THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 182 OF 2010

DR. ISANGA JOSEPH ………………………………………… APPELLANT

VERSUS

UGANDA…………………………………………… ………..RESPONDENT

[An appeal from the Judgment of the High Court of Uganda at Kampala (Anti-corruption Division) Hon. Justice J.B.A Katutsi (J) dated the 13th day of August 2010 in HCT Criminal Session Case No. 001 of 2010.]

CORAM: HON. MR. JUSTICE REMMY KASULE, JA

HON. MR. JUSTICE RUBBY AWERI-OPIO, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGEMENT OF THE COURT

This appeal arises out of the Judgment of His Lordship The Hon. Mr. Justice J.B. Katutsi J at the Anti-corruption Division of the High Court of Uganda dated 13th August 2010.

The appellant was convicted on three counts of embezzlement contrary to Section 19 A (iii) of the Anti–corruption Act and sentenced to 5 years imprisonment.

He now appeals against both conviction and sentence.

The memorandum of appeal sets out four grounds as follows;-

1. ***The learned Judge erred in law and in fact when he considered the prosecution evidence in isolation of that of the defence.***

2. ***The trial Judge erred in law and in fact when he relied on the contradicting evidence of the prosecution witnesses.***

3. ***The learned Judge erred in law and in fact in failure to properly evaluate evidence thus reaching wrong decision.***

4. ***The sentence of 5 years on each count was harsh and excessive in the circumstances.***

The appellant sought orders that the appeal be allowed, the Judgment of the High Court be set aside and he be acquitted and released forthwith.

We observe that the indictment and the proceedings in the court below used the term, "drugs" in reference to human medicine procured by the appellant. However in this Judgment, the court has preferred to use the more universally accepted term "medicine".

At the hearing of this appeal the learned counsel **Mr. Paul Rutisya** appeared for the appellant while **Mr. James Odumbi**

learned Senior Principal State Attorney appeared for the respondent.

Mr. Paul Rutisya argued grounds 2 and 4 together and then grounds 1 and 3 also together.

Mr. Rutisya submitted that the learned Judge misdirected himself when at p.9 of his Judgment he stated that the appellant was to take the Hospital Motor vehicle from Kaabong to Kampala for service only, but ended up procuring medicine from the Joint medical stores which was not the purpose for his travel.

He submitted that the above was not supported by the evidence. That PW1 the District Health officer's evidence in Court clearly indicated that procurement of medicine (drugs) for health centres and the District hospital is a long and very elaborate process. That medicines are procured through a District committee and that the process of procurement had been properly followed and there had been no complaint in this regard.

He submitted that the appellant travelled to Kampala to National Medical Stores and to Joint Medical Stores to procure medicine and also to have the motor-vehicle he was using repaired. This was known to the District Chief Administrative officer (CAO) who had authorized his travel for that purpose and had approved and released the necessary funds.

The evidence on record also clearly indicated that the appellant had travelled to Kampala to do both. He submitted that when the Motor vehicle was taken for repair, it was detained for some time.

It was as a result of the detention of the Motor vehicle by the garage for repairs that the appellant stayed longer in Kampala.

Counsel thus contended that the learned Judge therefore erred when he found that the sole objective of the appellant's trip to Kampala from Kaabong was to service the Hospital Motor Vehicle.

According to counsel, upon completion of the procurement of the medicine in Kampala, the appellant took delivery of the medicine and delivered the same to Karenga Health Centre in Karamoja and the consignment, he submitted, was duly received.

The learned counsel submitted further that when the consignment was disputed, the appellant was kept away from its verification process by the Police and District Authorities and as such he was unable to verify that the medicines inspected by the Police were the same as the consignment he had delivered. Thus, counsel argued that there was a breach of the chain in identifying the medicines bought and delivered by the appellant.

Therefore there was no evidence to establish that the medicine inspected by the District Authorities were the same as those procured and delivered by the appellant.

Counsel contended that the evidence relied upon by the trial Judge to convict the appellant was weak and contradictory. The evidence of PW1 contradicted with that of PW5, the Acting Medical Superintendent at Kaabong Hospital on material facts. He submitted that the Judge relied on the evidence of a witness who had been called a liar by other witnesses for the prosecution.

Lastly, learned counsel submitted that the sentence of 5 years imprisonment was harsh and excessive in the circumstances of the case. The appellant was a young professional who had scarified to remain and serve in Karamoja with the area's harsh conditions unlike other professionals who refuse to do so.

In reply the learned Senior Principal State Attorney Mr. Odumbi supported both the conviction and sentence imposed by the learned trial Judge.

He submitted that the learned trial Judge had properly evaluated the evidence and had come to the correct conclusion.

He rejected the submission of learned counsel for the appellant that the learned trial Judge had considered the prosecution evidence in isolation of the defence. He submitted that the learned trial Judge had in fact considered the evidence as a whole.

He questioned why the appellant had procured medicine which he did not have to deliver. This is because after having taken delivery of the medicine the appellant then dumped it at his

residence instead of taking it to Kaabong. He asserted that the appellant had admitted himself that he had the option of leaving the medicine at the Government stores over night or even longer if he did not have to take them immediately.

He contended that the trial Judge properly evaluated the evidence, when he considered the whole procurement process. The learned Judge found that the money used to procure the medicine belonged to Kaabong Hospital, but the appellant used that money to procure medicine for Karenga Health Centre which Centre had not requisitioned for the medicine. The medicine could only be procured by the health unit that required the said medicine.

Respondent's counsel emphasized that the appellant procured the medicine on 1st September 2009 and again on 16th and 23rd October, yet nobody knew where that medicine procured on the 1st September went. PW6 Kadaza, a clinical officer at Karenga Health Centre and PW7 Onek Simon Peter denied ever receiving the consignment. They both denied ever procuring the said consignment. Thus the evidence available showed that medicine was procured only by the appellant who delivered the same on 14th November at Karenga Health Centre.

Counsel for the respondent contented that if the appellant had left Kaabong on 15th, and was in Kampala on 16th where he remained until 26th, then he could not have procured the medicine

on 23rd and 26th given all the procedures he had to go through in the process of procuring the medicine.

Counsel pointed out that PW6 Bangonza had testified that the consignment delivered by the appellant was accompanied by invoices dated 16th and 23rd October 2009, but nobody had requisitioned for those consignments.

Counsel argued that according to the evidence of PW11, a sales officer at Joint Medical Stores, the procurement of the medicine had been initiated by e-mail from the appellant, which had been sent on 21st October. The order was confirmed on 23rd and delivery was made to the appellant on 26th. This consignment was delivered to Karenga health Centre on 14th November 2009. Counsel then concluded that the above was circumstantial evidence which proved that the appellant intended to take the medicine for his own use, more so as, although the invoices accompanying the consignment were in the name of Kaabong Hospital, the appellant had delivered the consignment to Karenga Health Centre.

Finally he submitted that PW10's evidence confirmed that the medicine procured from National Medical Stores was not the same as the one delivered by the appellant at Karenga Health Centre.

In respect to the sentence, counsel for the respondent contended that embezzlement was a serious offence and that the sentence

imposed by the learned trial Judge was appropriate in the circumstances.

In reply Mr. Rutisya maintained that the appellant never procured medicine by e-mail. That he did not steal medicine from the Joint Medical Stores on 23rd October as he was not at Joint Medical Stores on that day. The consignment procured by the appellant was delivered and was used by the health centre. The quality of the medicine was never brought into issue at the trial. The consignment of the medicine was inspected while it was at Kaabong after the same had been delivered 3 weeks earlier to Karenga Health Centre and the inspection was done in the absence of the appellant. Counsel reiterated his earlier prayer to allow the appeal, acquit the appellant and release him forthwith.

We have listened to the submissions of both counsel. We have also perused the record before us.

This is a first appeal. The duty of this Court as a first appellate court is now well settled. It has a duty to re-appraise the evidence and draw its own inferences of fact. This duty is set out in **Rule 30** of the Rules of this Court which stipulates as follows:-

> "***30***
>
> ***Power to re-appraise evidence and to take additional evidence.***
>
> ***(1) On any appeal from the decision of the High Court acting in exercise of its original jurisdiction, the court may-***

(a) Re-appraise the evidence and draw inferences of fact.

This duty was clearly set out in ***Pandya v R [1957] EA 33*** by the defunct ***Court of Appeal for Eastern Africa*** when it quoted with approval the decision of the Court of appeal of England in ***Coghlan v Cumberland [1898] 1 Ch. 704*** which had put the matter in part as follows;-

> "***Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the Judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the Judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the Judgment is wrong……"***

Justice Joseph Mulenga JSC in ***FR. Narsensio Begumisa and Others versus Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002)*** (unreported) put it thus:-

> ***"It is a well settled principle that on a first appeal the parties are entitled to obtain from the appeal court its own decision on***

issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses it must weigh the conflicting evidence and draw its own inference and conclusion"

We shall therefore proceed to reappraise the evidence and draw our inferences.

The appellant was charged with the following offences.

<u>Count one</u>

<u>STATEMENT OF OFFENCE</u>

EMBEZZLEMENT C/S 19 (a) (iii) of the Anti Corruption Act No.6 Of 2009.

<u>PARTICULARS OF OFFENCE</u>

<u>Dr. Isanga Joseph</u> on the 16th day of October 2009 at Joint Medical stores (JMS) in the Kampala District being employed by Kaabong District as a Medical Officer stole drugs vide Tax Invoice N0.0038635 valued at Shillings 6,921,730, the property of his employer, to which he had access by virtue of his office.

Count two

STATEMENT OF OFFENCE

EMBEZZLEMENT C/S 19 (a) (iii) of the Anti Corruption Act No.6 Of 2009.

PARTICULARS OF OFFENCE

***Dr. Isanga Joseph** on the 23rd day of October 2009 at joint Medical Stores (JMS) in the Kampala District being employed by Kaabong District as a medical Officer stole drugs vide tax Invoice No. 0038635 valued at shillings 3,856,193 the property of his employer, to which he had access by virtue of his office.*

Count three

STATEMENT OF OFFENCE

EMBEZZLEMENT C/S 19 (a) (iii) of the Anti Corruption Act No.6 Of 2009.

PARTICULARS OF OFFENCE

***Dr. Isanga Joseph** on the 1st day of September 2009 at Joint Medical store (JMS) in the Kampala District being employed by*

Kaabong District as a medical officer stole drugs vide Tax Invoice No. 0034351 valued at Shilling 12,208,653 the property of his employer to which he had access by virtue of his office.

To prove its case the prosecution at the High Court hearing called 16 witnesses. The appellant testified on oath but called no other witnesses. At the end of the trial the learned trial Judge was satisfied that the prosecution had proved its case beyond reasonable doubt and convicted the appellant on all the counts. The appellant then appealed to this court on the grounds, already set out above.

The grounds of appeal as set out herein are too general and appear to offend the provisions of **Rule 86** of the Rules of this court. The grounds of appeal do no set out concisely the grounds of the objection. It is not enough to simply state that the prosecution evidence was considered in isolation of the defence or that the evidence relied upon by the trial Judge was contradictory. The appellant must be precise and specific. See ***Katumba Byaruhanga versus Daniel Kyewalabye Musoke; Court of Appeal Civil Appeal No.2 of1998.***

We shall nonetheless proceed to consider this appeal, the above notwithstanding, as it is a criminal matter that relates to

fundamental human rights, that is the right to liberty and the right to a speedy trial.

A close scrutiny of the Judgment of the trial court reveals that the Judge did consider together, and not in isolation of each other, the evidence of both the prosecution and that of the defence. With all due respect to learned counsel for the appellant, we are therefore unable to find that the learned trial Judge considered the evidence of the prosecution in isolation of that of the defence.

Ground one of the appeal therefore fails.

Ground 3 of the appeal faults the learned trial Judge for having failed to properly evaluate the evidence.

The learned trial Judge at page 8 of his Judgment properly set the issue before court for resolution when he stated that:-

> ***"What is in dispute is whether he stole the drugs. Prosecution says he did, accused says he did not. It is an oath against an oath"***

The evidence therefore required to prove the offence must have related to stealing of the medicine and embezzlement of money.

In respect of the evidence relating to the procurement process the learned trial Judge noted as follows:-

> ***"Dr. Kisambu PW1 was at the mentioned time working as the District Health Officer for Kaabong District. He gave a clear and detailed***

> ***exposition of the procedure adopted before drugs are procured. In brief it is as follows. The stores assistant makes a drug order in comparison to what has been consumed and what is the balance in the store. When an order is made a Therapeutic Committee composed of officials from each department of the hospital or health unit sits to vet the order. Adjustments will be made as deemed necessary. A requisition for the funds is made which is attached to the order and submitted to the responsible officer. This is the order that is taken to either the Joint Medical Stores of National Medical Stores as the case maybe. In the case before the court this procedure appears to have been jettisoned by accused to the winds. In his evidence the accused stated that he received reports from lower level health units to this effect that the drugs were dwindling fast and as a good manager he requisitioned for travel allowance to go to Kampala to procure the required drugs to save lives.”***

With all due respect to the learned trial Judge, before evaluating the evidence in this regard, he seems to have made up his mind when he immediately stated as follows:-

> “***On the face of it a good idea. But beneath this Patina of seemingly innocence lies a scam of planned fraud.”***

The evidence in respect of the process of procurement of medicine in Kaabong District was set out well by prosecution witnesses.

At page 23 of the proceedings, the state prosecutor put the following question to PW1. Dr. Kisambu James, a medical officer for Kaabong District.

> "***would you please tell court the ideal procedure of procuring drugs? How would it be."***

The witness then went on to describe the procurement process as follows;-

> ***"A stores assistant initiates a requisition depending on the requirement. The requisition is made when the stock remaining in the store can last up to three months. The order is considered by the Therapeutic committee for the Hospital and for the Health Centre. The medical superintendent makes a requisition for funds to the Chief Administrative Officer. The Chief Administrative Officer issues a cheque to Joint medical Stores or to the National Medical Stores. The responsible officer then procures the medicine which are delivered to the stores together with invoices and verified."***

The same witness went on to state that the medical superintendent was the officer in charge of procuring medicine.

In cross examination the same witness, stated that from August 2009 the appellant was effectively the medical superintendent in Kaabong Hospital, the substantive holder of the office having absconded from office. Then he was the one who recommended that the appellant holds that office in the interim. He stated that the appellant executed the duties of the medical superintendent and that this fact was known by the entire District Administration. He further testified that for several months prior to the incident of 1st September 2009, the appellant actively travelled to Kampala procuring medicine and bringing it to Kaabong with the full knowledge of the District authorities. And that these procurements were not only known to the District authorities but were also approved by them.

In his evidence PW4 the Chief Administrative Officer does state that the appellant was authorized to travel to Kampala to service the Motor vehicle only. Indeed in his examination in Chief he stated that his testimony was in respect of **"the issue of Dr. Isanga (the appellant) having delayed to deliver drugs after having got it from medical stores"**

In examination in chief the Chief Administrative Officer went on to state as follows;-

> ***"That it came to my notice that some drugs were got but they have not reached the station as expected. The first consignment was released on 16th October, the other on 26th and the fact that it had not reached there it is fatal to the district, tantamount to theft, sabotage of Government programs and criminal in nature."***

The same witness went on to state in cross examination that the procurement procedure in this particular case was followed. That he authorized Dr. Isanga to travel to Kampala. That he authorized the Motor vehicle to leave the District with a driver, and authorized fuel and allowances for the staff.

He also stated that the appellant had travelled on a number of occasions to Kampala to procure drugs before the incident, the subject matter of this appeal, with PW4 the Chief Administrative Officer's knowledge and authorization.

We have not found any evidence to hold to the conclusion that the appellant was only authorized to take the Motor vehicle to Kampala for service as held by the learned trial Judge.

Indeed we find it implausible that a medical superintendent would be sent to Kampala by the District Administrator just to have a Motor vehicle serviced. With all due respect to the learned trial Judge, we find that he erred when he held that the appellant's initial intention of leaving Kaabong was to have the Motor vehicle

serviced and that instead of servicing the vehicle he rushed to procure medicine which he later dumped in his garage, something that was sinister.

It appears to us from the evidence on record that the reason the appellant left Kaabong to Kampala was to procure medicine and to service the Motor vehicle.

In his testimony PW4 Mr. Oloka, the Chief Administrative Officer, stated that the medicine procured by the appellant was in fact used soon after delivery because in his own words;-

> ***"The health officer in charge told us there was shortage of drugs in the health unit. Could you allow us to use them? I said go ahead"***

The authority to use the medicines was made whilst this matter was under Police investigation. This seems to underline the fact that the medicine was urgently needed by the health unit. This also seem to corroborate the appellant's testimony that Karenga health unit required the medicines urgently, hence the procurement.

What we find more pertinent is what actually transpired when the appellant and his driver PW9 travelled to Kampala.

The appellant testified that he travelled to Kampala on 15th October 2009 and he went straight to Joint Medical Stores (JMS) where he submitted an order for medicine for Karenga Health Centre.

He could not take delivery of the same as it was already late, at about 4 P.M.

That he went back to the Joint Medical Stores the following day of 16th October 2009, and took delivery of the consignment.

After taking delivery of the medicine, he instructed his driver to take him to his residence in Ntinda, Kampala, where he dropped the medicine and the driver took the Motor vehicle for servicing at a Motor Garage known as Italian Cooperation.

The medicine was left at his residence presumably because the Motor vehicle was being taken for repair. The consignment of the medicine was off loaded from the Motor vehicle and stored in a 'garage' at the residence of the appellant. The learned trial Judge seemed to have made a finding of fact that the garage where the consignment was off loaded was a place unsuitable for storage of medicine, when at page 9 of his Judgment, he stated as follows:-

> "***Human drugs were deposited of all places in a garage by a man who boasts of being a good manager and there to save lives, and who in the same breath admits depositing human drugs in a garage used to garage his vehicles."***

There is no evidence whatsoever that the garage was unsuitable for storage of medicine. It cannot be presumed that every garage is a place unsuitable for storage of medicine. This is a question of fact that required proof. Apparently no such proof was provided.

PW10 the Pharmacist who inspected the consignment did not find them to have been affected in anyway by the storage nor did he find them unsuitable for human use. With all due respect to the learned trial Judge, he misdirected himself on this issue of fact.

The appellant testified that when the Motor vehicle was taken for service, it was found that major repairs were to be undertaken which required more time. In the meantime the consignment remained at his residence in Ntinda in his garage. This was an act of a good manager.

The vehicle was not ready until 23rd October 2009. He could not travel to Kaboong there and then for 23rd was a Friday and replacement of tyres was done on Saturday 24th October 2009. On the 26th of October he received a call from the Hospital driver one Mr. Namuya Joel that he Namuya had been instructed to use the Motor vehicle to carry Polio vaccines to Karamoja.

On this particular issue Dr. Kisambu PW1 testified as follows:-

> ***"That time as I said we had a polio campaign and the vaccines for polio delivered to Kaabong were not enough so I contacted UNEPI to send more vaccines and they had***

> ***said they had no transport. So I said is it possible that I could come and pick the vaccines? They said yes and that is one of the reasons to why I came to Kampala."***

He then went on to state that:-

> ***"I came to Kampala for many things including taking polio vaccines. I called Dr. Isanga and I said I want the vehicle because we have a national program that we were supposed to coordinate with Kenya, Sudan and Uganda and I think it is urgent so there is no way we can postpone. So whatever you are using the vehicle for give it to me. I need to take vaccines. However when I brought the vehicle to Entebbe to load the vaccines I found there was a doctor who came to assist us to vaccinate had taken the vaccines therefore I took other material for the vaccination."***

He went on further to testify that after loading the vaccine material on the Motor vehicle that was being used by the appellant, he and the appellant travelled straight to Kaabong and were engaged in the vaccination campaign. That the Motor vehicle the appellant had used was required to be used in the vaccination campaign.

Namuya Joel PW9 denied having carried the vaccine materials and gas cylinder to Kaabong on the return Journey. However, his evidence does not seem to be credible as it contradicts with that of PW1, Dr. Kisambu and it was never relied upon by trial Judge.

The appellant testified that the driver was to travel on 27th October 2009 and travel back to Kaabong with the appellant the next day. The appellant states that the above was confirmed by Dr. Kisambu. On 28th October 2009 the appellant and Dr. Kisambu loaded vaccine supplies and drove to Karamoja.

From 28th October to about 12th November the appellant was carrying out activities related to the Polio vaccination campaign in Kaabong District. This is also confirmed by PW1 Dr. Kisambu.

On 13th November the appellant travelled back to Kampala, picked the medicine and dropped them at Karenga Health Centre. The consignment was delivered to Mr. Onek Simon Peter and Mr. Badaza Mathias.

On 15th of November 2009 the appellant was arrested by the Police. He was subsequently charged and convicted as earlier set out in this Judgment.

From the evidence on record what seems to have transpired is that, while the appellant was in Kampala another procurement process was stored in Kaboong Hospital.

This process was initiated by Dr. Sharif Nalibe PW5 who at the time worked at Kaabong Hospital under the appellant. It appears that he was in charge of the Hospital in the absence of the appellant. Dr. Nalibe in his capacity as the Acting Medical Superintendent instructed PW2 Mr. Ayolo Alex Alinga, a store keeper at Kaabong Hospital to go to Kampala and procure medicine from Joint Medical stores.

As already noted earlier in the Judgment the substantive Medical Superintendent had absconded from duty. The appellant was the Acting Medical Superintendent. Below him was Dr. Nalibe Sharif who was acting in the absence of the appellant at Kaabong Hospital.

PW2 stated that he went to Kampala to procure medicine from Joint Medical Stores on 3rd November 2009 for Kaabong Hospital. He found that the money on the Hospital account with Joint Medical Stores was not sufficient to cover his order. This was unbelievable to him, indeed, as the records and the information he had indicated that the Hospital had sufficient funds on its account with Joint Medical Stores. Further inquiry led him to find out that the funds for Kaabong Hospital had been used by the appellant on 16th October 2009 to procure medicine for Karenga Health Centre.

It appears he reported back to Dr. Nalibe without crosschecking with the appellant. Dr. Nalibe investigated the matter further and in fact ascertained that not only had the appellant procured

medicine from Joint Medial Stores for Karenga Health Centre using the funds on the account of Kaabong Hospital but the appellant who was by then back in Kaabong with the vehicle he had traveled with, had not delivered the said consignment to Karenga Health Centre. This matter was immediately reported to the Chief Administrative Officer. The Chief Administrative Officer appears to have then set into motion criminal investigations against the appellant.

The investigations did correctly ascertain that the appellant had indeed procured the medicine from Joint Medical Stores, for Karenga Health Centre using the funds on account of Kaabong Hospital. That the said consignment had at the time not been delivered to Karenga Health Centre. It later transpired that the consignment had been delivered much later.

All this time there was no attempt by the Chief Administrative Officer and the other District Authorities to inquire from the appellant an explanation. It appears that there was rivalry and or misunderstanding between Dr. Nalibe PW5 and the appellant for obvious reasons. Whatever the case, the appellant ought to have been asked to give his side of the story before commencement of criminal investigations.

PW5's testimony contradicts with that of PW1on material facts. Instead of making a proper inquiry, the Chief Administrative Officer PW4 relied on Dr. Nalibe's information. Dr. Nalibe does not

appear to have been a credible witness. In any case his evidence was largely hearsay.

The learned trial Judge found that when the consignment that was delivered at Karenga Health Centre was inspected by PW10 a 24 year old Pharmacist named Mpata Jerome Owagage, it was ascertained that the generic names of the medicines delivered by the appellant matched those of the consignment procured from Joint Medical Stores. However, that the brands of the consignment inspected by the witness did not match the brands of the consignment procured at Joint Medical Stores.

The learned trial Judge then concluded that the appellant had procured medicine of good quality from Joint Medical Stores and substituted the same with cheap brands and that the consignment delivered by the appellant at Karenga Health Centre was not the same as that procured from Joint Medical Stores by the appellant.

PW10's evidence that the medicine delivered by the appellant was not that, that had been procured from Joint Medical Stores because Joint Medical Stores procures medicine from specific manufacturers is hearsay. This witness stated in his examination in-chief that he got to know of that fact from his conversation with the General Manager of Joint Medical Stores.

With the greatest respect to the learned Judge, the consignment inspected by PW10, was inspected in the absence of the

appellant. There is no evidence on record to indicate and ascertain that the medicine inspected by PW10 was the same as that delivered by the appellant. The appellant had been kept out of the whole exercise. The presence of the appellant at the time of inspection was not only desirable as stated by the learned Judge but was mandatory. This was a criminal investigation and the consignment constituted exhibits.

Not only was the chain of exhibits broken in the process of investigations but the exhibits themselves were disposed of before the trial.

The trial Judge's findings that the consignment inspected by PW10 was the same as that delivered by the appellant was not based on any evidence.

Therefore, this fact was never proved beyond reasonable doubt. According to the learned trial Judge, it was his finding that the delivery notes were prepared on dates different from the dates as they appear on the indictment. This fact however, was not resolved in favour of the appellant.

There is no evidence that the appellant on 23rd October 2009 was at Joint Medical Stores and that he stole medicine there from as set out in the indictment which is set out earlier in this Judgment.

The evidence of PW4 set out earlier in this Judgment confirms that the District did in fact use the whole consignment procured and

delivered by the appellant, the evidence of PW10 notwithstanding.

The above being the case, then the offence of embezzlement could not stand as set out in the indictment. The consignment was not lost or put to use by the appellant personally for his personal gain or advantage. It was used by the District. It may as well have been that cheaper medicine was delivered but nonetheless the consignment was delivered and used by the District.

As already stated above, the question of quality or delivery of different brand of medicine from those supplied by Joint Medical Stores was never proved beyond reasonable doubt. No one from the Joint Medial Stores testified to the effect that the medicine in question was not the one that was supplied to the appellant.

We find that the District of Kaabong did not lose any money, as the medicine was procured and used by the District.

We find that the appellant did not embezzle the sums of money set out in the indictment.

Even if we had found, which we did not, that the appellant had delivered cheaper brands of medicine different from those procured from Joint Medical Stores, we would still have dismissed the charges as set out in the indictment.

In that case the amount lost would have been the difference in prices between the cost of medicine at Joint Medical Stores and that of the cheap brands delivered, and not the total cost of the whole consignment.

The prosecution in that case would have preferred other charges against the appellant such as causing financial loss and or abuse of office. The prosecution never did this.

It appears to us that this is a case in which the investigators came to the conclusion as to the guilt of the appellant even before investigations had begun.

We accordingly conclude that proof was not beyond reasonable doubt and that the trial Judge did not properly evaluate the evidence on record.

We therefore find merit in this appeal.

We hereby allow this appeal and make the following orders:-

(1) The Judgment of the High Court is hereby set aside and substituted with the Judgment of this Court.

(2) The appellant is acquitted of all the counts he was charged with as none of those counts was proved against him beyond reasonable doubt

(3) The conviction of the appellant is hereby quashed.

(4) The sentence of imprisonment to a term of five (5) years is hereby set aside.

(5) It is ordered that the appellant be set free forthwith.

(6) It is further ordered that any bail money deposited in Court by the appellant be refunded to the appellant forthwith.

Dated at **Kampala** this **1**st day of **July** 2014.

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HON. MR. JUSTICE REMMY KASULE

JUSTICE OF APPEAL

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HON. MR. JUSTICE RUBBY AWERI-OPIO

JUSTICE OF APPEAL

HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL