part of school fees. He denied that PW4 was with him in his car at the material time.

Be that as it may, the appeal is against the conviction and sentence. After abandoning the first ground of appeal, the following are the grounds:-

- (a) THAT, the learned trial Chief Magistrate erred in fact and law in failing to weigh the evidence judicially and caused a failure of justice.

(b) THAT, the learned trial Chief Magistrate erred in fact and in law in holding that the offence of embezzlement was established and so caused a miscarriage of justice.

(c) THAT, the learned trial Magistrate erred in law and in fact in ordering the appellant to refund one million shillings. 5

In ground (a) above, the learned Counsel for appellant submitted that the trial Chief Magistrate did not scrutinize the prosecution case before rejecting appellant's case. There was whole acceptance of the prosecution case without having regard to the burden of proof. Had he evaluated properly the evidence from both sides he 10 would have found that the prosecution had not proved its case beyond reasonable doubt.

In an attempt to justify his submission, the learned Counsel strenuously pointed out some inconsistencies and contradictions in the prosecution case. PW1 stated that he gave PW1 the 1m/- at his 15 house in Kampala but PW2 informed court that he received the money at Bimbo in Kampala. This the Counsel considers to be grave inconsistency pointing out that both witnesses were not truthful.

In reply, the learned Counsel for the State submitted that the above inconsistency is very minor not pointing to deliberate 20 untruthfulness of the prosecution witnesses.

In resolving the issue, it is the view of the court that lapse of time also could contribute to the said inconsistency. However, whether the said 1m/- was collected by PW2 at the house of PW1 or 25 at Bimbo is immaterial to the case. What the court considers material here is whether the appellant received the 1m/- from PW2 which according to the defence evidence is admitted.

It is also submitted that payment of 1m/- was not to the school but to the appellant as a loan advanced to him by PW1 30 otherwise it should have also been paid by cheque as the rest was done. In this regard the learned Counsel for the State, rightly submitted in my view, that in fact there is no law preventing any payment to any Government institution in cash except by cheque. Similarly, the fact that PW1 paid money to PW2 in cash does not 35 mean that the money was not for the Company. The question of payment which ought to be at the registered office of the Company does not arise either.

It is also submitted for the appellant that for the money paid by cheques at least there were covering letters, but for the 1m/- there was no any covering letter. The only inference which can be drawn is that the 1m/- was a loan. In lashing out this argument, the Counsel for the respondent relied on the evidence of PW1 in cross-examination. PW1 emphatically stated that the 1m/- was for school fees. The court also finds the assertion in the evidence of PW2, PW3 and PW4. In that respect the 1m/- was not a loan but part payment of the school fees. However, the document purportedly written by the Deputy Director of Flying School to PW1, dated 13.3.92 that 1m/- was in the pipeline should have not been accepted by the court without the author being called to court. This I consider a minor irregularity.

It is further submitted that the trial magistrate also relied on strenuous matters which are not part of evidence on record, for instance, in his judgment it is stated that "on Police investigation it was found that the appellant had received 1m/- from PW1 as fees but his Chief Accountant one Odyek when interviewed revealed that the money was reflected in the Accounts Book." Nowhere on record was it stated that the said Odyek ever gave evidence in court. The trial magistrate did not discard this evidence in his judgment so it operated in his mind which resulted into the conviction of the appellant.

The Counsel for the State conceded that evidence of PW5 in regard to Chief Accountant, the said Odyek, is hearsay and should not have been relied on in the judgment as it would amount to strenuous matter. The said Odyek should have been called to testify. However, it is submitted that the said strenuous evidence alone does not affect the outcome of the whole case. In any case the appellant does not dispute receiving the 1m/-.

Having considered the submissions of both Counsel on the above issue, by relying on the evidence of PW5 in regard to the Chief Accountant Odyek, the trial Chief Magistrate in his judgment had his mind affected by strenuous matters as the said Odyek was not called to testify. However, that strenuous evidence alone does not affect the outcome of the whole case as I have earlier on ruled that the 1m/- was not a loan but part of the school fees.

In the second ground of this appeal, it is submitted that the offence of embezzlement was not established. In David Turyahirayo Vs. Uganda (1990 - 91) 11 K.L.R 46, the elements of embezzlement are:- being an employee of the complainant, receiving property by reason of the employment, and intention to permanently deprive the employer of the said property.

It is submitted that there is no evidence whatsoever from the employer which was necessary to establish what property was expected from the company Speedbird Aviation Services. The appellant had testified that the 1m/- was a loan and not property of the employer. It was imperative for the prosecution to call evidence from the employer to rebut the appellant's evidence in that regard. In his judgment, the trial Magistrate had assumed that since 25m/- had been paid by cheques, and therefore the 1m/- was the difference to make the total sum of 26m/-. However, the latter purportedly written by the Deputy Director of the Flying School, dated 13.3.92 was not proved as the author was not called to testify and yet the trial Chief Magistrate relied on it. The conviction therefore was not justified in the circumstances. He relied on his opinion why the covering letter was not given to PW2 for the 1m/-.

On the other hand, it is the submission of the State Counsel that the offence of embezzlement was made out. It is not in dispute that the appellant is an employee of Soroti Flying Academy. He is paid salary by the Government of Uganda as the Director of the school. He received the 1m/- on 13.3.92 in the course of his employment as the Director and as school fees. He did not hand over that money to the school but converted it to his use and thereby permanently depriving the school of the money. Evidence of PW5 reflects how the witness investigated the matter to that effect.

Having evaluated the evidence on record, it is not in dispute that the appellant was at the material time an employee of the Soroti Flying Academy. He was paid salary by the Government of Uganda as the Director of the School. Defence evidence admits this fact. It is the contention of the prosecution that on 13.3.92 the appellant received the 1m/- as school fees in the course of his employment as the Director. But the defence evidence is that the 1m/- was a private loan given to the appellant by PW1. For reasons which I have earlier on stated on this issue in this judgment, the 1m/- was not a private loan as alleged by the appellant. It was part of school fees as emphasised by PW1 himself supported by PW2, PW3 and PW4. In addition, evidence of PW5, the investigating officer also confirms the same story. He indeed received the 1m/- on 12.3.92 as school fees in the course of his employment as the Director.

The only remaining element of the offence of embezzlement is whether the appellant did not hand over that money to the school but converted it to his use thereby permanently depriving the school of the money.

Defence evidence regarding this issue is that the 1m/- was received by the appellant as a private loan therefore he did not hand that money to the school. It is already ruled that the 1m/- was not a private loan to the appellant, it was school money. By not handing it to the school, the appellant converted the money to his own use and thereby permanently depriving the school of it.

In the premises, there was no need for an independent evidence of an auditor or the Chief Accountant or any person designated to that effect that the 1m/- was missing from the school account. PW4 pointed a finger in that regard and the defence did not deny. It is trite law, however, that the prosecution must prove each ingredient of the alleged offence beyond reasonable doubt. According to evidence on record, the prosecution has proved all the ingredients of embezzlement in the present case beyond reasonable doubt.

In the last ground of this appeal, it is the contention of the learned Counsel for the appellant that the "order" of the trial Magistrate that the appellant "refund" the 1m/- is erroneous in law. Under section 259 of the Penal Code Act, where a person is convicted under the provisions of section 257 and 258, the court "shall" in addition to the punishment provided therein, order such person to pay by way of "compensation" to the aggrieved party, such sum as in the opinion of the court is just, having regard to the loss suffered by the aggrieved party. In that context, it is the argument of the appellant's side that Soroti Flying Academy has not complained for the loss of the said 1m/-. So who is the aggrieved party in the instant case?

The learned Counsel for the State submitted that the order to "refund" 1m/- was a problem of English. "Compensation" if used would have come to the something, that is, "refund" of not less than 1m/-.

On the issue of who is the aggrieved party in the present case, it is the submission of the State Counsel that evidence of PW5 states clearly that a report was made to the Police Headquarters about the embezzlement of the 1m/-. The matter was investigated and found that the school had not received the 1m/- which it ought to have received. It is the school which the appellant should have compensated.

Court:

When certain words are used in any provision of the relevant law in force, courts ought to interpret them in the context of the law. Under section 259 of the Penal Code Act, the word

"compensation" is used and not "refund." The trial Magistrate ought to have used the word "compensation" in his order for compensation to the aggrieved party. As to who is the aggrieved party in the present case, evidence on record points a finger at the Soroti Flying Academy. Report of complaint for embezzlement of the 1m/- originated from the Soroti Flying Academy according to evidence of the investigating officer, PW5. The order to pay compensation of 1m/- was to the school as the aggrieved party.

In conclusion, for reasons stated elsewhere in this judgment, the conviction and sentence ought to stand. Accordingly, the appeal is dismissed, conviction and sentence of the trial court upheld.

S.G. ENGWAU

JUDGE

16.7.93.

24.8.93: Appellant absent in court.

Mr. Wandera for appellant on private brief present.

Khiisa S.R.S.A. for the respondent also present.

Mr. Wandera: Appellant is in Soroti prison and unable to meet expenses for his presence here at Mbale court. Pray that judgment be delivered in his absence under section 331 C of the Criminal Procedure Act.

Khiisa: Respondent in the circumstances has no objection to the application unless in the opinion of the Judge the presence of the appellant is required in which case funds be made available for the transfer of the appellant to Mbale.

Court: Funds to transfer the appellant to Mbale court are not available to the court at this time. Since the Counsel for appellant is desirous of having the judgment delivered, the court has advised him to inform the appellant of the result and subsequent right of appeal.

In the premises, judgment is delivered in open court.

S.G. ENGWAU

JUDGE

JUDGE

24.8.93.

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE.

CRIMINAL CONFIRMATION NO. 8..OF 1993

UGANDA PROSECUTOR
VERSUS:
STEPHEN NGANIA ACCUSED

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU

CONFIRMATION OF SENTENCE

In Kapchorwa Court of Magistrate Grade One, the accused was charged with Assault Occasioning actual bodily harm c/s 228 of the Penal Code Act.

After full hearing of the case, on the 25.8.92, the accused was convicted and sentenced to 26 months' imprisonment.

I have carefully perused the court proceedings and declined to reverse the sentence imposed in the circumstances of the case.


S.G. ENGWAU

JUDGE

20.8.93.

SGE/eg