

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

CRIMINAL APPEAL NO 0024 OF 2014

UGANDA ::: APPELLANT

Vs.

OBORE GEORGE ALFRED

OKALLANY SAMUEL

OPOLOT PHILLIP GONZAGA: ::: RESPONDENTS

BEFORE: HON. LADY JUSTICE MARGARET TIBULYA.

J U D G M E N T

This is a Judgment on an appeal and cross appeal from the Judgment and orders of a Magistrate one Court sitting at Kololo.

I will first deal with the appeal, then proceed to consider the cross appeal. The appellant (prosecution) laid two grounds.

1. The Magistrate erred in law and fact when she held that theft was not proved and wrongly acquitted the respondents of the offence of embezzlement.
2. The Magistrate erred in law and fact when she did not exhaustively consider and evaluate the evidence on record and eventually wrongly acquitted the respondents of the offence of embezzlement.

The role of first appellate court is to subject the evidence to a fresh re-evaluation and come to its own conclusion bearing in mind that it neither saw nor heard the witnesses testify.

THE EVIDENCE

PW1(**Wendo Wilber**), Town Clerk Malaba (2007-2008) testified that he saw a document dated 15/8/2005 signed by A1 and 2 acknowledging receipt of the 4,000,000/= as part payment for a market tender award whose total cost was to be 7m/=. The 4m/= that they received was not reflected in the accounts books of the Town council and the tender was not awarded to Adlink.

PW3 (**Orono Francis Xavier**) then Assistant C.A.O was given a note signed by the two respondents in which they acknowledged receipt of 4,000,000/= from one Asabo, in respect of a market tender award. The Treasurer confirmed to Pw 3 that the matter had not gone through the system (Financial system).

PW4 (**Apero Catherine**), then Senior Treasurer said that M/S Adlink sued Malaba Town Council over the 4,000,000/= which the respondents had received. The receipts did not reflect the 4,000,000/=.

PW5 (**George William Omase**) introduced the respondents to Asabo who gave them 4m/=.

The respondents (A1 (**Obore**) and A2 (**Okallany**) said they got 4,000,000/= from Asabo to fund a trip to Rwakitura. Both acknowledged receipt of the money in exhibit P.6.

DW4 Zehireyo Wycliffe, the Internal Auditor of Malaba since February 2006 said that the 4m/= was received in the council coffers and was spent with support of the Accounting records. It was not misappropriated by the accused persons. He saw a photocopy of a receipt issued by one Okurut a cashier who handles the cash book.

Arguing the two grounds jointly, the appellant said that the evidence of PW1 (**Wendo Wilber**), PW2 (**Ochwo Gabriel**), PW3 (**Orono Xavier Francis**), PW4 (**Apero Catherine**), PW5 (**Omaset George William**) and PW6 (**Yeheyo Benson**) who exhibited an acknowledgment of receipt of the money by the two respondents, plus that of the Respondents confirms that the respondents received the 4,000,000/=, and that the paper trail ended with them.

It was further argued that there was no legal basis for their receipt of cash or direct payment since they were not mandated to do so. A1 (**Obore**) had no role in awarding tenders.

It was submitted that the ingredients of theft, and with that, those of embezzlement, were proved.

In reply it was argued that the learned Magistrate properly evaluated the evidence relating to embezzlement and came to a proper conclusion. The evidence of PW's 1 to 6 could not

justify a finding of guilt.

Theft was not proved since the relevant entry books were not exhibited.

The prosecution did not prove that the money was not used for a trip to Rwakitura or that the respondents pocketed it.

Asabo did not testify, so there was no proof that he gave the money to the respondents.

If the money was stolen it did not belong to Malaba Town Council.

The minutes of a meeting in which it was resolved that 4,000,000/= be borrowed from Asabo to fund the trip (Exhibit D2) evidences the fact that the respondents could not have stolen the money. They had the authority to borrow it.

The trial magistrate considered the above evidence and;

- Doubted that the money was used for a trip (see paragraph 2 of page 9 of the lower court judgment). She noted that exhibit P.6 (**the acknowledgment by A1 and 2**) does not say so.
- found that the 4m/= was not entered in the council records.
- found no evidence of theft and no evidence that the money was used for the trip to Rwakitura, but noted that the prosecution evidence only points to the fact that the accused received 4m/= for a market tender award.

EVALUATION OF THE EVIDENCE.

The respondents do not deny receipt of the money. The only question relates to the purpose for which they received it. Exhibits P 2 and P 6 clearly show that it was part payment for Malaba market tender award for which the total was to be shs 7,000,000/= per quarter. The Court documents (exhibit P.2) are clear that the plaintiff was claiming a refund of 4m/= advanced to the respondents in connection with a tender for Malaba Town Council Market. The defense assertion that the money was borrowed and was meant to fund a trip to Rwakitura is against the weight of evidence and is false.

As to where the money went, the prosecution evidence (PWs 1, 3, and 4,) is that it was not reflected in the council books, meaning it was not remitted to the local government by its recipients (the respondents).

DW4 (Zehireyo Wycliffe) said that it was officially received and spent. He however agreed that a cashier was the one to have issued a receipt.

The officials who were directly concerned with receipt of council funds - the Town Clerk (**PW1 Wendo**), PW3 (**Orono**) Assistant C.A.O, and PW4 (**Apero Catherine**), Senior Treasurer, were positive that the 4m/= was not reflected in the books of Accounts. DW3's evidence to the contrary is against the weight of evidence and cannot be believed.

THE THEFT

The story line is not intricate and is based on facts which no force of argument can alter. It is simply that the respondents

received 4m/= from one Asabo as part payment for a market tender ward. The money was not declared to the council - for it was not entered in the council books of accounts- meaning that the respondents were the last known persons to handle it. Their claim that it was used to fund a trip to Rwakitura is outright false - the acknowledgment (P.6) shows that it was neither a borrowing nor meant for any other purpose other than to be part payment for a market tender award. Once these facts are believed (**and there is no alternative to this**), there should be one logical conclusion which is that the respondents stole the 4,000,000/=.

The trial Magistrate seems to have born all these facts in mind but none the less found that the accused did not steal the money. That finding is contrary to the evidence.

My view is (**and it is my finding**) that the accused stole the 4m/=. The money trail began and ended with them.

EMBEZZLEMENT

The fact that the respondents were public officers was not contested.

Theft of the 4,000,000/= was sufficiently proved.

The fact that they had access to the money by virtue of their employment is evident from the fact that they acknowledged receipt of it in the capacities of chair-person Malaba Town Council and Acting Town Clerk Malaba respectively. They

stamped the acknowledgment document with their official stamps.

Questions were raised about the ownership of the stolen money and whether Asabo gave the respondents the money at all. On this last one, the defense itself testified that Asabo indeed gave the appellants the money. On whether it was council money, the documents show that they received it as council officials, and that council finally paid it back to Asabo under court order. It was not necessary for Asabo to testify to this since the exhibited documents were clear, yet both the defense and prosecution account of events tallied. There was ample evidence to ground a conviction for embezzlement. The appeal succeeds. The order of acquittal is set aside and replaced by an order of conviction for embezzlement.

THE CROSS APPEAL

OBORE GEORGE ALFRED

OKALLANY SAMUEL

OPOLOT PHILLIP GONZAGA:..... CROSS-APPELLANTS

Vs.

UGANDA :..... RESPONDENT

Three grounds of cross appeal were laid and I will discuss them in the order they were laid.

1. **The learned trial magistrate erred in law and in fact when she found that the first and second Appellants committed an arbitrary act of receiving a payment of UGX 4,000,000/=from Asabo of c/o Adlink (U) Limited.**

THE APPELLANTS ARGUMENTS

- The money in issue was borrowed pursuant to a decision by the executive committee to fund a trip to meet the president in Rwakitura.
- The trial magistrate only considered the evidence of receipt of the money by the cross appellants, but did not consider the fact that the relevant books of entry for the year in question were not produced in court to show that there was no entry for the transaction in issue. This was a fatal failure on the part of the prosecution.
- The magistrate reasoned that failure to record the transaction in the books of account amounted to arbitrariness. The question of the books of account was confusing and incapable of convincing a court of law to find that the 1st and 2nd appellants committed an arbitrary act.
- The evidence of PW's 2 and 3 was that there were **no proper** books of account at the material time; the court should not have found the non recording of the money as an arbitrary act.
- The borrowing was sanctioned by the town council executive, and there was no arbitrary act. The import of defense exhibit 2 is that the cross appellants acted with the authority of the Town council executive.
- By arguing that the cross appellants should have proved that the money was used for a trip to Rwakitura, the magistrate shifted the burden of proof.

THE RESPONDENT ARGUED

- a) That the appellants were neither mandated to award the tender nor to receive the money as A1 confirmed in cross examination. There is no accountability for the money to date.
- b) The meeting which gave the purported authority (Exhibit D2) ended at 5:00p.m when they had already received the money at 11:00 a.m.
- c) The paper trail for the money ended with them; there was no indication that the money was banked or recorded in the books of account, and latter requisitioned for use.
- d) The appellants committed the council to a company whose particulars were not yet verified by the tender board. The town council was successfully sued because of their acknowledgment and lost 10,495,000/- as a result.
- e) The receipt furnished by the accused to account for the money was issued in June 2006, a year after they received the money. The fact that money meant for the council ended with them was arbitrary and prejudicial to the council interests.

The trial court considered all the evidence on record and noted that the prosecution evidence was consistent, and that the cross appellants admitted receipt of the money from Asabo as per **exhibit P6**, according to which the money was for a tender award for a market. The magistrate wondered whether it was their role to award tenders or to collect money for that purpose.

She did not believe that the money was used for the trip to Rwakitura since the information in the acknowledgement (exhibit P.6) was that it was part payment for a tender award. She noted the absence of accountability for the money, and the absence of evidence that it was entered in the council books and concluded that the actions of the appellants were arbitrary.

THE COURT'S FRESH EVALUATION OF EVIDNCE AND DECISION.

1. About the argument that the money in issue was borrowed pursuant to a decision by the executive committee to fund a trip to met the president in Rwakitura, i have already observed and I repeat that both the acknowledgement by the cross appellants (exhibit P.6) and the Court documents (exhibit P.2) are clear that the plaintiff was claiming a refund of 4m/= advanced to the respondents in connection with a tender for Malaba Town Council Market. Whether or not there was a meeting giving authority (Exhibit D2) to the appellants to borrow the money is irrelevant to the issue at hand, since there is no connection between the 4,000,000/= the appellants received and any borrowed funds for the trip. The purpose of the 4,000,000/= was clearly stated. The defense assertion that it was a borrowing, sanctioned by the town council executive, meant to fund a trip to Rwakitura is against the weight of evidence and is false. The learned magistrate's decision was rightly based on evidence.
2. On the assertion that the trial magistrate only considered the evidence of receipt of the money by the cross appellants, but did not consider the fact that the relevant books of entry for the year in question were not produced in court to show that there was no entry for the transaction in issue, and that this was a fatal failure on the part of the prosecution, the prosecution evidence (PWs 1, 3, and 4,) was that the money was not reflected in the council books, meaning it was not remitted to the local government by its recipients (the respondents). The learned magistrate believed their evidence, which was within her prerogative.

DW3 (Zehireyo Wycliffe) said that the money was officially received and spent. He however agreed that a cashier was the one to have issued a receipt.

The officials who were directly concerned with receipt of council funds - the Town Clerk (**PW1 Wendo**), PW3 (**Orono**) Assistant C.A.O, and PW4 (**Apero Catherine**), Senior Treasurer, were positive that the 4m/= was not reflected in the books of Accounts. DW3's evidence to the contrary is against the weight of evidence and cannot be believed. The non-production of the books of account does not water down the prosecution evidence. As the respondent argued, the paper trail for the money ended with the appellants. There was no indication that it was banked or recorded in the books of account.

3. About the magistrate's reasoning that failure to record the transaction in the books of account amounted to arbitrariness, yet the question of the books of account was confusing and incapable of convincing a court of law to find that the 1st and 2nd appellants committed an arbitrary act, the evidence of PW's 2 and 3 was that there were **no proper** books of account at the material time, and not that there were **no** such books.

Moreover other than the issue of non recording of the money, the court questioned the appellant's role in awarding tenders and /or in collecting money for that purpose. The court did not believe that the money was used for the trip to Rwakitura since the information in the acknowledgement (**exhibit P.6**) was that it was part payment for a tender. The absence of accountability for the money, and of any evidence that it was entered in the council books are just some of the factors the court based to arrive at the conclusion that the actions of the appellants were arbitrary.

4. The complaint that the magistrate shifted the burden of proof when she commented that the cross appellants should have proved that the money

was used for a trip to Rwakitura, is not helpful since there is sufficient evidence that the 4m/= was not borrowed, and it was not meant for a trip to Rwakitura. There was no shifting of burden and indeed no need to do so because there was sufficient proof of the issue. No amount of argument could change that.

The learned magistrate decision was rightly grounded on evidence, the cross appellants admitted receipt of the money from Asabo as per **exhibit P6**, according to which the money was for a tender award for a market, and not for a trip to Rwakitura. There is no indication that it was their role to award tenders or to collect money for that purpose. There is evidence that there was no accountability for the money or that it was entered in the council books. The conclusion that the actions of the appellants were arbitrary was inevitable. The trial court rightly convicted the cross appellants for abuse of office. The first ground in the cross appeal therefore fails.

2. The learned trial magistrate erred in law and in fact when she failed to properly evaluate the evidence on record leading to an erroneous finding that the appellants committed an arbitrary act prejudicial to the interest of their employer, Malaba Town Council and therefore abused their respective offices.

- o For the appellant's it was argued that the borrowing of the money (exhibit D.2) was sanctioned by the Malaba Town Council. They didn't borrow as individuals or in excess of authority. The finding that they did an arbitrary act was against the weight of evidence. Exhibit P.6 was made pursuant to the authority in D.2.

- o No mention was made by the trial court of PW4's (Zehireyo Wycliffe) evidence that he did not find any anomalies in the books of account and that the money was received by MTC. Had this been done, the court would have found that the appellants did not commit an arbitrary act by failing to record the transaction in issue and would not have convicted them for Abuse of Office.

I have already dealt with the issues raised in the second ground. I will only repeat that the 4m/= was not borrowed. Exhibits P.2 and 6 are clear on this. The issue of Malaba Town Council sanctioning any borrowing does not therefore arise.

I have already said that there is no connection between exhibit P.6 and D.2. Exhibit P.6 is an acknowledgement of receipt of money for **a tender award** while D.2 are minutes of a meeting at which a resolution to borrow money was made. This was not the money in issue.

I have already considered PW4 (Zehireyo's evidence) and found it to be false for reasons already given. Ground 2 has no merit and fails as well.

3. The learned trial magistrate erred in law and in fact when she found that the second and third Appellants neglected to pursue Civil suit No. 80 of 2006, vide David Asabo and Adlink (U) Ltd versus Malaba Town Council, which was against their employer who was obliged to pay Ugx 10,405,000/= thus causing financial loss to Malaba Town Council.

The arguments;

- ✚ *The appellants said that they did all they could to settle the suit, and that the fact that matters got out of hand cannot be*

attributed to them. In response it was argued that the issue of refund to Asabo was neglected by the appellants. The matter ended in court and 10,459,000/= had to be paid.

The complaint is not about the failure to settle the matter but rather the deliberate act of letting MTC pay money received by individuals who had not declared it. A2 is the one who had received the money and therefore knew that the Council was not supposed to pay it. A3 as town clerk had evidence (**Exhibit P6**) showing who had received the money. Instead he created stories about a trip to Rwakitura thereby committing the council to refund money it did not owe.

✚ *That DW3 (A3) wrote to the Attorney General seeking legal advice and requesting for representation. The respondent said that the demand for the 4m/= came to the attention of Malaba Town Council when A2 and 3 were in office. A2 knew he had received the money but did nothing to avert the loss to the council.*

I have perused the documents relied on by the appellants and found that A3 gave misleading information to the Solicitor General. In exhibit D5 for example, he told the Solicitor General that the money had been borrowed by the council, yet he had documents, (**exhibit P6**) clearly showing that A1 and 2 had received the money as part payment for a market tender award.

✚ *A3 attended court and was advised to settle matter. He engaged defence counsel as shown in Exhibit D.6 and convened meetings with the Executive Committee of Malaba Town Council to urge them pay Asabo.*

The response was that the duty to award tenders is for the contracts committee and not the accused. They solicited for the money in Abuse of authority of their Offices.

I agree with the respondent that A3 must have been aware of the irregularities in the whole matter. Whether or not he attended court is not relevant given that he was proceeding from dishonest premises. The act of settling out of court of the case, thereby binding Council to pay money which to his knowledge was not owed is one of the reasons he was rightly convicted.

Other arguments were that;

- A2 and 3 were arrested on 3/3/2007 and interdicted till 2013 and could not defend the case while incarcerated.
- All payments were made when A2 and 3 were on interdiction.
- The Magistrate didn't analyze the evidence that A2 and 3 were out of office at the time the money was paid and were not responsible for the financial loss. They did not neglect their duties.

Issues relating to the arrest and interdiction of the appellants are irrelevant to the charges. The offences were committed once A2 received and failed to declare the money to council, and when he did not take steps to refund it, and let the civil suit proceed resulting in councils payment of 10,495,000/=. A3 knew and/or had reason to believe that council was not indebted to Asabo but allowed to settle the case out of court thereby committing the council to pay monies it was not factually liable to pay. These actions took place before the arrest and interdiction of the appellants.

- *It was argued that the courts observation that A2 plus 3 didn't instruct lawyers was against the weight of evidence since DW3 testified that he attended court and instructed officials from the Attorney Generals Chambers to represent Malaba Town Council.*

I should only say that the so called instructions were premised on wrong information from the accused and did not amount to instructions at all.

In convicting the appellants Learned Magistrate considered that:-

- It wasn't disputed that Malaba Town Council lost 10,459,000/=,
- Exhibit P.2 (court summons) bears a stamp of office of the Town Clerk dated 12/12/05. The town clerk must have got the summons.
- The affidavit of service shows that Malaba Town Council was aware of the case.
- The appellants knew that there was a pending case. They knew that the plaintiff was telling lies. They should have defended the suit to avert loss to the council.
- The accused knew that their acts/ omissions would cause financial loss.
- They should have followed up the case conclusively and involved lawyers.
- There was no appeal against the courts decision.

These were all valid considerations which in conjunction with those I have pointed out lead to no other conclusion than that the appellants caused financial loss to Malaba Town Council. This ground therefore fails, and with it the whole cross appeal. The conviction and sentence for abuse of office and causing financial loss is upheld.

Margaret Tibulya

Judge.

26th August 2015.