

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

CRIMINAL APPEAL NO. 28 OF 2015

(Arising from Criminal Case No. 0040 of 2012)

AMUGE PARTRICIA ::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

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

BEFORE: HON.LADY JUSTICE MARGARET TIBULYA

J U D G M E N T

BACK GROUND

The appellant was convicted with embezzlement and sentenced to 18 months imprisonment. She now appeals against the conviction on four grounds as follows;

1. The Trial Magistrate erred in law and fact when she failed to adequately evaluate all the material evidence adduced at the trial and hence reached an erroneous decision which resulted into a serious miscarriage of justice.
2. The Trial Magistrate erred in law and fact as regards the application of circumstantial evidence and convicted the appellant on the basis of unsatisfactory and uncorroborated circumstantial evidence.
3. The learned Trial Magistrate erred in law and fact when she disregarded the evidence of the appellant thus convicting her wrongly.
4. The learned Trial Magistrate erred in law and fact when she convicted the appellant basing substantially on accomplice evidence without first cautioning herself.

THE EVIDENCE.

PW2 (Rakesh Gupta) discovered that the reconciliation account of Crane Bank Ltd had negative entries. He made a report (**P.3 (c)**) to the effect that the account opening deposit account 01H1099042102 was debited with various amounts in favor of Teopista Ibanda, holder of account number 0140075949300, yet the money did not belong to her but to a different customer and to Crane Bank Ltd. The total amount involved was 17.25 million. The user ID appearing in the transaction documents was for Sheba Kagwisa (Pw4), except one entry.

The table below shows the particulars of the transfer vouchers in issue; (**for all these vouchers, there was no corresponding deposit on the indicated day by Teopista Ibanda, the account holder**).

DATE OF VOUCHER	AMOUNT	USER ID
19/09/2011	1,750,000/=	SHB115101
23/09/2011	1,000,000/=	ID TVG2582101
27/09/2011	1,000,000/=	ID SHB156901
30/09/2011	1,100,000/=	ID SHB 171901
3/10/2011	1,000,000/=	ID SHB 178502
8/11/2011	1,100,000/=	ID SHB 301701
14/11/2011	100,000/=	ID SHB 311601
14/11/2011	1,750,000/=	ID SHB 318402
21/11/2011	1,100,000/=	ID SHB 339101
21/11/2011	1,000,000/=	ID SHB 33940
24/11/2011	1,750,000/=	ID SHB 350002
6/01/2012	1,100,000/=	ID SHB 434301
9/01/2012	1,750,000/=	ID SHB 437601

The total wrongly credited to Teopista Ibanda's account number **0140075949300** was **17,250,000/=** as per statement of account for the period 13th September to 11th January 2012, (**P3 (a) and (b)**).

Thirteen vouchers were posted with Pw4's (**Kagwisa Sheba**) user ID: SHB. She denied having posted them and revealed that she had shared her password with Patricia Amuge (appellant) whom she trusted as her supervisor.

The money left Teopista's account by ATM withdrawals but Teopista Ibanda has never signed for an ATM card from Crane Bank. The bank records showed that the card was given to Jimmy Lwande (who was A2) for delivery to the owner.

According to the ATM card log, the card was captured by an ATM machine in December 2011. The appellant went to Atimango the in-charge of releasing captured ATMs and she got it. The bank tried to contact Teopista Ibanda on the phone number she provided in her account opening form and the given address but her phone was disabled and the given address was fake.

PW3 (Winnie Nimanya Kasemutwe) an employee of the bank used to sit next to the appellant. One time the appellant gave her an ATM card in the name of Teopista, and a Pin on a piece of paper so that she could draw some money, and she drew 100,000/=. The appellant told her that Teopista was her maid. Pw3 returned the card to her after the transaction.

PW4 (Kagwisa Sheba), said that the appellant trained her in the different ways of creating accounts and how to find out if the account has been opened and how to balance excel sheet. She was her supervisor and friend. They were not allowed to share passwords but since the appellant was training her and helping her learn different procedures of the reconciliation desk, she knew her password.

One Ibanda Shafiq opened an account with the bank and deposited 1,750,000/=. **PW4** transacted the 1,750,000/= in this account. She has no idea where Ibanda Teopista came from. Exhibits P. 3 (b) are crediting documents in which Teopista Ibanda was being paid. The documents bear her user **Id, "SHB7"** and signature but they were not posted by her. She was on leave from the 2nd /01.2012 to 14/01/2012 as per leave application exhibit P4.

PW5 (D/AIP Abwang Emmanuel) recovered an ATM withdraw slip for 100,000/= and a reversal form bearing the names of Teopista Ibanda from the appellants residence. The reversal form was claiming for a captured ATM Card.

The appellants evidence was that there was a strict policy and bank staffs were not supposed to share passwords. And, many people were involved in reconciliation because it involves account opening. Payment vouchers were proof that the customer's account had been credited. A payment voucher would bear the logo of Crane bank, the date of Transaction, the user ID of the person who has done the transaction, the signatures of the person who transacted and that of the manager.

The vouchers in P. Exh 3(b) did not pass through her hands. User Id's "TUD" and "SHB" were not hers. User Id "SHB" belongs to Sheba Kagwisa (PW4). The signature thereon is also hers. She does not know Teopista Ibanda and has never heard of her. She does not know PW4's (Kagwisa Sheba), password and was not aware of the ATM card of Ibanda Teopista. It was not allowed for her to be given a card of Teopista. Nothing was recovered from her house. Further that the signature in P.EX.5 is not hers.

DW 3(Augustine Okello) said that a search was done at his home in his presence but in the absence of the Appellant and that the police did not find or take anything of relevance.

This being the first appellate Court in this matter, it has a duty of re-evaluating the entire evidence on record and come to its own conclusion bearing in mind that it did not have the opportunity to see the witnesses testify, see **KibuukaVs Uganda, (2006) 2 E.A 140.**

The resolution of the issues.

- 1. The Trial Magistrate erred in law and fact when she failed to adequately evaluate all the material evidence adduced at the trial and hence reached an erroneous decision which resulted into a serious miscarriage of justice.**
- 2.**
- 3. The learned trial Magistrate erred in law and fact when she disregarded the evidence of the appellant thus convicting her wrongly.**

Resolving that above two issues calls for the re-evaluation of the available evidence the exercise to which I will embark on right away.

The ingredients of the offence of Embezzlement are;

- a. **the accused should be proved to have been an employee of the bank, and,**
- b. **that she stole the money in issue,**
- c. **that the money was the property of her employer, and**
- d. **That she had access to the money by virtue of her office.**

PW1's (Christine Rwabogo) evidence that the appellant was a member of staff of Crane Bank was not challenged. Since the appellant also described herself as such I find the first ingredient sufficiently proved.

THEFT

Counsel for the appellant raised the following arguments;

- **There is no evidence that the accused with-drew the money since no with draw slips were exhibited.**
- **Un-like Pw3, the appellant was never capture on CCTV camera withdrawing the money.**
- **The documents that were recovered from the appellant home were never exhibited.**
- **Given that passwords used to expire every two days the appellant was not able to use Pw4 password,**
- **That all the signatures on the vouchers were for Sheba was not contradicted.**
- **No evidence that A2 ever gave the ATM card to the appellant**
- **There was no evidence that the appellant stole the money.**

I need to point out that the arguments as laid are premised on the wrong assumption that with-draw of funds can only be proved by exhibiting the with-draw slips and viewing CCTV cameras. These are just some of the ways of proving that a person with drew funds. The question in my view should instead be whether there was evidence that the appellant withdrew the money, and I will answer it through a step by step evaluation of the available evidence.

PW2 (Rakesh Gupta)'s evidence that the **17,250,000/=** which was wrongly debited from the account opening deposit account **01H1099042102** and credited on account number 0140075949300 belonging to Teopista Ibanda was drawn via ATM was not challenged, and there was no reason to disbelieve it. That evidence proves that the money left the bank, and by an ATM transaction. It in turn suggests that the person who had the ATM card was

probably the drawer of the funds. His evidence that the bank failed to trace Teopista Ibanda using the Phone number indicated in the documents, and that the address indicated in the documents was false was also not challenged and there was no reason to doubt it either. That evidence points to the fact that the transactions were fraudulent indeed.

PW3's (Winnie Nimanya Kasemutwe) evidence that the appellant gave her an ATM card in the name of Teopista so that she could draw some money is credible, though denied by the appellant. It is lent credence by that of **PW5 (D/AIP Abwang Emmanuel)** who said that he recovered an ATM withdraw slip and a reversal form claiming for a captured ATM Card in the names of Teopista Ibanda, from the appellants residence.

PW5's evidence is lent support by the unchallenged evidence of Pw2 (**Rakesh Gupta**) that according to the ATM card log, the card in issue was captured by an ATM machine on December 2011, and that the appellant contacted one Atimango, the in-charge of releasing captured ATMs who gave it to her.

It could therefore not have been a mere coincidence that a reversal form claiming for a captured ATM Card in the names of Teopista Ibanda was recovered from the appellant's residence. There is nothing on the record to suggest that **PW5 (D/AIP Abwang Emmanuel)** could have been influenced to give false evidence. Considering the evidence of Pw's 2, 3 and 5 the defense evidence that nothing was recovered from the appellant's home is not correct and must be rejected. The combined effect of **PW 2, 3 and 5's** evidence is to link the appellant to the ATM card that was used to draw the funds in issue.

Pw3's evidence that the appellant gave her the ATM card in issue and that she returned it to her after the transaction, taken with that of Pw2 that the ATM card log showed that when the card was captured by the ATM machine it is the appellant who claimed it, and Pw5's that he recovered an ATM card claim form from the appellants home, all leave no doubt that the appellant was the one with the card at the time of the impugned transactions.

The mystery surrounding the appearance of **PW4's (Kagwisa Sheba)** User Id in the transaction documents was sufficiently explained by her evidence that since the appellant was training and helping her learn different procedures of the reconciliation desk, she knew her password. Moreover her evidence that she was on leave from the 2nd /01/2012 to 14/01/2012

as proved by exhibit P4 lends credence to her assertion that she did not make the impugned transactions.

The fact that no withdraw slips were exhibited and that the appellant was never capture on CCTV camera withdrawing the money does not water down the above evidence.

In the same breath, that the documents that were recovered from the appellant's home were never exhibited does not weaken the evidence that they were recovered from there.

I found the argument that the appellant could not have been able to use Pw4's password given that passwords used to expire every two days interesting, since the burden for the state to prove the guilt of the accused does not extend to proving how she managed to execute the crime.

The fact that all signatures on the vouchers were for Pw4 (Sheba) does not water down the evidence that the appellant had and used the ATM card to draw the funds. There is nothing to suggest that Sheba could have drawn the money, despite the fact that her signature appeared on the documents. She testified so and it was the trial courts prerogative to believe her as was the case. How the appellant managed to draw the money in the circumstances of the case was not for the state to prove.

That there was no evidence that A2 ever gave the ATM card to the appellant is not important given that there was evidence that the appellant had it anyway. There is sufficient evidence that the appellant fraudulently and without claim of right drew the money under circumstances amounting to theft of it.

The first and third grounds of appeal must fail.

2. The Trial Magistrate erred in law and fact as regards the application of

circumstantial evidence and convicted the appellant on the basis of

unsatisfactory and uncorroborated circumstantial evidence.

It was argued that the evidence did not irresistibly point to the guilt of the appellant as the lower court found, but that it instead pointed to Pw4 who posted the transactions. It was her signature on the vouchers. There was no evidence that the appellant ever received the ATM card or that she with-drew the money.

I have already addressed the issues raised in this ground and found that the evidence that the **17,250,000/=** which was wrongly debited from the account opening deposit account **01H1099042102** and credited on account number 0140075949300 belonging to Teopista Ibanda was withdrawn via ATM suggests that the person who had the ATM card was probably the drawer of the funds.

PW3's (Winnie Nimanya Kasemutwe) evidence that the appellant one time gave her an ATM card in the name of Teopista, and that she returned it to her after she withdrew 100,000/=, supported by that of **PW5 (D/AIP Abwang Emmanuel)** that he recovered an ATM withdraw slip for 100,000/= and a reversal form claiming for a captured ATM Card in the names of Teopista Ibanda, from the appellants residence and that of Pw2 (**Rakesh Gupta**) that according to the ATM card log, the card in issue was captured by an ATM machine on December 2011 after which the appellant contacted one Atimango, the in-charge of releasing captured ATMs who gave it to her, all sufficiently link the appellant to the ATM card that was used to with draw the money.

I have said that the mystery surrounding the appearance of **PW4's (Kagwisa Sheba)** User Id in the transaction documents was sufficiently explained by her evidence that since the appellant was training and helping her learn different procedures of the reconciliation desk, she knew her password. Moreover her evidence that she was on leave from the 2nd /01/2012 to 14/01/2012 as proved by exhibit P4 lends credence to her assertion that she did not make the impugned transactions.

The above evidence irresistibly points to the guilt of the appellant and not to Pw4. There is basis for the finding that Pw4 did not post the impugned transactions. Her signature may be appearing on the vouchers but that is not evidence that she made the transactions.

The second ground also fails as well.

4. The learned trial Magistrate erred in law and fact when she convicted the appellant basing substantially on accomplice evidence without first cautioning herself.

Counsel citing the case of *Mohammed Mukasa and anor Vs Uganda Criminal Appeal No 27 of 1995* in which it was said that,

“if the accused makes a full confession and tars himself with the same brush and the

statement is sufficient by itself to justify the conviction of the maker of the offence for which he is being tried jointly with the other accused, the statement may be taken into consideration or as evidence against the co-accused”,

argued that for a statement to be used against a co-accused, it must amount to a full confession upon which alone a maker can be convicted of the offence he is being jointly tried with the co-accused, and that this reflects the interpretation of S.27 of the Evidence Act. It was argued that the admission by the A2 did not amount to a full confession and the trial magistrate erred in using it against the appellant.

Section 27 of the Evidence provides as follows;

“When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself or herself and some other of those persons is proved, the court may take into consideration such confession as against that other person as well as against the person who makes the confession.”

Explanation.—“Offence”, as used in this section, includes the abetment of, or attempt to commit, the offence.”

Three issues must be resolved;

- 1. Whether A2 Luande was an accomplice.**
- 2. Whether evidence as given by A2 can be properly categorized as confession within the meaning of Section 27 of the Evidence Act.**
- 3. Whether it was proper for the learned magistrate to use the evidence of a co-accused against the appellant.**

WHO IS AN ACCOMPLICE?

The Supreme Court in Nasolo v Uganda [2003] 1 EA 181 (SCU) said that

“In a criminal trial a witness is said to be an accomplice if, inter alia, he participated, as a principal or an accessory in the commission of the offence, the subject of the trial. One of the clearest cases of an accomplice is where the witness has confessed to the participation in the offence, or has been convicted of the offence either on his own plea of guilty or on the court finding him guilty after a trial. However, even in absence of such confession or conviction, a court may find, on

strength of the evidence before it at the trial that a witness participated in the offence in one degree or another. Clearly, where a witness conspired to commit, or incited the commission of the offence under trial, he would be regard as an accomplice.”

With regard to Mr Luande other than the fact that he was charged with the appellant there is nothing to suggest that he was an accomplice. He denied participating in the commission of the offence and was acquitted. I find that he was not an accomplice.

Was Luande’s (A2) evidence a confession within the meaning of Section 27 of the Evidence Act?

I don’t think that his evidence was a confession. First of all he did not admit the offence. He was in fact acquitted. Secondly, even if he was admitting the commission of the offence, that would not amount to a confession within the meaning of Section 27 of the Evidence Act. The process of making a confession is formal and a confession must have been proved against its maker through a prescribed process. The evidence of concern here did not go through that process. The case cited by counsel for the appellant is irrelevant and his whole submission on this issue is misconceived.

Whether it was proper for the learned magistrate to use the evidence of a co-accused against the appellant.

I think it was not proper to do so for the sole reason that the appellant was not given the opportunity to ‘confront her accuser’ as it were, which the opportunity to cross-examine a witness affords. While i agree with counsel for the appellant that the learned magistrate’s reference to Luande’s evidence was in error, that finding does not alter the result of the appeal since even without that evidence, there was sufficient basis for an adverse finding against the appellant.

The fourth ground succeeds but it does not affect the out-come of the appeal.

There is sufficient evidence to ground a conviction for embezzlement. The appeal is dismissed for lack of merit and the judgment and orders of the lower court are upheld.

Margaret Tibulya

Judge

17th December 2015.