THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSTICE A.E.N. MPAGI-BAHIGEINE, JA
HON. JUSTICE A. TWINOMUJUNI, JA
HON. JUSITCE A.S. NSHIMYE, JA

CRIMINAL APPEAL NO.70 OF 2008

1. **NUUHU KALYESUBULA**
2. **KATO CHICAGO**
3. **RUTH BARYA……..APPELLANTS**

V E R S U S

UGANDA…….RESPONDENT

[Appeal from judgment and orders of the High Court of Uganda at Kampala (Hon. Justice C.A. Okello, J) dated 1st July 2008 in High Court Criminal Appeal No.70 of 2008]

JUDGMENT OF THE COURT:

This a second appeal from the judgment of the High Court of Uganda sitting at Kampala in which the appellants were convicted of the offence of embezzlement and sentenced as appears below.

The brief background to this case is as follows: the three appellants, Hajji Nuuhu (1st appellant), Kato Chicago (2nd appellant) and Ruth Barya (3rd appellant) were charged before the Chief Magistrate's Court of Buganda Road with the offence of embezzlement contrary to s.268(b) of the Penal Code Act, on one count. All three appellants were convicted of the offence of theft contrary to s.254 (1) and 261 of the Penal Code after the trial court found no sufficient evidence to support the charge of embezzlement. They were sentenced to four years imprisonment (for 1st appellant), and three years imprisonment (for 2nd and 3rd appellants). All the three appellants appealed to the High Court where the court reversed the conviction of theft and convicted them of embezzlement, hence this appeal.

The offence for which the appellants were convicted was committed on several occasions. According to the evidence adduced, the three appellants were employed by the Evatex Co. Ltd, in the case of the 1st and 2nd appellants as loaders/store attendants while the 3rd appellant was a receptionist/sales lady. As loaders or store attendants, the duties of the 1st and 2nd appellants were loading and off loading bales of clothes at the company's stores at Nateete and at the sales office/shop on Nabugabo Road. The 3rd appellant's duty was to open the Nateete store at 8.30 am then close it at 5.00 p.m. and to keep custody of the keys. The work practice was that when bales of clothes were required from Nateete, all the three appellants in the company of their senior officials of Evatex Co. Ltd would travel together to Nateete. On arrival at the store, the house maid to the landlady, Mrs Lamulafu (PW3), who used to keep the keys for the outer gate of the store would open it in the presence of the co-workers. After removal of merchandise, the store and outer gate would then be locked, and the gate key returned to PW3 until the next trip. The company policy or working rule was that no employee of any description whatsoever was permitted to enter the store alone.

Mrs. Lamulafu was however, not aware of this policy with the result that on several occasions, she gave the gate key to the 1st appellant who would either arrive alone, or in the company of the 2nd appellant. Occasionally, the 3rd appellant would be with the two. These visits were either in the early morning or late in the evening. On such visits, the appellants would load and take away some bales of clothes without the knowledge of the top most officials of the company. An audit exercise was carried out which revealed that between January 2006 and December 2006, the company lost 1246 bales of clothes worth shs.200m. During internal investigation into the loss by the company, the three appellants disappeared. Subsequently, the appellants were arrested by the police later and were ultimately charged in court with the said offence.

On the first appeal, the High Court reversed the trial court's conviction of theft to embezzlement on the ground that the evidence adduced by the prosecution supported it.

In this court, the appellants attacked the decision of the High Court on three grounds framed in their joint Memorandum of Appeal, thus:

1. **The trial judge erred in law and infact when she dismissed the appeal.**
2. **The trial judge failed to properly evaluate the evidence on record and thereby came to wrong conclusions that the appellants were guilty of the offence of embezzlement.**
3. **The decision of the trial judge was against the weight of evidence.**

Mr. Stephen Sserwadde, learned counsel for the three appellants in this court, argued the three grounds together. We also find it more appropriate to consider them together just like both counsel did. Mr. Stephen Sserwadde represented all the three appellants while Mr. Wamasebu Asst. DPP represented the respondent.

Mr. Sserwadde counsel for the appellants submitted that the first appellate court had the duty to subject all evidence to a fresh scrutiny and come to its own conclusion but the High Court judge did not do this. The judge held that there was direct evidence implicating the accused persons. However, the evidence was circumstantial. The complainant company had a sale outlet at Nabugabo Road in the City Centre where the appellants as employees brought bales of clothes collected from their store at Nateete. Counsel further submitted that the judge wrongly relied on PW3's evidence in holding that there was direct evidence. PW3 said that she used to see the 1st appellant at times alone or in the company of the 2nd, 3rd appellants collecting bales of used clothes in a store in Nateete. Since this was a duty the complainant had entrusted to the appellants, there was no evidence to show that the collection from Nateete was not authorised by the complainant company. Also there was no evidence to show that the bales collected did not reach Nabugabo store.

In support of his arguments, counsel advanced the following reasons:

(1) The judge did not at all refer to the evidence of DW4 which was in direct contradiction with the evidence of PW5. The judge should have found PW5 to have been telling lies because there was no proof that the clothes off loaded at the home of DW4 came from the company stores. Also, this evidence did not implicate A2 and A3.

(2) Secondly, the trial judge glossed over the evidence of PW4 and the auditor. The auditor told court that he had found 1246 bales missing from the

company, that the company had no proper records of movements of its goods and that there was no record of the number of bales being stored at Nateete. There was also no record of clothes received at Nabugabo from Nateete hence the company systems of checks used was faulty. Counsel concluded by inviting this court to acquit the appellants and quash their convictions and sentences.

In his reply, Mr. M. Wamasebu for the respondent supported the conviction and sentence. Counsel invited this court to only look at points of law or mixed law and fact. He concluded by saying that there was no compelling evidence advanced by the appellants to justify this court to interfere with the findings of the firs appellate court

In the case of **Kifamunte Henry vs Uganda Cr. App. No.10/1997** it was stated that it was the duty of the first appellate court to rehear the case on appeal by reconsidering all the materials which were before the trial court, and make up its own mind. It was also pointed out that except in the clearest of cases, we, as a second appellate court are not required to re-evaluate the evidence like a first appellate court. In our view, the instant case is one of such clearest of cases which make it incumbent on this court to re-evaluate the evidence.

PW1 who was an official of the company testified that the 1st appellant was formally employed by Evatex from 2004 – 2006. His evidence was corroborated by the evidence of two independent witnesses who were not employed by the company but who had had connections with the company and knew the 1st appellant as its employee.

Such was the evidence of PW3 who testified that she had known the 1st appellant as an employee of Evatex for two years. She saw him many times in the company of officials and employees of the company when he collected the gate key for the Nateete store from her. She occasionally saw him escorting containers of goods to the same store. It is evident that it was this status which enabled him to access the gate key from her with no questions raised on the occasions he went to the store in the absence of his fellow employees.

The other witness who knew and dealt with the 1st appellant as an employee was Sulaiman Lule PW2 who testified that he used to buy clothes from Evatex from December 2005 to October 2006, during which time the 1st appellant would carry his purchases to his selling place at Owino. He later made his purchases from the appellant at a stall in Owino, when the appellant informed him that the stall was a branch of Evatex and the 1st appellant was its Branch Manager.

Regarding the employment status of the 2nd and 3rd appellants, they conceded, at trial, that they were employees of the complainant company. In the present case, given the evidence reviewed above, we agree with the findings of the learned appellate judge that the three appellants were employees of the complainant company.

Counsel for the appellants argued that the appellate judge was wrong in relying on the evidence of PW3 as direct evidence to support the fact that all the appellants were seen in the company of each other collecting bales of used clothes in a store in Nateete. That since this was part of their duty, there was no evidence to show that the bales collected did not reach the Nabugabo store. We respectfully disagree with these arguments. Available evidence which we find credible prove that PW3 saw the 1st appellant remove bales of clothes from Nateete over a period of time while PW5 saw him deliver bales of clothes to his sister's home. These two eye witnesses observed the actions of the appellants; they gave direct evidence of the embezzlement and it cannot be treated as circumstantial. Despite the weaknesses in record keeping, the audit report proved the loss of 1246 bales of clothes valued at 202,745,000/=.

PW3 testified further that she used to give the key to the gate to the employees of Evatex as a group and occasionally she gave it either to the 1st appellant alone or when he was in the company of the 2nd and 3rd appellants. Also, the evidence of PW5 shows that the 1st appellant would deliver some of the bales of clothes to his sister's home. In the words of s.268 of the Penal Code Act that are relevant to the case, it says;

> **"Any person who being-**
>
> **a) …….**
>
> **b) a director, officer or employee of a company or corporation;**
>
> **c) ……**

d) ……steals any chattel money or valuable security-

e) being property of his or her employer,

f) ……

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 three years and not more than 14 years."

Considered together, the evidence on record proves that the three appellants were employees of Evatex Co. Ltd and by virtue of their employment status, they accessed their employer's store at Nateete and stole some bales of clothes therefrom. Such actions fit neatly within the wording of section 268(b)(e) and (g) of the Penal Code.

On the strength of the above evidence, we find that the appellate judge properly evaluated the evidence on record and came to a right conclusion that the appellants committed the offence of embezzlement.

We do not propose to interfere with the sentence passed by the trial court against each appellant because the sentences are within the ambit of section 268.

In the result, we find no merit in this appeal which we dismissed accordingly. The conviction and sentence of the 1st appellate court are upheld.

Dated at Kampala this 9th day of February 2010.

Hon. Justice A.E.N. Mpagi Bahigeine
JUSTICE OF APPEAL.

Hon. Justice Amos Twinomujuni
JUSTICE OF APPEAL.

Hon. Justice A.S. Nshimye
JUSTICE OF APPEAL.