THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT ANTI CORRUPTION DIVISION KAMPALA

CR. SC. NO. 14/2013

UGANDA:: PROSECUTOR

VERSUS

REMO LEVY SAMSON :: ACCUSED

BEFORE: HON. JUSTICE LAWRENCE GIDUDU

J U D G M E N T

The accused, Remo Levy Samson, is charged with Embezzlement C/ S. 19(a) (i) and (iii) of the Anti-Corruption Act 2009 and on the alternate count of Diversion of public resources C/Ss 6 & 26 of the same Act.

The accused was is an employee of Moyo District Local Government (MDLG) where he worked as a senior accounts assistant. The prosecution case is that between the months of October and November 2012 the acccused stole UGX 31,630,000= (thirty one million six hundred and thirty thousand shillings) the property of MDLG to which he had access by virtue of his employment.

In the alternative the prosecution case is that between the months of October and November 2012, the accused being employed by MDLG as senor accounts assistant converted UGX 31,630,000= (thirty one million six hundred and thirty thousand shillings) meant for the implementation of activities/projects under natural resources department of MDLG

The accused pleaded not guilty. He admitted withdrawing UGX 31,630,000= (thirty one million six hundred and thirty thousand shillings) for various activities but that the activities were halted by council when the money was already available in his safe custody.

It was the Ag. Head of natural resources dept. Mr. Godfrey Rovakuma who asked him to lend him the money promising to pay back. This arrangement, according to the accused, was consented to verbally by the CFO, Mr. Drichi Henry,(PW3).

In criminal cases, the prosecution has the burden of proving all the essential elements of the offence beyond reasonable doubt. ***Woolmington v. DPP*** **[1953] AC 462 followed.**

In a charge for Embezzlement, the prosecution must prove the following ingredients;

- Proof of employment by the government
- Theft of the money
- Property must belong to the employer
- Accused had access by virtue of his office

It was not in dispute that the accused was employed by MDLG as a senior accounts assistant. His appointment letter, schedule of duties, bank agency letter were tendered in by PW1, Aloka Alosious, and admitted as **P.1.**

It was also not disputed that the money belonged to MDLG and that the accused had access to it by virtue of his office. The accused being the bank agent of the natural resources account withdrew the money belonging to MDLG in order to pay its officers to implement specified activities.

Did the accused steal UGX 31,630,000= (thirty one million six hundred and thirty thousand shillings)?

Ms. Marion Acio, on behalf of the DPP, submitted that the accused stole the money when he did not pay it to the payees and chose to lend it to his boss Rovakuma. He posted the cash book fraudulently to indicate that the payees on the payment vouchers, exhibit **P3** had been paid whereas not. Further, that the money had specific activities for which it was approved and those activities were not done.

Ms Acio dismissed the accused's defence that he lent money. She referred to this as an illegal deal and specifically mentioned exhibit **P11**which reveals that the accused expected a cut in these transactions.

Mr. Majoli, learned counsel for the accused deferred and asked me to find that no embezzlement was committed on the basis that theft, a key element of the offence, was not proved.

He argued that to sustain the charge, the prosecution had to prove that the accused benefited from the stolen funds. That what happened was the lending of money by the accused to Rovakuma, a practice that was common. That Rovakuma took the money and used it. At the end

of the day, Rovakuma has repaid all the money. That Rovakuma should be the thief and not the accused. He relied on exhibits **P11** to show that Rovakuma borrowed the money for his benefit. He asked me to acquit the accused.

Both counsel have correctly stated the key elements in the offence of embezzlement. The contested element is whether the accused stole the money?

Theft is defined in sec. 254 of the Penal Code Act thus:

254. Definition of theft.

(1) A person who fraudulently and without claim of right takes

anything capable of being stolen, or fraudulently converts to the use of any

person other than the general or special owner thereof anything capable of

being stolen, is said to steal that thing.

(2) A person who takes or converts anything capable of being stolen

is deemed to do so fraudulently if he or she does so with any of the following

intents—

(a) an intent permanently to deprive the general or special owner of

the thing of it;

(b) an intent to use the thing as a pledge or security;

(c) an intent to part with it on a condition as to its return which the

person taking or converting it may be unable to perform;

(d) an intent to deal with it in such a manner that it cannot be

returned in the condition in which it was at the time of the taking

or conversion;

(e) in the case of money, an intent to use it at the will of the person

who takes or converts it, although he or she may intend

afterwards to repay the amount to the owner.

From the above definition, it is abundantly clear that the thief need not benefit from the item stolen. What is important is that the **taking** must be **fraudulent and without claim of right.** The use of the stolen property may be by **any person other than the special owner**. Any person here includes a third party.

From this definition, I find the argument that the accused did not benefit from the borrowed funds as, with respect, not valid. What is important is that the property stolen has been put to use by a person who is not its owner or special owner.

Further, the taking must be fraudulent. This has been defined in subsection 2 paragraph (e) with special reference to theft of money as:-

(e) in the case of money, an intent to use it at the will of the person

who takes or converts it, although he or she may intend

afterwards to repay the amount to the owner.

This definition renders the accused's defence and argument that this transaction was borrowing with the intention to refund the money irrelevant. The law is that if you take money belonging to another without his/her or its consent and convert it at will even with the intent to refunding it afterwards, you commit an offence of theft. That is what section 254(1) (2) (e) of the Penal Code Act means.

Turning to the facts of this case, it is not in dispute that the accused received the money into his custody. He was supposed to pay it to the payees. But before he could do so, the activities were halted by MDLG council. The accused was then supposed to bank the money and post his books to reflect this position.

Instead, the accused "lent" the money to one Rovakuma, and he posted the cash book, exhibit P4, to read that he had paid it to the genuine payees such as Letaru Leah, Alule and Baako Rose among others. These names appear in the cash book as paid. The evidence of the examiner of accounts, Ayume Charles, PW4, taken together with that of Baako Rose, PW7, as confirmed by the testimony of the accused on oath is that this entry in the cash book was false. Except for Rovakuma who took more than the money on the vouchers, the other payees did not receive any money. In fact they were not even aware that money had been processed to cash.

The accused dealt with the money at will as much as Rovakuma who benefited from it. The consent of MDLG was not obtained. The accused alluded in his evidence that he sought the verbal consent of PW3, the CFO. But when PW3 testified, he was not cross examined on this. This renders such reference to the verbal consent to be an afterthought.

But even if PW3 had agreed to the arrangement, which is not the case, such an agreement would not be valid because, PW3 was not the owner of the money. The money belonged to MDLG and could only be disbursed with the approval of the Chief Administrative Officer, who is the accounting officer for the district.

The promises to refund the money contained in exhibits **P11** are, therefore, of no consequence in law in view of the clear provisions defining what amounts to theft in sec. 254 of the PCA discussed above. I find as a fact that there was theft of UGX 31,630,000= belonging to MDLG.

Learned counsel canvassed the view that according to the evidence of the accused, this was internal borrowing which was allowed. In fact the accused stated that a problem only arises if the boss does not refund the money.

With respect, financial regulations providing for borrowing of public funds in government do not cover the scenario the accused and his counsel advanced. Any such activity can only be illegal as much as it is criminal.

The borrowing cheats are of no value except to prove the theft of the stated funds. Perhaps, I should cite the clear provisions of the law which prohibits this practice to shutter the false hopes of the accused and his advocate that government funds are available for lending to bosses. He below is an extract from the **Public Finance and Accountability Regulations 2003, SI 23, no. 73**

PART XIV—LOANS, ADVANCES AND INVESTMENTS.

67. Authority for loans and advances

(1) The grant of loans and advances from public moneys or funds is strictly limited and such loans and advances may only be made by the Accountant General under the authority of an advance warrant under the hand of the Minister and for the purposes stated in the Act.

(2) All such advances shall be retired in the financial year in which they are made, and no advance account or loan account shall be opened, nor will any action be taken by any public officer, which will result in the issue of an advance or loan without the prior approval of the Accountant General.

(3) Any public officer taking action prohibited under subregulation (2) of this regulation commits an offence and is liable to the penalty prescribed under section 43 of the Act.

68. Loans and advances to be secured by agreements

(1) All loans and advances, other than those for Standing or Temporary imprests and those in respect of staff advances shall be secured by legally enforceable agreements in a form approved by the Attorney General.

(2) The agreements, which must clearly specify the full details of the advance, including the amount, the terms of repayment or recovery, the collateral security (if any) and the rates of interest, etc., shall be properly executed by all parties, and shall be retained in safe custody in a strong room or safe.

Regulation 67 specifically empowers the Accountant-General to grant loans under strict conditions. Such loan agreements are made by the Attorney-General. What happened in Moyo was a crime committed by both Remo and Rovakuma. It was not borrowing of public funds under the law.

The lady assessor advised me to acquit the accused on the grounds that he did not benefit from those funds. This was the argument of counsel and formed the gist of the accused's defence. I have already explained at length how invalid this reasoning is. The definition of theft in the PCA does not exempt this transaction from the crime of theft.

I am, therefore, with respect, unable to take the advice of the lady assessor.

In conclusion, it is my finding on the basis of evidence adduced and generally admitted by the accused, that the accused stole the money mentioned in the charge sheet. The charge of embezzlement C/S 19(a)(i)&(iii) of Act 6 of 2009 has been proved by the prosecution beyond reasonable doubt.

I find the accused guilty and convict him accordingly.

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Lawrence Gidudu

JUDGE

20th Dec. 2013

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REASONS AND SENTENCE

The convict is a first offender, has been on remand for 6 months, he is convicted of embezzling 31 million shillings which has all been recovered by today. All these factors are taken into account in favor of the convict.

The Prosecution asked me to impose an 8 year prison term on the convict on grounds that the message needs to go out that Government workers should not steal public funds. The defence asked me to impose a fine on grounds that all the money has been recovered and the convict is sickly with (HIV positive).

The punishment for this offence is 14 years imprisonment or a fine of 7,320,000/= or both. This case falls in the category of serious offences because of the nature of the punishment. I want to make it clear that this court will not encourage convicts to steal money and then when caught they refund it, and then walk away free. It is like saying that was bad luck try next time. This Court cannot constitute itself into that kind of forum.

This court was set up to specifically make it known to convicts of embezzlement and other related offences that they will be punished and not massaged to be able to steal again.

Considering the mitigating and the aggravating factors. It is in my view that the mitigating factors outweigh the aggravating factors. The amount that was stolen was relatively small and the effect of that theft is not great because those activities that money was supposed to do had been halted. I will therefore not impose imprisonment of 8 years as Learned State Counsel asked me, but also I will not just impose a fine to enable the convict to go back and try his luck again at stealing public funds.

I will therefore have to balance the equation by imposing a prison term that will inform the convict and others that when you steal Government funds you pay the price, even if you have refunded that money by the time you are convicted that is the message. I would have imposed a prison term of 2 years (24 months) but since the convict has been on remand for 6 months I will deduct that period that you have been on remand and I therefore impose a prison term of 18 months imprisonment as the punishment.

Therefore you have 14 days to appeal against both the conviction and the sentence.

I make an order that the funds recovered be returned to the coffers of Moyo District Local Government since the financial year in which they were stolen is still running. If the conviction had come after I would have said the money goes back to where it came from.

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LAWRENCE GIDUDU

JUDGE OF THE HIGH COURT.