

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT
KAMPALA**

CRIMINAL APPEAL. NO.01/2011

**TWINE
ACCUSED**

NABOTH::

VERSUS

**UGANDA::
PROSECUTOR**

**BEFORE: HON.LADY JUSTICE CATHERINE
BAMUGEMEREIRE**

J U D G M E N T

(Arising out of the Judgment of Susan Abinyo Magistrate Grade
One sitting at Anti Corruption Division Kololo on 2.02.2011)

This appeal arises out of the Judgment of Magistrate Grade One
Susan Abinyo dated 2.02.2011.

The brief facts of this case were that in 2006 the Appellant was
Headmaster of Kabashwere Primary School. He had been posted
to that school on promotion. Upon arrival he found the position
of Deputy Headmaster vacant. Consequently, the Appellant made
a request to the District Education Officer to fill the vacancy. The
Senior Personnel officer in the District a one Tayebwa, (not in
any way connected to Appellant's counsel) promised to appoint a
Deputy Headmaster. After a while the Appellant received
communication to the effect that Herbert Muhangi had been
appointed Deputy Headmaster although he would report on duty
in due course. As it were, the Deputy never arrived. The
Appellant Kept pressing for the arrival of his Deputy but it never

materialised. In June 2006, the name of one Herbert Muhangi appeared on pay roll with a sum of Uganda Shilling four million (UGX 4,000,000) against it. The Appellant alerted PW1 the senior personnel officer of Mbarara District a one Jane Tayebwa. In response, the Appellant was instructed to withdraw the money and take it to PW1 who would in turn pass it on to the deputy to help him settle down. The Appellant alleged that the he obliged and withdrew the money from the school account and handed it to PW1 who on receipt of the money gave him UGX 300,000 in appreciation for the good work. The Appellant returned to school but the deputy never came. Each time the Appellant raised a query about the arrival of the Deputy he got the same response; the deputy was on the way. The Appellant further alleged that whenever the salary of this Muhangi was on pay roll the Appellant would withdraw the money and pass it on to the senior personnel PW1 but still the deputy never came.

When the requests for a deputy increased the name of the Muhangi was deleted from pay roll. It later turned out that one Muhangi never existed after all. In the meantime, the Appellant continued to file monthly returns and on each occasion, Muhangi appeared as one of the teachers. Subsequently the Appellant was arrested and charged with three counts of Embezzlement contrary to s.19 of the Anti Corruption Act of Uganda 2009 (ACA) and Abuse of office contrary to s.11 of the ACA. The Appellant was tried and convicted of both offences and sentenced to imprisonment for one year or in the alternative a fine of Uganda Shillings One Million (UGX 1,000,000/=). He opted to pay the fine. But the Appellant was not satisfied with the judgment, conviction and sentence and appealed against both conviction and sentence.

The memorandum of appeal in this case contained six grounds of appeal as listed below:

1.The Learned Trial Magistrate erred in law and in fact-when she held that the accused failed to discharge the burden to prove that he handed over the money he withdrew to the senior personnel officer hence he stole the said money.

2. The Learned Trial Magistrate erred in law and in fact-when she held that the onus lay on the accused to prove that he handed over the money PW1 and he failed to discharge the burden satisfactorily.

3. The Learned Trial Magistrate erred in law when she held that Prosecution discharged the burden of proof beyond reasonable doubt on both charges of Embezzlement and Abuse of Office.

4. The Learned Trial Magistrate erred in law and in fact-when she held that the accused's act was arbitrary and prejudicial to the interests of the employer.

5. The Learned Trial Magistrate erred in law when she held that the accused abused the authority of his office because of having access to the payroll.

6. The sentence of a fine 50 currency points on each count and 6 months imprisonment in default was excessive in the circumstances of this particular case.

Mr Tayebwa for the Appellant stated that the six grounds of appeal could be combined and disposed of by arguing ground no.1.

In his opening argument, Mr Tayebwa stated that it was erroneous to presume that the Appellant withdrew money for himself and that he thus committed the offence of Embezzlement contrary to s.19 (1) of the ACA. Counsel further argued that the explanation given by the appellant was reasonable and credible. The Appellant had explained that he passed the Deputy Headmaster's salary to PW1, Tayebwa Jane. Counsel for appellant further argued that it was erroneous for the court not to evaluate the evidence of both sides before pronouncing itself on who it believed. He contended that the whole Judgment did not show evidence of PW1's testimony being weighed against the appellant's evidence. As a consequence the key issue as whether the Appellant handed the money to a personnel officer and if so, if the said personnel officer actually received the money remains unresolved. Counsel argued that there was a reasonable doubt as to whether he stole the money and that if court had directed itself properly to the law and the facts it ought to have found in favour of appellant.

In reply Mr Senoga for the State submitted that in absence of any evidence provided to show that the Appellant passed on the Deputy's salary to Tayebwa and that Tayebwa remitted a portion of the money back to the Appellant, it was reasonable for the Court to infer that the appellant stole the money. In addition State Counsel submitted that issues of who posted the ghost teacher or whether PW1 signed the transfer letter were irrelevant. He further argued that even if the transfer letter allegedly signed by Tayebwa had been in issue prosecution had provided sufficient evidence through expert witnesses to confirm that Tayebwa did not forge the document in question. In his view the expert evidence had neither been challenged nor

contradicted. He therefore invited court to find that the expert evidence was persuasive.

It is the duty of this court as a first appellate court to subject the evidence on record to fresh and exhaustive scrutiny weighing conflicting evidence and drawing its own conclusions from it. In doing this I am cognisant of the fact that I did not have the benefit of observing the witnesses testify first hand and I do take that limitation into account. See the case of **Pandya v R 1957 EA 336** and that of **Kifamunte Henry v Uganda Supreme Court Criminal Appeal No.10 of 1997.**

Having perused and scrutinised the lower court record and given careful consideration to the arguments for and against the Appellant I shall start by addressing myself to ground number one of the appeal.

Ground No. 1 which in my view could have been phrased more succinctly states as follows:

“ The Learned Trial Magistrate erred in law and in fact when she held that the accused failed to discharge the burden to prove that he (***The Appellant***) handed over the money to the senior personnel officer which he (***The Appellant***) withdrew from the school account and that hence he stole the said money.”

The crux of the matter in Ground No.1 relates to principles governing the burden of proof in criminal matters. I will therefore start from the basics. In the case of

Okethi Okale and others v Republic [1965] 1 EA 555 it was held and rightly so in my view, that

‘in every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous

and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches

And further that

'The burden of proof in criminal proceedings is throughout on the prosecution, and it is the duty of the trial judge to look at the evidence as a whole.'

The above principles echo those laid down in **Woolmington v DPP 1935 AC 462 HL** where it was held by the Lord Chancellor Viscount Sankey, as he then was that,

'Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt...If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of ...common law ... and no attempt to whittle it down can be entertained.'

Notwithstanding the well laid out cardinal principles above, the learned trial magistrate stated as follows: I will quote page 36-37 of the Judgment.

'The accused in defence denied that he did not create the fictitious teacher on the payroll but accepted to have withdrawn the money advanced to the said fictitious teacher for the months of June, July and August 2004 and handed over to PW1 the then Senior Personnel Officer upon her instructions to do so. It is

trite law that the burden of proof lies on the person who alleges given facts and wishes court to believe on the existence of those facts. The accused failed to discharge that burden to prove that he handed over the money he withdrew ... to PW1.

...The accused does not deny in is defence but stated that he handed over the money to PW1 ...The onus lay on the accused to prove that he handed over the said money to PW1 which (onus *my addition*) the accused failed to discharge.'

With respect to the learned trial magistrate shifting the burden of proof from the prosecution to the accused was erroneous in law. By placing the burden on the appellant to prove a fact and his innocence the trial magistrate reversed a fundamental principle of criminal law and procedure. The burden of proof in criminal proceedings lies throughout on the prosecution and this burden does not shift. In addition I find that if the trial magistrate had properly evaluated the evidence and law in this case she would have found that sufficient doubt was raised by the appellant. The question of fact here which remains unanswered is who took the money which was paid to a ghost teacher? The Appellant stated that he handed over money to Senior Personnel Officer. But the Personnel Officer denied receipt of any money. That created a serious doubt about the money trail in respect of this case. If court had directed itself properly to the facts it ought to have found that the Appellant appeared not to have acted on his own but rather on behalf of or in consonance with others. It would not have been unreasonable to reach a conclusion that either the personnel officer or a person working for or on her behalf received the money in question.

Clearly PW1 was in charge of pay-roll and in charge of recruitment, posting, and transfer of teachers. It begs the

question as to how a fictitious person would be appointed and transferred to the Appellant's school with an unusually and suspiciously huge salary which then disappears from school accounts. Despite the anomaly the personnel officer continued to receive and accept monthly returns from the Appellant on whose payroll the fictitious teacher appeared. One wonders why the Personnel department did not question the anomaly. Why did such a glaring irregularity not attract the attention of the Personnel Department? This unresolved question indeed creates a reasonable doubt. Given the fact that the main reason the trial magistrate convicted appellant was that the Appellant failed to prove in writing that he passed on money to PW1 and the fact that the Trial magistrate did not thoroughly evaluate the evidence in its totality it was erroneous for her to convict the Appellant in the face of contradictions.

Having found that the offence of Embezzlement against appellant was not proved beyond reasonable doubt I cannot find the offence of Abuse of Office proved. I also do not find that the appellant did an act prejudicial to the interests of his employer namely, theft from his employer. I also find it difficult to avoid the conclusion that the learned trial magistrate having, initially accepted the prosecution case then proceeded to cast the onus of rebutting facts on the defence. As stated above apart from certain limited exceptions, the burden of proof in criminal proceedings lies throughout on the prosecution and never shifts. By reversing the onus of proof in this trial, the trial magistrate arrived at an erroneous conclusion. This appeal is therefore allowed, the conviction quashed and the sentence set aside.

Appeal Allowed

.....
**HON.LADY .JUSTICE
CATHERINE BAMUGEMEREIRE.
JUSTICE OF THE HIGH COURT**