

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
CRIMINAL APPEAL NO. 003 OF 2011

(From Kubale Chief Magistrate's Court CR. Case No. 146 of 2007)

1. BALIKOWA NIXON :::::::::::::::::::::::::::::::::::APPELLANTS
2. KASIIME SEDDY

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE : HON MR. JUSTICE J.W. KWESIGA JUDGMENT

The two Appellants were Charged, prosecuted and convicted of the offence of Embezzlement contrary to Section 268 of the Penal Code. It was alleged that they embezzled Sh. 450,390,000/= money belonging to **COWE LIMITED**. This is company limited by guarantee and having no share capital incorporated on 3rd January, 2002. This company's full name is **M/S COWE (CARING FOR ORPHANS WIDOWS AND ELDERLY LIMITED)**.

This organizations memoranda and Articles of Association has objectives contained in Articles 2 (a) to (i) which portray it as charitable

NGO while at the same time engages in Micro- Finance schemes as any other financial organization.

This organization received money from the Public in small sums and maintained a bank account at **CENTINARY BANK, KABALE BRANCH, NO. 70104000131**. (See Bank Statement Admitted at the trial as PE. 28) running from 5th December, 2006 to 5th March, 2007. This exhibit shows The **TOTAL WITHDRAWALS** from this Account **Shs. 451,282,900/=** while **the reflected embezzled sums according to the charge sheet is Shs. 450,390,000/=**. The signatories to this Account were **M/S ANDREW KAGGWA KULAMBA, BALIKOWA NOXON (A1), SAANO EFRANCE** and **KASIIME SEDDY (A2)** was an appointed agent for purposes of withdrawals on behalf of the company under authority of the above named mandatory signatories. This is evidenced by the company resolution dated 21st February, 2006 and admitted at the trial as Defence exhibit DE 1.

The learned trial Magistrate convicted Balikowa Nixon and Kasiime Seddy of **embezzlement C/S 268 (b) and (g) of the Penal Code** and sentenced each to **four (4) years imprisonment** and each was ordered to refund **Shs. 225,195,000/=**. The convicts appealed against both the conviction and sentence in the following grounds:-

1. The learned Chief Magistrate erred in Law and in fact when he did not properly evaluate the evidence on record before convicting the appellants which occasioned a miscarriage of justice.
2. The learned Chief Magistrate erred in Law and fact when he held that 450,370,000/= came into the possession of the appellants by virtue of their employment and that the appellants stole the money from **COWE**.
3. The learned Chief Magistrate misdirected himself on the burden of proof and standard of proof when he shifted the burden onto the Appellants and he convicted the Appellants on insufficient evidence which occasioned a miscarriage of Justice
4. The learned Chief Magistrate erred in Law and in fact when he imposed an excessive sentence of 4 years imprisonment and compensation of Shs. 225,195,000/= each.

The above four grounds constituted the two Appellants' joint criticism of the trial Magistrates decisions in this case as a whole. This court as the first appellate court is obliged to subject the case as a whole to a retrial by freshly evaluating the evidence and apply the relevant law and make its own findings. The guidelines for this approach has been settled by several decisions of superior courts for example the court of Appeal for

East Africa in **SELLE & ANOTHER VS ASSOCIATED MOTORS BOAT CO. LTD & OTHERS (1968) EA 123.**

“.....this court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular this court is not bound necessarily to follow the Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the imprisonment based on the demeanor or a witness is



inconsistent with the case generallyFor the guidance can be found in the following cases:-

Peters Vs Sunday post Ltd (1958) EA 424 Watt Vs Thomas (1947) A.C 484 and Shah Vs Aguto (1970) EA 263.

Following the approach settled by these cases cited I will consider the issues in the instant case. For the prosecution to secure a conviction in a case of embezzlement under Section 268 (b) and (g)

which states:- That a person who being “(b) a
director,
officer or employee of a company or corporation,..... (g)
to
which he or she has access by virtue of his or her office, commits the
offence of embezzlement and shall on conviction be sentenced to
imprisonment for not less than 3 years and not more than 14 years.”

The elements of the offence that need to be proved are:-

- (a) That the Accused was employed by the company or corporation.
- (b) That he or she stole the employer’s property or money.
- (c) That the property or the money came into his or her possession by virtue of his/her employment.

Each of the Accused persons pleaded not guilty and the moment an Accused pleads not guilty the duty to prove the case as a whole falls upon the prosecution. In Uganda, the Accused person defence is presumed to be innocent until he pleads guilty or he is proved guilt. This presumption of innocence is preserved by **Article 28** of The Constitution of The Republic of Uganda 1995. Also see **WOOLMINGTON VS D.P.P [1935] 464** where it was held that the Accused in a Criminal trial is presumed innocent until proved

guilty. No matter what the charge the principle that the prosecution must prove the guilt of the Accused person is part of the Uganda's Criminal Law and any attempt, save for the few known exceptions at common law, such as where the Accused person is insanity or intoxication, the burden of proof is on the prosecution to prove all the elements of the offence charged. The standard of proof is proof beyond reasonable doubt. Further reference is made to **OLOO S/O GAI VS R. [19601 EA 86.**

From the evidence on record, particularly Defence Exhibit DE 1 it is proved that **COWE LIMITED** is company that was incorporated on 3rd January, 2002 under the certificate of incorporation Number **51470** issued by Registrar of Companies. Under the schedule to the Memoranda and Articles of Association, Balikoowa Nixon appears as the subscriber to these documents and The General

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Secretary of the company. Therefore the available evidence proves beyond reasonable doubt that he is an officer or a director of COWE LTD. This is also evidenced by the extra-ordinary

company Resolution dated DEI produced by PW 6. Section 27 (1) of The companies Act (cap 110) provides **“(1) The subscribers to the Memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as a member in its register of members**Article 22

(c) of COWE LTD Articles of Association made him the third high ranking member of the Board of Directors. There is no doubt left in my mind that A1 was a director or employee of the company. MS KASIIME SEDDY, according to The Resolution DE 1 was an employee of the company. Her Defence evidence further confirms that she was employed as a Coordinator of COWE LTD operations in Kabale district. She was transferred from Bushenyi district and started working in Kabale on 7th January, 2006. In my view, there is no doubt that A1 was a director of COWE LTD and A2 was an employee of the same company at the time of the alleged offence.

The second essential ingredient of the offence to be proved is theft of the alleged sum of Shs. 450,390,000/= or any specific

part of it.

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It must be proved that the alleged sum came into their possession by virtue of their employment and that the theft was to the prejudice of their employer, the company. Unlike ordinary theft, embezzlement is constituted when an employee of Government, corporation or a company gets access to the money or property of the employer and commits conversion of the said money or property to the prejudice of his employer. Therefore embezzlement is the fraudulent conversion of the property of another by one who has lawful possession of the property of another or has been entrusted with the property and by virtue of the provisions of Section 268 (a) to (g) of the Penal Code a specific definition is statutorily provided for. Embezzlement can be defined as the fraudulent conversion of property or money of employer by the employee who has lawful possession of the employer's property and whose fraudulent conversion has been made punishable by the statute. Section 268

(b) and (g) of the Penal Code is the Statutory definition and gives penalty or punishment of 3 to 14 years imprisonment.

In the instant case the several complainants were the not members of the company, COWE LTD, but third party who had contractual dealings with the company. This case arises from a scheme where people paid membership to the scheme and not to the company and deposited money with the company and at the end of the month they would receive back the money with interest or “top up.” Some people received the repayment plus interest and some other people did not get paid. It must be settled that there was no proof that the contributions became members of COWE LTD because they did not satisfy the provisions of Section 27 of The Companies Act. It is not contested that COWE LTD never complained against the Appellants. The trial Magistrate Judgment expressed his decision as follows **“In my view, once state showed that some members of COWE complained, as evidenced by the 13th witnesses, and once it is shown the money was on COWE counts, any withdraws amounted to embezzlement, unless accounted for.**** The Judgment went on to state. **“COWE in my view was an elaborate fraudulent scheme. It induced poor members of the society to contribute funds with a promise of quick profits.....I am not**

satisfied with vague explanations to how it was paid back to members” (*underlining provided for emphasis*). The employees of the company in the circumstances of this case owed accountability to the company for the money they received from the complainants on behalf of the company. The company as a legal person is accountable to the third parties because the employees of the company bind the company in what they transacted on behalf of the company.

With due respect to the views expressed by the learned trial Magistrate, the last part of his views above underlined amounted to shifting the burden of proof. Criminal convictions can only be based on the weight and strong case made by the prosecution evidence and not on the weak defence or lack of defence. See **OKETH OKALE & OTHERS VS REP \ 19651**. The Accused persons explanations however weak could not change the fact that it is COWE LTD and not the employees were unanswerable. It is not a disputed fact that COWE LTD had a bank account whose bank statement was admitted as P.E 28. The transactions reflected show that on several occasions cash deposits were made and withdraws were made by cheques presented by SAANO EFRANCE, BALIKOOWA NIXON and one occasion by KASIIME SEDDY. These withdraws were in accordance with the mandate contained in the

company resolution signed by the company Board of Directors. There is no evidence that the other company officers namely, ANDREW KAGGWA KULUMBA (Chief Director), GESSA FRANKLINE (Deputy Director), MPOLOGOMA (Information Director), KIBALAMA JAMES (Director relief), JAANO EFRANCE (Treasurer) or any other representative of the company incriminated the two Appellants on the alleged theft. It must be proved that every withdraw amounted to theft. It must be proved that the properties allegedly owned by the acquired by funds from other sources. The fact that the Accused/Appellants bought expensive properties, in absence of any cogent evidence of theft from the company cannot be circumstantial evidence to prove theft or embezzlement. There must be evidence connecting the property purchased to the "lost" company funds. Each of the Accused persons provided some explanation as to the source of his/her wealth. It is necessary before drawing the inference of the Accused's guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which weaken or destroy the inference. In a case exclusively depending upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculcating facts are incompatible with the innocence of the

Accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt of the Accused person. See: **SIMON MUSOKE VS R. [19580 E.A 715** and in **TAPER VS R [19521 A.C 489** where

Lord Normand held that before drawing inference of the Accused's guilt from the circumstantial evidence, court must be sure that there are no other circumstances which would weaken or destroy the inference. The circumstances must produce moral certainty to the exclusion of every reasonable doubt. In the instant case the trial court dismissed the Accused/Appellant's defence without assigning reasons for the dismissal.

The prosecution had the burden to adduce evidence that rules out the co-existing circumstances for instance;

- (a) That part of the money withdrawn is not part what was paid to the people referred to as contributors whether they testified or not. There is evidence that some of the contributors were paid initial deposits and top-ups.
- (b) There is no explanation as to the role of police closure of offices of COWE LTD at Kabale and there was no register of recovered documents. The company accounting documents were necessary to explain contents of The Bank Statement P.E **28**. These would

have provided a full list of contributors, how much was refunded and what was the top-up or interest and possibly the outstanding.

(c) There was no specific proof that the whole Shs. 450,390,000/ = was contributed by what the Magistrate referred to as

“induced poor members of the society to contribute funds with promise of quick profits.” It ought to have been proved that all deposits were from the complainants.

(d) Every allegedly embezzled sum must be proved to have been taken either by A1 or A2 fraudently, permanently and to the prejudice of COWE LTD. There must be evidence of individual conversion of the company’s money and each person must be convicted for individual criminal liability because they are severally liable for what they individually stole if it can be proved. Examination of the Bank statement (PE. 28) shows that out of the alleged Shs. 450,390,000/= , some of the money was not taken out of the Bank or withdrawn by cashed cheques and some was by SAANO EFRANCE, another official of the company. Therefore circumstantial evidence suggests that other than A1 and A2 there were other payees from the company account which is not contested and therefore it is not proved that every withdrawal was an act of embezzlement.

Theft from the company must be proved beyond reasonable doubt and the moment theft is not proved there can not be embezzlement in this case. The general practice as established by the prosecution witnesses is that they paid money to COWE LTD after sometime they would get back the money with interest. They would redeposit the same money or more money for purposes of getting more money. COWE LTD used to give out receipts to prove who deposited money, how much money was deposited and these were the same receipts or coupons that would be used or presented to claim and determine the money the individuals were entitled to. Even before considering the fraudulent intention, I

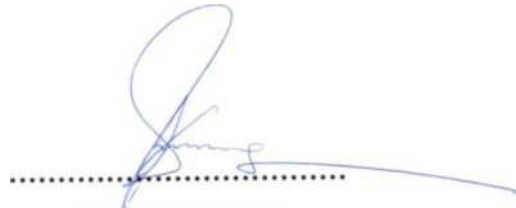
have held that prosecution failed to prove that all the money withdrawn from the Bank Account in issue was a product of this scheme exclusively. The several cheques or any other counting documents used to withdraw should have been part of the prosecution evidence. It was important to rule out the possibility that the withdraws were for part-payment to the 13 witnesses or those not complaining. The conduct of depositors and their transactions with COWE LTD created a contractual relationship similar to that of a Bank and its customers, where savings are deposited and withdrawn with interest after specified period. It is not contested that Bank of Uganda intervened in the Transactions of COWE LTD, caused termination of the company transactions and left the poor contributors' interests unprotected. There is no evidence of any recoveries by Bank of Uganda and for whose benefit. It is unfortunate that the prosecution has not proved the essential elements of the offence preferred in the charge sheet to the required standards because of the gaps in the process of proof above

highlighted. My view is that all is not lost despite the picture created which is not clear due to unprofessional investigation. COWE LTD should have been subjected to serious forensic Audit to establish what the trial Magistrate called elaborate fraudulent scheme and to determine where liability legally falls. The aggrieved depositors should pursue COWE LTD and Bank of Uganda for recovery of the money based on the contracted relationship disclosed by their testimonies in court which did not portray the intention to permanently deprive the depositors of their money. The solution does not lie in criminal penalties. The complainant's are entitled to their money if proved satisfactory.

In view of the above, I will allow grounds 1, 2 and 3 of this Appeal. I have made findings that the convicts are not guilty on the grounds that no sufficient evidence was adduced to prove the charge of embezzlement beyond reasonable. The order for restitution of Shs. 225,195,000/= was based on conclusion that the two appellants embezzled Shs. 450,390,000/= which I have held was not proved by the state beyond reasonable doubt. This was a wrong order because even if the embezzlement had been proved there was need to prove how much each of the two Accused persons took to determine the individual liability. In Criminal Law each person must be specifically proved liable because each Accused person carries his or her own Criminal Liability and that is why one may be Acquitted while the co-Accused is convicted. In the result I uphold the appeal as a whole, quash the conviction and set aside the imprisonment sentence. The order for restitution or

compensation of Shs. 225,195,000/= by each of the Accused persons is hereby set aside. I order the release of the Appellants unless he/she is held on any other Lawful case.

Dated at Kabale this 2nd day of May, 2012.



J.W. KWESIGA
JUDGE

In presence of:

Mr. Murumba holding brief for Ngaruye for A2. Mr.
Arinaitwe Rajab RSA for the State .
Mr. Musinguzi Joshua - Court Clerk.