**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA SITTING AT GULU**

**CRIMINAL APPEAL No. 0004 OF 2018**

**(Arising from Gulu Chief Magistrate's Court Criminal Case No. 0279 of 2015)**

**UGANDA …………………………………………….……….……………… APPELLANT**

**VERSUS**

**OBURA GEOFFREY ….…….…..…….….……….…….…………………… RESPONDENT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

The appellant was indicted with one count of theft C/s 254 (1) and 261 of *The Penal Code Act*. - It was alleged that during the month of November, 2014 at Gulu School of Clinical Officers in Gulu District, the appellant stole academic transcripts of 39 students of Gulu School of Clinical Officers all valued at shs. 1,755,000/= (one million seven hundred fifty five thousand shillings).

The prosecution case was that on 25th November, 2014 the Academic Registrar of Gulu School of Clinical Officers lost his mother and was granted a compassionate leave of absence to attend her funeral. In his absence, the duties of Academic Registrar were assigned to the respondent. Upon his return, the Academic Registrar found 39 of the student transcripts he had left in his office, missing. The School Principal's preliminary investigation revealed that the Academic Registrar had issued 3 transcripts before he proceeded on compassionate leave while the respondent had issued one. His attempt to issue a certified copy for the second without the original is what sparked off the discovery that 39 of them were missing, all from the 2014 academic year and the majority had fees balances. The matter was reported to the police.

Testifying as P.W.1 the Principal and Accounting Officer of the School Ms. Grace Jennifer Aninge stated that the respondent was at the material time a Senior Tutor and the Deputy Academic Registrar of Gulu School of Clinical Officers. The school trains but certificates are issued by the Uganda Allied Health Examinations Board. They are picked from Kampala by either the Principal or the Academic Registrar and kept in the latter's office, in a bag placed in a cabin. On 25th November, 2014 the Academic Registrar lost his mother and was granted a compassionate leave of absence. In his absence, the duties of Academic Registrar were assigned to the respondent. Upon his return, the Academic Registrar found 39 of the transcripts missing. Her preliminary investigation revealed that the Academic Registrar had issued 3 transcripts before he proceeded on compassionate leave while the accused had issued one. His attempt to issue a certified copy for the second without the original is what sparked off the discovery that 39 of them were missing, all from the 2014 academic year and the majority had fees balances. The matter was reported to the police.

P.W.2 was the Academic Registrar of the School Mr. Taddeo Mulumba and he testified that he keeps custody of students' academic transcripts and issue them out. On 25th November, 2014 he lost his mother and was granted a compassionate leave of absence. The respondent took over that responsibility and office for the duration of that period. Before leaving for burial, he issued transcripts to three students, locked the office and handed the keys over to the Custodian. The transcripts were kept in no lockable office cabinet. His office could be accessed by the semi-illiterate cleaner, the respondent, the Secretary and the Principal. Around 28th November, 2014 he received a call from a student who told him the respondent could not find her original transcript but had offered her a duplicate which she had rejected. He returned to the office on 2nd December, 2014 and on checking found that a total of 39 transcripts were missing. Originals and copies were placed in different envelopes. It is the entire envelope of originals which was taken. The Uganda Allied Health Examinations Board has since issued duplicates.

P.W.3 No. 259640 D/Sgt. Oyet Maurice testified that he was allocate the file on 6th December, 2014 for investigation. In his investigations he found that the key to the office of the Academic Registrar is kept by the Warden and it is from where the cleaner picks it. The respondent explained that he did not find the originals and that is why he issued certified copies to the student. The cabinet in which the transcripts were kept was not lockable. Only the Academic Registrar and the respondent knew that it was not lockable.

The Warden of the School testified as P.W.4 Oketch Zacharia and stated that he would keep the keys to the office of the Academic Registrar among others. Student Transcripts were lost during the time the duties of Academic Registrar had been delegated to the respondent. The other persons with access to the office during that time were the cleaner and the Secretary. They would take the keys in the morning and only return them to him in the evening. After the cleaning, the cleaner would leave the key in the Library and the rest could pick it from there. The respondent though had exclusive access to the transcripts.

In his defence D.W.1 Obura Geoffrey, the respondent testified that he did not steal the transcripts. They were of no value to him or anyone apart from the students since they are embossed with the photograph of the holder. The 39 transcripts were later recovered from the office of the Academic Registrar and the students receive them. The charges are instigated by the Principal as part of a pattern of getting rid of him including relieving him of the sports portfolio, the procurement portfolio and placing him under interdiction. The Academic Registrar never handed the scripts to him. He only accessed the office the day the student came asking for his transcript. He spoke to the Academic Registrar who directed him where he would find them but only found the certified copies. The cabinet in which they were kept was not lockable. The Academic Registrar might have misplaced them after receiving the news of the passing of his mother.

The Librarian of the School Mr. Okello Stephen testified as D.W.2 and stated that in November, 2015 the Academic Registrar asked him for assistance in moving items from his office to give way for the renovation of the floor of his office. As they moved the cabinet, he saw an envelope containing documents, on the floor. Upon checking the documents he discovered they were original student transcripts for the year, 2014. He was no aware of the court case when he found them but it is D.W.3 who told him about it when he revealed the discovery to him. D.W.3 Ojok Hudson, a Tutor at the School testified that when D.W.2 found the documents he told him about it. He told him he had handed them over to the Academic Registrar.

In his judgment, the trial Magistrate disbelieved the defence evidence to the effect that the missing academic transcripts had been recovered during November, 2015. He found that all elements of the offence were proved to the required standard save the fact that the respondent was the perpetrator. The office of Academic Registrar was accessed by several members of staff during the material time. The cabinet in which the transcripts were kept was not lockable. The only time the respondent accessed the office was upon notification of the Academic Registrar and in the presence of a student who had come to pick his academic transcript. There was no proof that he stole the transcripts. He was acquitted.

The appellant did not file any ground of appeal and neither did the Principal State Attorney assigned the case appear in court on the day the appeal was fixed for haring. Considering that under section 28 (1) of *The Criminal Procedure Code Act*, unlike a civil appeal which is commenced by a memorandum of appeal, an appeal in criminal case is commenced by a notice of appeal, in order to avoid unnecessary delay, the court went ahead and undertake its duty as first appellate court even without a memorandum of appeal.

Arguing on behalf of the respondent, counsel for the respondent submitted that the appellant failed to file a memorandum of appeal although the State Attorney was served with a certified copy of the record of proceedings and judgment on 6th June, 2018. There is no direct evidence of the respondent taking the transcripts. The prosecution relied on circumstantial evidence whose quality could not sustain a conviction. The office was accessed by several members of staff during the material time. None of the 39 students came to testify that they were never issued with their original academic transcripts.

This being a first appeal, this court is under a duty to reappraise the evidence, subject it to an exhaustive scrutiny and draw its own inferences of fact, to facilitate its coming to its own independent conclusion, as to whether or not, the decision of the trial court can be sustained (see *Bogere Moses v. Uganda S. C. Criminal Appeal No.1 of 1997* and *Kifamunte Henry v. Uganda, S. C. Criminal Appeal No.10 of 1997*, where it was held that: “the first appellate Court has a duty to review the evidence and reconsider the materials before the trial judge. The appellate Court must then make up its own mind, not disregarding the judgment appealed against, but carefully weighing and considering it”). An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, (see *Pandya v. Republic [1957] EA. 336*) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion (see *Shantilal M. Ruwala v. R. [1957] EA. 570*). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (see *Peters v. Sunday Post [1958] E.A 424*).

The elements of the offence of theft are; (i) appropriation of property (ii) belonging to another, (iii) dishonestly without consent or claim of right, (iv) with the intention to permanently deprive that other, (v) by the accused. Appropriation is defined by Lord Roskill in *R v. Morris [1984] AC 320* as an "assumption of any of the rights of the owner." Hence appropriation can take place when the accused has assumed a single right, it need not be all rights of the owner.

The offence of theft involves an unauthorised taking, keeping, or using of another's property. It is committed by a person who has no lawful justification in taking possession of the property in issue. Although appropriation also includes assuming the legal rights of the property where permission was originally granted, or the property had, for instance, initially been acquired honestly, the fraudulent conversion of property of an employer by specified employees who have lawful possession of the employer’s property and whose fraudulent conversion permanently deprives the employer of that property, is instead termed as embezzlement.

One main distinction between theft and embezzlement is the relationship a person has to the money or property that has been taken. When a person has control of or other type of relationship to the property, the more appropriate charge is that of embezzlement. This means he or she is in a position to manage, maintain or use the property that has been misappropriated. When property that has been entrusted to a person through a relationship of trust, also known as a fiduciary relationship, who is an employee, a servant or an officer of the Government or a public body, a director, an officer or an employee of a company or a corporation, or a clerk or servant employed by any person, association or religious or other organisation, is dishonestly taken by that person, he or she commits the offence of embezzlement, not theft because it is a fraudulent appropriation of property by a person to whom it has been entrusted. Under section 19 of *The Anti Corruption Act, 2009* the offence of embezzlement is committed by an employee or officer of the Government or a public body, who steals a chattel, money or valuable security, which is the property of his or her employer, access to which he or she has by virtue of his or her employment and received or taken into possession by him or her for or on account of his or her employer.

That notwithstanding, it is common practice for the prosecution to prove elements of an offence with reliance on inferences drawn from the evidence. The fundamental principle of universal application in cases dependent on circumstantial evidence, is that in order to justify the inference of guilt, the incriminating fact must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. A conviction will be upheld if on the facts proved, no hypothesis consistent with the innocence of the convict can be suggested; if otherwise the circumstantial evidence can be explained reasonably with the innocence of the accused, the conviction and sentence must be set aside.

In general, inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion is no more than speculation and the requisite burden of proof will not be met. The court considers the cumulative effect of separate items of evidence. Taken separately the circumstances of the case may or not lead to an inference of guilt against the accused, but considered cumulatively they may lead to only one conclusion and that is that the accused and no one else who committed the offence. Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined if only because evidence of this kind may be fabricated in order to cast suspicion on another. It is necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

The evidence led by the prosecution revealed that several people had access to the office of the Academic Registrar at the material time. The question is not whether there are sufficient proven facts to draw an inference that one of these persons in fact stole the transcripts, but rather whether it is reasonably possible that one of them may have done so. The important point is for the court to exclude all alternative theories before it can consider any theory proved. There should be sound reasons for excluding every possible rival theory.

On a consideration of all the evidence I think that ability of other members of staff to gain unfettered access to the office is a factor which, at the very least, weakens the inference of guilt. I do not think that this is such a case. For the reasons which I have set out above, the prosecution did not prove its case beyond reasonable doubt. The “circumstantial web” in the present case was equally consistent with the transcripts having been taken by another person. The taking in those circumstances would be consistent with the explanation given by the respondent in his defence and that hypothesis, being a reasonable one, was never ruled out by the prosecution evidence. In all the circumstances I am of the view that the appeal must fail and it is accordingly dismissed.

Dated at Gulu this 13th day of December, 2018 …………………………………..

 Stephen Mubiru

 Judge,

 13th December, 2018.