THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

ANTI-CORRUPTION DIVISION

CRIMINAL APPEAL N0. 13 OF 2014

(Arising from Anti Corruption Session Case No.10 of 2012)

BETWEEN

BYARUHANGA JOTHAM ::APPELANT

AND

UGANDA ::: RESPONDENT

BEFORE: HON. JUSTICE LAWRENCE GIDUDU

JUDGMENT

The appellant, being dissatisfied with the judgment and orders of Principal Magistrate Grade one, her worship Dorothy Lwanga delivered on the 29th day of May 2014, appealed to this Court against the said judgment and orders.

The appellant was convicted of Embezzlement C/ S. 19(c) (iii) of the Anti-Corruption Act 2009 and sentenced to a fine of Ugx. 1,500,000/= or imprisonment for 20 months in default. He was also ordered to pay a refund of Ugx. 6,385,000/= within three months.

The facts of the case as gathered from the record of appeal are that the Appellant was employed as manager of **Kisyoro co-operative Savings and credit society** herein after referred to as (**Kisyoro Sacco**); a registered co-operative society.

Kisyoro Sacco held and operated a Bank Account Number 95050100001336 at Bank of Baroda, Mbarara branch in the names of **Kisyoro secondary school support scheme co-operative savings and credit society limited**.

The Appellant, together with Ndumu Yosia PW3, Florah Niyibizi PW4, and Kakama Shedrack PW5 were signatories to the above mentioned bank account.

On the 1/7/2008, the appellant together with PW4 and PW5 went to Bank of Baroda Mbarara Branch and withdrew Ugx. 16,770,000/=. The appellant kept the money in his bag. The three signatories went separate ways only to meet at the taxi park and headed back to the Sacco offices.

Upon reaching the office the appellant presented Ugx 8,385,000 to the cashier and entered only Ugx 8,385,000 in the books of accounts. This figure was queried an an audit was carried out. Ugx 8,385,000 was found to be missing.

The appellant was charged with embezzlement. He claimed to have been conned and under took to re-pay it. He defaulted in the payments. He was charged, tried and convicted

The appellant, through his lawyer M/s. Kiwanuka and Co. Advocates contested the conviction and sentence on the following grounds; that:-

1. The learned Magistrate erred in law and fact when she failed to evaluate the evidence on record as a whole thereby arriving at an erroneous decision thus occasioning a miscarriage of justice.

2. The learned Magistrate erred in law and fact when she held that the case against the accused had been proved to the required standard thus convicting the appellant on insufficient evidence.

4. The learned Magistrate erred in law and fact when she sentenced the appellant to an excessively harsh sentence.

5. The learned Magistrate erred in law and fact when she ordered the appellant to refund the embezzled funds yet there was no credible and cogent evidence that he embezzled the said funds

He abandoned ground 3.

It is trite law that the duty of the first appellant court is to re-evaluate the evidence and make its own findings and conclusions without ignoring the judgment. This court has to bear in mind hat it never saw or heard the witnesses testify.

Learned Counsel for the Appellant argued grounds 1,2 and 5 together thus:-

- The charge sheet reflected the embezzled amount as Ugx 8,385,800/= and yet the evidence on record showed Ugx 8,385,000/=. The 800/= was not accounted for. He submitted that Prosecution witnesses and the evidence adduced must prove what is stated in the charge sheet and not otherwise.
- The money in the bank never belonged to **Kisyoro Sacco**. The bank statements and withdraw slips bare the names **Kisyoro**

Secondary School Support Credit Savings and Credit Society and not Kisyoro Co-operative Credit and Savings Society.

- The Appellant never stole the money. It was taken by Happy Richard. He only made a mistake of not obtaining an acknowledgment of receipt from Happy Richard and took responsibility for that.

In reply to these complaints, Ms Nalule for the state supported the conviction and subsequent sentence. She argued that the trial magistrate was right to find that the appellant was the thief because there was no evidence that Happy Richard signed for the money which was found to be missing.

Without much ado, the appellant admits in his defence as having given one Happy Richard UGX 8,385,000= It is the money he is charged with embezzling. The trial magistrate resolved this discrepancy by accepting the prosecution explanation that it was a typing error. Besides I do not believe that the appellant was prejudiced in any way because he knew the figure that was in contest. The conviction cannot be quashed on such a flimsy ground where no injustice is shown to have been occasioned.

Another issue of contention is that the money was drawn from an account bearing the names of Kisyoro Secondary School and not Kisyoro Sacco. The gist of this argument is that the money belonged to a different owner and not the complainants.

The trail court did not resolve this issue although it was included in the accused's written submissions. The state did not address me on this matter on appeal either.

To prove embezzlement, theft must be proved. The owner or special owner must prove ownership of the property in issue in order to prove theft.

The undisputed evidence is that Kisyoro SACCO owned money on an account in Bank of Baroda in which the signatories were Ndumu, PW3 as chairman; Flora Niyibizi, PW4, treasurer; Kakama Shedrack,PW5, secretary and the appellant as manager. They signed the cheque from which the funds were drawn. Kisyoro secondary school has never reported loss of its money. The appellant knew at all times that the money belonged to Kisyoro Sacco and that is where he took the balance.

At all times, Kisyoro SACCO owned the money in question. Nobody laid an adverse claim to those funds on the account. As long as the Kisyoro SACCO owners were the signatories then prima facie they were the real

owners of the stolen money. The argument that the money belonged to somebody else is misleading. It has no merit especially when Kisyoro secondary school has not claimed that its money was stolen by Kisyoro SACCO. Besides how come Kisyoro SACCO are the signatories? The appellant cannot escape culpability using such tricks.

It was argued that it was one Happy Richard and not the appellant who stole the money. There was no evidence before court for this proposition. Happy Richard is a creature of the appellant. Both PW4 and PW5 who went with the appellant to pick money denied knowing him. They never saw him in the bank. I was asked to consider that the appellant only made a mistake of giving money to Happy Richard without requiring him to sign for it.

With respect, on the contrary I would hold that the appellant stole the money on admission. Even if Happy Richard had signed for the money, the appellant would still be culpable because he had no authority from Kisyoro SACCO to pay any money to Happy Richard. An employee who pays out money belonging to his employer without authority is culpable as a thief under the definition of embezzlement. This argument is an admission that the appellant embezzled the money and I am surprised that counsel filed this appeal.

With respect, I find no substance in the arguments of learned counsel in grounds 1and 2.

There was also a flimsy argument that the appellant was not an employee of Kisyoro SACCO and so he could not be charged with embezzlement. It was submitted that because there was no written agreement, the appellant was not an employee. With respect, this is another of a series of erroneous submissions by the appellant's counsel. A contract of employment may be oral or written. The appellant did not deny being employed as manager. In his defence, the appellant admits working with Kisyoro SACCO as manager on 1st July 2005. He had applied for the job according to the application tendered by PW3 as exhibit P2. I won't waste valuable on this. The submission that he was not an employee is a falsity originated from the bar.

The last ground was that the sentence was harsh and excessive. It was argued that the fine of 1,500,000= or 20 months imprisonment and the order to refund the stolen money were excessive. Counsel suggested that a fine of 500,000= or six months imprisonment in default would be appropriate. In reply the state submitted that the sentence was not excessive. The order of refund is obligatory upon conviction and that the appellant got a light sentence.

Sentencing is a discretionary power of the court. It is exercised judicialy depending on factors that mitigate or aggravate the sentence. It also flows from the public policy expectation that courts shall punish convicts with deserving punishments.

Upon conviction, the law provides for a punishment of 14 years imprisonment or a fine of 6,720,000= or both. The appellant was sentenced to a fine of 1,500,000= or suffer 20 months in prison. Is this harsh and excessive?

During the sentencing hearing, the defence asked for a non custodial sentence in order to give the appellant the opportunity to continue refunding the money because he had already refunded 2,000,000= It was this submission that weighed on the trial magistrate to impose such a lenient sentence.

It is therefore dishonest on part of counsel who was the same lawyer in the lower court to complain and ask the high court to impose a laughable sentence of six months imprisonment or a fine of 500,000=

The appellant stole money belonging to Kisyoro SACCO and claimed it had been paid to one Happy Richard who has since disappeared. The SACCO needs it money and this court directs that the same be paid quickly in the terms proposed by the trial magistrate.

Consequently, the complaint against sentence fails. He got one of the lightest sentences to come from the anti corruption division and should have held his peace instead of appealing. If the state had put in a cross appeal against sentence, I would have been inclined to increase it to a custodial sentence.

The result is that the appeal fails on all the grounds. It has no merit. It is dismissed. The judgment and orders of the lower court are upheld.

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LAWRENCE GIDUDU
JUDGE
10th November,2014.