

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA

HOLDEN AT SOROTI

CRIMINAL APPEAL NO. 4 OF 1993.

(From Kumi original Criminal Case No. 26/93)

JOHN BOSCO AKOL ..... APPELLANT  
VERSUS  
U G A N D A ..... RESPONDENT

BEFORE: THE HON. MR. JUSTICE S.G. ENGWAU.

J U D G M E N T

The Accused (A1) hereinafter referred to as the appellant was charged in the first count with Embezzlement contrary to section 257 (a) of the Penal Code Act. It was alleged that the appellant together with three others between October, 1992 and 9th day of February, 1993 at the Education Office Kumi in Kumi District being employees of the Ministry of Education stole 114 corrugated iron-sheets valued at U. Shs 1,140,000/- the property of their employer which came into their possession on account of their employment. In the alternative count, they were charged with theft contrary to section 252 of the Penal Code Act.

In the second count, the appellant was charged with Attempted embezzlement, contrary to sections 369 and 257 (a) of the Penal Code Act. He was convicted on both counts and sentenced to 5½ years' imprisonment in the first count and one year in the second count, sentences to run concurrently. In addition the learned trial Magistrate ordered that the appellant be interdicted.

Summary of evidence on record is that in 1991, the appellant was an Ag. Inspector of Schools in Kumi District but was directed by his D.E.O. to supervise a scheme ran by NURP consisting of distributing iron-sheets to schools within Kumi district. - About July, 1991 the appellant received 7,920 iron-sheets from the Prime Minister's Office for distribution according to instructions issued by his D.E.O and the D.D.C. This was a Japanese Government grant and the iron-sheets were stored in the stores of Foods & Beverages and Wiggins S.S. both stores are within Kumi Town.

After some time, the D.E.O. because of high rent charges demanded by Foods & Beverages instructed the appellant to transfer all the iron-sheets with Management to a room in the D.E.O's offices. About 2,137 iron-sheets were transferred. Eventually 80 iron-sheets were distributed to Kajamaka and Kanyum Primary Schools, leaving a balance of 1,337 iron-sheets at the Education offices.

At the beginning of February, 1993, some Japanese made iron-sheets started changing hands in Kumi Town which aroused suspicion.

Investigations revealed that 114 iron-sheets were missing from the Education offices without sufficient explanation. Accordingly three people were charged including the appellant.

The appeal is against both conviction and sentence and the grounds argued include the following:-

1. THAT, the learned trial Magistrate erred in law and in fact in failing to appraise the evidence on record correctly.
2. THAT, the trial Magistrate's apparent bias against the appellant has occasioned a total failure of justice.
3. THAT, a sentence of imprisonment for 5½ years was harsh and unreasonable.
4. THAT, the second leg of the sentence involving interdiction was unlawful.

In the first ground of this appeal, the learned Counsel for the appellant submitted that from all the 13 prosecution witnesses who testified in the case, none of them gave an incriminating evidence against the appellant in both counts. However there is overwhelming evidence against A2, A3 and A4 for the theft of the iron-sheets in question. A2 and A3 were office messengers in the Education office and A4 was a clerk. According to the retired D.E.O., PW1, it was him who instructed the appellant to collect the donation of iron-sheets from the Prime Minister's office in Kampala. However, he retired before the said iron-sheets had arrived. So whatever happened to them he did not know.

Evidence is that PW2 who was found in possession of 12 iron-sheets properly identified as part of the consignment testified that it was A3 and A4 who sold those iron-sheets to him. PW3 also testified that in the night of 4.2.92, he saw A2 ferrying some iron-sheets. He became suspicious and reported him to a Police officer PW13 who traced and recovered 15 iron-sheets at the home of PW9. On 11.2.92 PW6 was also found with 29 iron-sheets already roofed on his house which he also said was sold to him by A4. The new D.E.O. PW4 confirmed that a total of 57 iron-sheets were recovered in diverse places within Kumi Town.

It is therefore submitted that there is no single iota of evidence implicating the appellant with the alleged offence of embezzlement. He was only arrested and charged just because the investigating officer, PW13 believed he was in charge of the stores but failed to give satisfactory explanation for the missing 114 iron-sheets.

It is the contention of the learned Counsel for the respondent that the learned trial Magistrate had properly evaluated and appraised the evidence on record.

In an effort to fortify her contention, the learned Counsel pointed out that the appellant did not inform the new D.E.O. that he had kept the iron-sheets at Foods & Beverages and Wiggins S.S. stores, nor did he disclose their number. By failure to disclose such information the appellant had the intention to misappropriate the iron-sheets which according to her was done. According to her, failure of accountability concealed the theft.

After perusing the evidence on record, I'm inclined to agree with the Counsel for the appellant that had the learned trial Magistrate properly appriased the evidence before him, he would have come with a different conclusion. Evidence is that when the appellant received 7,920 iron-sheets from the Prime Minister's office, receipt of the same was actually acknowledged by the Education office at Kumi. The new D.E.O. - PW4 confirmed that story when the old D.E.O. - PW1 made a handover report to him. In fact PW4 stated also that when the iron-sheets formerly stored in Foods & Beverages' store were removed and stored in the Education offices, it was the office superintendent one Marx Ochaga who kept the keys to the outeroors and one Oumo, the accountant kept the keys to the inner door. He also said that the outer doors were secure but the only inner door was defective and that the said Oumo reported to him how termites had worsened the strength of that door, making access to the iron-sheets therein easy.

Now, there is no evidence on record about physical damage on the outer doors before the thieves broke into the room where the iron-sheets were being kept. In fact evidence of investigations is silent about that vital information. To hold that because the appellant was in charge of the distribution of the said iron-sheets and therefore was also in charge of them in the Education offices is erroneous in the absence of such proof. Evidence is that PW1, the D.E.O., had instructed the appellant to put the iron-sheets in one of his offices to avoid payment of high rents demanded by Foods & Beverages Management. It was technically clear that it was PW1 and thereafter PW4 who were in charge of the iron-sheets put in their offices. They were therefore responsible for the loss. Evidence of PW4 further exonerates the appellant in that at the material time when the iron-sheets in question were stolen, the appellant was on duty outside the offices. In the light of all that the appeal succeeds on the first ground.


As regards the second count, it was alleged that the appellant in July, 1991 at Kampala, Kumi Town and Bukedea Catholic Mission in the Kumi District being employee of Ministry of Education Kumi attempted to steal 44 iron-sheets valued at Shs 440,000/- the property of his said employer which came into his possession by virtue of his employment as Senior Assistant Inspector of Schools, in the Ministry of Education.

It is the contention of the learned Counsel for the appellant that the learned trial Magistrate was biased and occasioned a total miscarriage of justice. The learned Counsel illustrated that point by referring court to the proceedings at page 53 where the trial court took the work of a prosecutor by questioning the appellant at great length instead of clarification only on certain matters. The learned trial Magistrate again repeated the same game at page 39 of the proceedings.

Be that as it may, PW4, the D.E.O., the Headmaster of Okunguru Primary School, PW7, the driver of the vehicle which distributed the iron-sheets, PW8, the investigating officer, PW13 and the Headmaster of Kachumbala Primary School DW5 all support the appellant that the 40 iron-sheets delivered at Bukedea Catholic Mission stores with Fr. Phallan were for safe custody pending the collection of more 360 mabatis from Wiggins S.S. store all to be delivered at Kachumbala Primary School later when transport was available. Evidence is also that another 44 iron-sheets were found at Okunguru Primary School in excess of 400 iron-sheets which were to be given to each school during the exercise. Explanation given for that excess is that the driver, PW8 who delivered them did so in a hurry as it was getting late yet he had to make deliveries to some other schools on that day.

In the premises, there is no cogent evidence to the extent that the appellant ever attempted to embezzle the 44 iron-sheets in question. If anything the appellant is exonerated. To make it worse there is no an iota of evidence that the appellant even committed the alleged offence in Kampala as alleged. All that sample together tends to support the contention that the trial was conducted perfunctorily with some bias with due respect to the learned trial magistrate. Accordingly the appeal also succeeds in the second count against conviction.


In conclusion therefore, convictions in both counts cannot stand and are hereof quashed and sentences thereto set aside. However, on the order for interdiction made by the learned trial magistrate, it is my humble view with due respect that the trial magistrate by any stretch of imaginations had cross the boundary far beyond his judicial powers. That would be a disciplinary or an administrative measure to be taken by the parent Ministry in which the appellant was an employee if it was found fit so to do. An interdiction order made thereto also quashed and set aside.

  
STEVEN GEORGE ENGWAU  
JUDGE  
14.4.94.

28.4.94: Appellant before court. Mr. Kakembo for appellant present.  
Ms Nandawula for the respondent. Judgment delivered in open court.

STEVEN GEORGE ENGWAU  
JUDGE /28.4.94.

Order: Cash bail be refunded to the appellant.

  
STEVEN GEORGE ENGWAU  
JUDGE /28.4.94.