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based in Kampala. As Depot Manager his major responsibilities included safety of operations in the depot, freight operations, credit control, depot staff supervision and control of the quality of products.

The first appellant and Godfrey Sebumba were among members of staff working directly under the second appellant.

In early May, 1992, Abebe Guibrecht, (PW2) Accounting and Financial Manager of Esso, reviewed returns and or reports from Kampala Depot for the month of January, 1992; He noted some irregularities. As a result Esso carried out detailed investigations for the period 1/1/1991 to April, 1992. Those investigations

allegedly revealed that Esso had lost a lot of its products valued at Shs. 54,000,000/=. Consequently the two appellants and Godfrey Sebumba were arrested and charged with various offences in Makawa Magistrate's Court. In the first count all the three were jointly charged with embezzlement contrary to S. 257 (b) of the Penal Code. In count two the two appellants were jointly charged with the

offence of fraudulent false accounting C/S 305 (a) of the Penal Code. Godfrey Sebumba alone was further charged with four counts of Forgery C/S 326 of the Penal Code. These were counts 4, 5, 6 and 7.

The three were acquitted of the charge of embezzlement but

were convicted of the minor and cognate offence of simple theft C/S 252 of the Penal Code for which the two appellants were each sentenced to imprisonment for 48 months. The appellants were also convicted on the second count of fraudulent false accounting and were each sentenced to 30 months imprisonment. The appellants'

appeals against both the convictions and sentences were dismissed

by the High Court. Hence this appeal.

In his memorandum of appeal to this Court, the first appellant

preferred four grounds of appeal but his counsel, Mr. John Kityo,

abandoned the first ground which was objected to by Mr. Michael

Wamasebu, learned Principal State Attorney, appearing for the state.

Mr. Kityo also abandoned ground three during his submissions.

The second appellant preferred six grounds of appeal but grounds

two and five were abandoned by his counsel, Mr. P. Ayigihugu,

because of objection raised by Mr. Wamasebu.

Because the submissions of Mr. Kityo and Mr. Ayigihugu overlap

we shall consider the two memoranda of appeal together.

The residue of the grounds of appeal by the first appellant

state as follows:

"2. The respondent did not prove

the charge in COUNT 2 beyond

reasonable doubt.

4. The sentence on both count No.

1 and 2 is illegal"

The residue of the grounds in the memo of the second appellant

state that -

"1.

The learned appellate judge erred

in law to dismiss the appeal after

he had held that the trial Magistrate

had shifted the burden of proof to

the appellants.

2.

The learned appellate judge erred in

law to uphold the convictions against

the appellant without evidence to

prove the charge against him.

3.

.....

The subsection is very clear. It prohibits raising grounds of appeal on second appeal to this Court which grounds entail the re-evaluation of the evidence by this Court on second appeal. In our view the ground to which objection is made requires this Court to re-evaluate the evidence as if we are the first appellate Court. We could not do that. We accordingly upheld Mr. Wamasebu's objection and struck out ground two from the memorandum of the

"Either party to an appeal from a Magistrate's Court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law."

Section 337 (1) reads as follows -

We will first consider a preliminary matter by Mr. Wamasebu. He objected to ground two of the memorandum of the second appellant contending that it offended S. 337 (1) of the Criminal Procedure Code in that the ground raised a point of fact. In reply Mr. Ayigihugu submitted that the ground raised a point of law only and was therefore properly before us for consideration. We upheld the objection and promised to give our reasons later. We now give the reasons.

4. The learned appellate judge erred in law in failing to consider the case of the appellant separately and also failed to consider the evidence in respect of each count.
5.
6. The learned appellate judge erred to uphold the sentences imposed on the appellant in view of the fact that he was convicted of simple theft."

second appellant.

We now consider the submissions on the remaining grounds of appeal. The complaints of the 2 appellants as contained in their memoranda and the submissions of counsel broadly stated are that -

(a) The trial Magistrate shifted the burden of proof to the appellants. Although the appellate judge in the Court below accepted that the trial Magistrate misdirected himself on the burden of proof, the judge failed to give effect to this finding.

(b) That since the evidence against the appellant was circumstantial evidence, it was insufficient to found convictions of the appellants.

(c) In particular there was no evidence proving the second count.

(d) That the learned appellate judge erred in upholding the convictions and sentences.

Ground one in the appeal before the learned judge in the Court below was concerned with shifting the burden of proof. Grounds 2, 3, and 6 concerned lack of evidence. These were the substantial complaints.

We find it pertinent to reproduce ground one which states:-

"The trial Magistrate occasioned very serious miscarriage of justice when he shifted the burden of proof from the prosecution to the defence as per page 33 of the judgment."

"It is thus true to say that the quoted observation made by the trial Magistrate in the instant case is a misdirection. He thereby fell into the same error as was in Okethi Okale and Ndege Maragwa above. He first believed the prosecution case and then cast theonus on the appellants to rebut or throw doubt on the prosecution case. On the authorities stated above, that is a wrong approach. A correct approach is to consider the prosecution and the defence cases together. The problem of the trial Magistrate appears to have started on page 25 of his judgment when he said, 'In such regard, when the prosecution established a prima facie case, the accused must raise a reasonable explanation in order to escape the charge against him. '"

The learned judge then made the following observations: -

(1967) EA 543 and Okethi Okale Vs. Republic (1965) EA 555.

of proof as set forth in decisions such as Muriambi Vs. Republic the learned judge rightly referred to the principles on the burden Because of this fundamental misdirection by the Magistrate,

"In defence as herein above explained A1 and A2 never raised a reasonable explanation in order to escape the charge against them."

misdirected himself is the following -

misdirection. Among the passages in which the trial Magistrate who appeared for the respondent in the Court below conceded the of the trial Magistrate. Mr. Mugenyi, the Principal State Attorney, offending passages on the burden of proof contained in the judgment for the appellants drew the attention of the learned judge to the During the hearing of the appeal in the Court below, counsel

Clearly this provision is irrelevant to the criminal charge preferred against the appellants. The trial Magistrate was obviously influenced by the section (which is more appropriate in Civil Cases) and consequently grossly misdirected himself in that he required the appellants to raise a reasonable explanation before they could "escape the charge." He made this fundamental error immediately after he had summarised the evidence in the case and before he had subjected the evidence of any prosecution witness to scrutiny and even before he had decided on the credibility of any witness.

"Whereas desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist....."

The Section states that -

reproduction by the Magistrate of S. 100 of the Evidence Act.

much later in the Magistrate's judgment and was preceded by misdirection quoted by the learned judge and reproduced above came asked himself whether the accused had any defences. The Magistrate's whether the prosecution had proved its case, the Magistrate first by him in the case it surprises us that instead of first asking to any evidence. Since he chose to raise "issues" for consideration That 'issue' was raised before the trial Magistrate had alluded

- (a)
- (b)
- (c) Whether the accused persons have defences against the charge against them."

raised as an issue for decision this -

We should point out that the trial Magistrate's misdirection started much earlier. At page 2 of his judgment the Magistrate

The learned judge clearly accepted the complaint by the appellants that the trial Magistrate had occasioned a miscarriage of justice by in effect requiring the accused to prove their innocence. Notwithstanding that finding on the burden of proof, the learned judge did not state whether or not the ground succeeded and if so what was the effect of the misdirection. With respect we agree with appellants' counsel that the learned judge erred. With respect we do not accept Mr. Wamasebu's submission that this error was cured

"The above statement tends to shift the onus of raising reasonable explanation on the accused once a prima facie case has been established. This can be misleading. The burden of proof in criminal proceedings lies on the prosecution throughout. At the end of the trial, the Court has to consider the evidence before it together. If there is a reasonable doubt as to the guilt of the accused, then he must be acquitted. That doubt need not be created by the evidence or explanation of the accused. It may come from within the prosecution evidence itself. For the above reasons, I find that the trial Magistrate misdirected himself on the burden of proof."

- to observe that -

When referring to the misdirection the appellate judge continued

judgment.

fact that he repeated the same misdirection towards the end of his each accused before he convicted them. This is apparent from the prevented from making a fair assessment of the evidence against to our system of justice the trial Magistrate was obviously fundamental misdirection on the burden of proof which is contrary We cannot but infer that having administered to himself a

by the judge's subsequent statement at page 11 of his judgment

that there was overwhelming evidence against the appellants.

That statement was in any case made after the learned judge had

considered grounds 2 and 3 of the appeal before him, implying thereby

that it referred to those grounds as he had dealt with the first

ground separately. As first Court of appeal, the learned judge

was duty bound to make conclusions in consequence of his re-evaluation

of the evidence and give effect to his conclusions particularly

so as the misdirection was a fundamental one. Accordingly the ~~complaints~~

Ground one of second memorandum of appeal must succeed.

Regarding the grounds on lack of evidence and consideration of

each appellant's case separately, as counsel for the appellants

submitted before us, the learned judge did not point out the over-

whelming evidence against each appellant on each of counts one

and two.

The prosecution called six witnesses, including a handwriting

expert, Apollo M. Ntarirwa (PW6). This witness whose evidence

is normally valuable in fraud cases did not incriminate any of

the appellants. He actually exonerated them.

While a Court is not bound to accept

evidence of an expert witness, there must normally be cogent reasons

for refusing to accept evidence of an expert.

In ground 5 of appeal in the Court below the appellants

complained that there was no evidence to prove theft of property

valued at Shs. 54,000,000/=.

As we understand the case against each of the appellants, the

key prosecution witnesses in so far as the case against the

appellants is concerned were Muyanja (PW1) who was the Operations

Manager, Abebe Geberchwo (PW3) the Accounting and Financial Manager and

PW4, Hobbie Travis Muzeyi, the Manager of a Petrol Station in

Masaka.

The particulars of offence in count one alleged in brief

that the appellants and others between 4/1/1991 and 30/4/1992, stole lubricant oils and greases all valued at Shs. 54m/=.

None of the key witness or any witness for that matter gave details

to prove how Shs. 54m/= was arrived at. A charge of general

deficiency must be supported by evidence. The learned judge observed that PW3 was not challenged on the total of Shs. 54m/= with

respect we think that that is a misdirect on the evidence because

the record shows that when PW3 was challenged in cross-examination

by Mr. Nsubuga Mubiru DW3 replied -

"But we have not broken down
the figures"

The assumptions of PW1, PW3 and PW4 are to the effect that

the appellants together with Godfrey Sebumba must have stolen

the items between 4/1/1991 and 31/1/1992. PW1 and PW3 based their

assumptions on the discovery of what they all called "manipulation

of stock registers and apparent arithmetical errors." The

evidence of PW1 is basically hearsay because it is based on reports

of PW3 and others. Then there was the evidence of PW4 who claimed

that he was made to carry some packaged items by A2 between 25/5/1991

and 30/11/1991 three or four times. He specifically referred to

items mentioned in invoices No. 2968 dated 25/5/1991, No. 1990

date 16/9/91, No. 2098 dated 11/10/91 and No. 4997 dated 30/11/91.

The trial Magistrate listed the amounts on the five invoices.

This amounts to Shs. 2,040,300/= But what is significant here is

that according to PW4's evidence the theft must have occurred

before the end of 1991. But then this conflicts with the audit

reports. Two witnesses, PW1 and PW3, testified that the company's

accounts for 1991 were audited by firms of external auditors called

Price Water House. PW1 suggested that in 1991 there were about three

audits. According to PW3 the auditors made physical checks on stocks

during the actual auditing exercise and yet the auditors did not

mention in their audit reports for 1991 any discrepancies discovered.

When PW3 was cross examined after his recall, he stated that -

"It is not my responsibility to take stock. Monthly stock taking is the duty of the depot Manager, sales invoicing clerk and the accounts clerk. They could be audited on a surprise basis. But we do physical inventory at the end of every year. At the end of 1991 we had Price Water House. These are our auditors and they never reported discrepancies between the records and the physical stock. They never made any complaints to us. They did not tell whether they were satisfied with the stock or not. These external auditor did not discover anything at this stage"

None of the key witnesses explained why the auditors who are experts could not find deficiencies after the physical auditing. This seriously affected PW4's credibility as a witness. The auditors' report therefore supports the appellants who testified on oath that there were at least two audits in respect of the relevant period and nothing wrong was found.

Neither the trial Magistrate nor the learned appellate judge considered this very important aspect of the evidence. Instead the trial Magistrate relied on A3's challenged admission to police by speculating that -

"On this note and holding, I infer that very many lubricants and greases were stolen from the company."

From the passages that follow this speculation by the Magistrate, we are left in no doubt that the appellants were convicted because of "arithmetical errors."

It is unfortunate that defence counsel never made submissions to trial Magistrate before he wrote his judgment. This compounded problems for Magistrate.

On the basis of the auditors report there was no loss during 1991. During the proceedings in the Court below, the evidence on the auditors' report was drawn to the learned judge but he did not comment on it. We think, with respect, that the learned judge erred in that regard.

In their evidence on oath both appellants denied any theft during 1991. Therefore the evidence of PW4 in the context of the case is highly suspect particularly since the gate registers which would reveal any alleged excess taking were not available.

For the period between January 1992 and 30/4/1992 neither PW1 nor PW3 or any other witness pinpointed any of the appellants.

The guilt of the appellants was thus founded on "arithmetical errors." Both PW1 and PW3 and the trial Magistrate repeatedly used the expression "arithmetical errors" in reference to alleged discrepancies and loss. Clearly arithmetical errors could not be a substitute for evidence to prove the charges preferred against the appellants.

We think with respect that had the learned judge sufficiently re-evaluated the evidence as he was bound to do, he would have held that the misdirections of the trial Magistrate occasioned a

raised against them.

them because they had not explained away "the prima facie case" the trial Magistrate relied on "arithmetical errors" to convict. Instead of giving the appellants the benefit of the doubt,

considerable doubt about the guilt of the appellants.

evidence against the appellants raised only suspicion but not

Kippering Co-op. Kaske & Another (1949) 16 RACA 135. Thus the

the prosecution and never shifts to the accused. See R. Vs.

exclusion of any reasonable hypothesis of innocence is always on

which justify the drawing of this inference from the facts to the

hypothesis than that of his guilt. The burden of proving facts

accused and incapable of explanation upon any other reasonable

the incriminatory facts must be incompatible with the innocence of the

order to justify, on circumstantial evidence, the inference of guilt,

Here we would like to restate what has been stated before that in

that the evidence against the appellants was circumstantial.

Both counsel who appeared in the Court below rightly agreed

"arithmetical errors" in entries in the stock books.

there were trainee employees in the depot who must have made the

Further in their evidence both the appellants stated that

miscarriage of justice and would have allowed the appeals.

Again Mr. Kityo and Mr. Ayigihugu submitted that there was no proof that each of the appellants committed the offence in count two. When submitting in the Court below, counsel for the Respondent appears to have conceded this.

In brief the particulars of offence in count two alleged that the appellants on 20th day of January, 1992 falsified documents, i.e., stock sheet records by making entry therein purporting to show that ten cartons of lubricant oils had been purchased from Esso Standard whereas not.

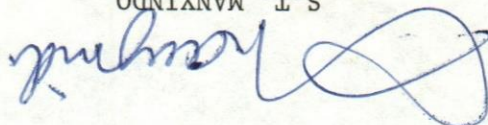
PW3 in his testimony stated that the second appellant was on computer course during January, 1992. He did not say on which days in January, 1992 A2 was at the station on duty. A2 denied preparing any stock sheets. A1 likewise denied writing the sheets in question.

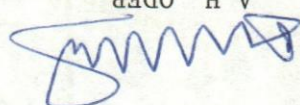
PW6 testified that he could not tell who wrote exh. P.3. Exh. P.3 is a stock sheet dated 20/1/1992 which was relevant to count 2. Since PW6 a handwriting expert, proved that neither A1 nor A2 or both wrote that stock sheet, there was clearly no basis for convicting the appellants on the count of fraudulent false accounting. The speculation by the trial Magistrate that the appellants had the opportunity to make the entries is fallacious. In the circumstances with respect we agree with counsel for the appellants that the conviction on this count was bad. The grounds on lack of evidence must therefore succeed.

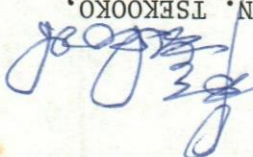
In the result we allow the appeal, quash the convictions set aside sentences.

Before we take leave of this case we wish to express surprise that an important case like this, involving a huge sum of money was left to be prosecuted by the police. We think that the Director of Public Prosecution should have taken over and prosecuted the case. In the event the case was badly investigated and badly prosecuted.

Dated at Mengo this day of 1995.


S.T. MANYINDO,
DEPUTY CHIEF JUSTICE.


A.H. ODER,
JUSTICE OF THE SUPREME COURT.


J.W.N. TSEKOOKO,
JUSTICE OF THE SUPREME COURT.