THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO.17 OF 2019

{Coram: Katureebe, Arach-Amoko, Mugamba, Buteera, Chibita.JJSC.}

SUMBU JEAN LOUIS ::APPELLANT

VERSUS

UGANDA :: RESPONDENT

[***Appeal from the judgment of the Court of Appeal at Kampala (Kakuru, Musota & Madrama JJA.) dated 11th March,2019 in Criminal Appeal No.29 of 2017***]

JUDGMENT OF THE COURT

This is a second appeal. It arises from the decision of the Court of Appeal which upheld the conviction of the appellant by the Anti-Corruption Court for the offences of two counts of Embezzlement contrary to section 19(c)(i) and (iii) of the Anti-Corruption Act, eight counts of forgery contrary to sections 342 and 347 of the Penal Code Act and the sentences of five years and two years imprisonment respectively.

Background:

The background facts as found by the High Court and the Court of Appeal are that the appellant, a Congolese national, was between the years 2005 and 2013 employed as a programme administrator with a Non–Government Organization (NGO) known as Malteser

International. The organization operated in Uganda and in the Democratic Republic of Congo.

The appellant was in charge of administration, financial accountability and was directly in charge of the organization's project expenses.

The NGO was reconstructing and rehabilitating hospitals, supplying equipment and training personnel in Uganda. The appellant was a signatory to the organization's Bank Account No.9030006392953 (Shillings A/C) and to No. 9030008069572(Dollar A/C) at Stanbic Bank Arua branch. No money could be drawn from the accounts without his signature. The appellant would account for the money requisitioned and disbursed. The accountability took the form of cash books, in soft copies, vouchers in hard copies, cash account protocol, bank statements and other accounting documents.

In March 2013 it was found that the money in the organization's bank accounts was far less than what was reflected in its books of accounts which were submitted by the appellant. After discovering some anomaly in the funds the organization did an internal audit which confirmed that there was embezzlement of funds. It further engaged the services of Deloitte and Touche an external auditor who examined the methods of internal audit and came to the same conclusion that shs 599,562,500/= and US $ 370,523 was missing.

The appellant was eventually charged and prosecuted with two counts of embezzlement and eight counts of forgery at the Anti-Corruption Court.

The trial court convicted the appellant as charged for the offences of embezzlement and forgery and sentenced him to imprisonment for five and two years respectively. All the sentences were to run concurrently.

The appellant being dissatisfied with the conviction and sentence by the trial court appealed to the Court of Appeal on the following grounds:

1. **The learned judge erred in law when she failed to properly evaluate the evidence on record with respect to the offences of embezzlement and thereby erroneously convicted the appellant.**
2. **The learned judge erred in both law and fact when she relied on purported confessions to convict the appellant on the offences of embezzlement.**
3. **The learned judge erred in law when she failed to properly evaluate the evidence on record with respect to the offences of forgery and thereby erroneously convicted the appellant.**
4. **The learned judge erred in both law and fact when she tried and convicted the appellant for the offences of embezzlement and forgery without being seized with the requisite territorial jurisdiction.**

5. **The Learned judge erred in law when she failed to expressly pronounce herself on whether the sentence passed against the appellant will run either concurrently or consecutively.**

The Court of Appeal found no reason to fault the findings of the trial judge. They dismissed the appeal and upheld the convictions and the sentences.

The appellant was not satisfied with the findings of the Court of Appeal. He appealed to this Court and his memorandum of appeal has six grounds. They read:

1. **That the learned Justices erred in law in the re-evaluation and scrutiny of the evidence and the circumstances of the case on record as the first appellant court, thereby wrongly confirming the conviction and sentence of the appellant.**
2. **That the learned Justices erred in law when they held that they cannot interfere with the decision of the trial Judge and prosecution had proved all the ingredients of the offences of embezzlement and forgery whereas not.**
3. **That the learned Justices erred in law when they misdirected themselves and totally disregarded the submissions of the appellant with no arbitrary intent thereby wrongly confirming the conviction and sentence.**
4. **That the learned Justices erred in law when they neglected and disregarded the fact that Malteser International in DRC and Malteser Uganda were /are two different organizations**

raised by the appellant thus reaching to an erroneous decision leading to the miscarriage of justice.

5. **That the learned Justices erred in law by generating fanciful theories that led court to arrive at erroneous decision occasioning miscarriage of justice.**
6. **That the learned justices erred in law by confirming the excessive and harsh custodial sentences regardless of the circumstances despite the pleadings raised by the appellant wrongly dismissed the appellant's appeal against sentence and conviction.**

Representation

At the hearing of the appeal on 5th February, 2020, Mr. Bakole Simon appeared for the appellant on private brief while Ms. Namatovu Josephine, Assistant Director of Public Prosecutions appeared for the respondent.

Submissions

Counsel for appellant filed written submissions, which he adopted during the hearing and made further oral clarifications. Counsel for respondent did not file written submission as mandated during pre-hearing conference. She made oral submissions.

Appellant's submissions

Counsel for the appellant argued grounds 1,3 and 4 together, then 2 and 5 together and lastly ground 6 alone.

He submitted that the Court of Appeal as the first appellate court failed to re-evaluate and scrutinize the evidence on record. He argued that the Court of Appeal should not have found that the appellant was properly convicted, given that the appellant was engaged with Malteser International based in DRC. He added that the appellant was a freelance collaborator. Counsel contended that consequently the appellant would not be tried for embezzlement as an employee of Malteser.

Counsel stated that there was failure by the Justices of Appeal to appreciate the fact that there was no cash book and that there was failure by the head of finance who prepared the audit report to tender in his own report. Counsel contended that there was no audit done and that no cash book was availed to court to justify the allegations. He added that no internal or external audit was done to know the specific claim save for a report written and tendered in court.

Counsel argued that the Justices of Appeal failed to re-evaluate the particulars of the 8 counts of forgery. He submitted that the ingredients were not re-evaluated well. He contended that PW8, PW10, PW11, PW12, PW13 and PW14 in their evidence failed to adduce sufficient evidence to connect or link the appellant to the commission of the alleged forgery.

He submitted that the appellant and PW3 had collected many bank statements over the years, that the prosecution failed to prove exactly from which bank statements were collected by the appellant and those collected by PW3. Counsel argued that mere stating that

certain bank statements were forged without pointing out who forged them does not prove the case of forgery against the appellant.

Counsel submitted that the appellant was convicted on the evidence that he was an employee of Malteser International Company yet the evidence on record was that he was never an employee of anybody as he was a freelancer.

On ground 2 and 5, Counsel submitted that the appellant was convicted by virtue of his office, his signature and the emails. He argued that there was no evidence that money was stolen from Stanbic bank in Arua. Counsel contended that the Arua bank was a transaction point, not where the alleged crimes of theft were committed. Counsel contended that the lower courts relied on circumstantial evidence which was not corroborated.

Counsel submitted that the appellant in his defence had outlined the procedure of accessing funds from the bank and that there was no complaint by beneficiaries about the process. He contended that the appellant would use cheques to access cash.

Counsel reiterated that there was no cash book or audit report tendered in court to corroborate the alleged admission of the appellant to PW2 that he had used the money to solve personal problems.

He added that there was no evidence to show how the trial court arrived at the figure of Shs. 599,562,500/= and US $ 370,523 to be paid to Malteser International as compensation. He pointed out that

there was no receipt for cash deposits, no proper auditing and no cash books. Counsel further contended that the compensation was entered in error without cogent evidence that the money was lost.

On ground 6, counsel submitted that the sentence of 5 years imprisonment is harsh and excessive. He stated that the trial Judge did not consider both aggravating and mitigating factors before arriving at the sentence of 5 years imprisonment.

Respondent's submission

Counsel for respondent opposed the appeal and supported the conviction and sentences of the appellant as they are.

Counsel submitted that the appellant's grounds were inherently vague, incompetent and that they contravened Rule 62(2) of the Rules of this court which is couched in mandatory terms. She contended that the Rule requires that the grounds must be concisely set out, made under distinct heads and numbered consecutively. She argued that none of those grounds adhered to the requirements of Rule 62(2) aforesaid.

Counsel added that grounds 4 and 6 were never raised at the Court of Appeal. As such she urged this court not to entertain them.

On grounds 1, 3 and 4 counsel observed that the appellant claimed that he was never an employee of Malteser International Company but rather was a freelancer. She submitted that the evidence of PW1, PW2, PW3 and PW4 was that the appellant was employed by Malteser

International and that this was never challenged at all. She noted that the appellant admitted during his defense evidence that he was indeed an employee of Malteser.

Counsel further submitted that the appellant in his written submissions right from the trial court all through to the Court of Appeal had rightly conceded and did not contest the first issue which hinged on employment. She said that the appellant was an employee of Malteser working and based in DRC.

Counsel submitted that the definition of employment in Section 2 of the Employment Act defines an employee to mean any person who has entered into a contract of service or an apprenticeship. She contended that a contract of service is defined in the same section of the Employment Act to mean any contract whether express or implied where a person agrees in return for remuneration to work for an employer. It was her submission that the appellant was indeed an employee of Malteser International and that the Court of Appeal was correct in so finding.

On Ground 4, counsel contended that it was a new ground and that there was no evidence anywhere on record that the learned Justices erred in law when they neglected and disregarded the fact that Malteser International in DRC and Malteser Uganda were different.

Counsel argued that in the submissions which were made in respect of grounds 1, 3 and 4 the appellant raised arguments which are not in the memorandum of appeal and that this contravened Rule

70(1)(a) of the Supreme Court Rules which precludes the appellant from arguing any grounds that are not specified in the memorandum of appeal or a supplementary memorandum without leave of court.

On grounds 2 and 5, counsel submitted that the argument in these two grounds was vague. She contended that there were no fancy theories pointed out and that upon perusal of the judgment, there was no indication of such theories shown. She added that the argument was idle and prayed that court be pleased to disregard it.

On Ground 6, counsel submitted that the appellate court can only interfere with a sentence of a lower court if the sentence is manifestly harsh or illegal. She contended that the sentence of five years given to the appellant, considering the manner in which the offences of theft, embezzlement and forgery were committed and the amount of money involved could not be said to be harsh. Counsel submitted that both aggravating and mitigating factors were considered by the trial Judge before arriving at the sentences.

Counsel submitted that this appeal lacked merit and prayed that this court be pleased to dismiss it and uphold both the convictions and the sentences.

Consideration by the court

On the first ground of the appeal, counsel for the appellant faults the Court of Appeal for having failed in its duty as the first appellate court to re-evaluate the evidence on record.

In **Kifamunte Henry Vs Uganda, SCCA No. 10 of 1997,** this court held that it is the duty of the first appellate Court to rehear the case on appeal by reconsidering all the materials which were before the trial Court and make up its own mind and that failure to do so amounts to an error of law. This being a second appeal this Court does not have the onus to re-evaluate evidence unless it has been shown that the first appellate Court did not re-evaluate the evidence on record. In **Areet Sam Vs Uganda, SCCA No. 20 of 2005** this court reiterated the above duty in the following terms:-

"We also agree with Counsel for the respondent that it is trite law that as a second appellate Court we are not expected to re-evaluate the evidence or question the concurrent findings of facts by the High Court and Court of Appeal. However, where it is shown that they did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong on findings of fact, the Court is obliged to do so and to ensure that justice is properly and truly served."

We shall follow the principle above in resolving grounds 1,2 and 3.

Counsel for the appellant contended that the appellant was not an employee of Malteser International based in DRC but that he was a freelance collaborator. Counsel for the respondent opposed this position and submitted that the evidence of PW1, PW2, PW3 and PW4 was that the appellant was employed by Malteser International and that this was never challenged at all. She added that the appellant

admitted during his defense evidence that he was indeed an employee of Malteser International.

Upon perusal of the record, on page 461, which is the appellant's final submission at the trial court we note that counsel for the appellant conceded:

"a) That the accused is an employee of Malteser International

The prosecution proved that the accused is an employee of Malteser International." The underlining above is for emphasis.

On pages 73 and 74 of the record, during cross examination the appellant stated as follows

"…**I joined Malteser International in 2001. Malteser deals in medical assistance. I worked as Project coordinator Pharmacy from 2001 to 2004. In 2005 I was promoted to program Administrator. In 2010 I was promoted to Senior Financial Administrator. I stopped working in March 2013…"**

At page 494 of the record the trial Judge noted the following in her judgement:

"Exhibit P2 the contract of employment signed by the accused with Malteser supports PW1(Dr.Alfred Kinzel Bach)'s evidence that the accused was a Senior Financial Manager with Malteser International. The accused also described himself as having been an employee of the organization. In my view this evidence

sufficiently answers the first ingredient for each of the two counts in the affirmative."

We agree with counsel for the respondent that this issue was not specifically raised as a ground at the Court of Appeal. The Court of Appeal in its judgment at page 187, paragraph 5 of the record, found that;

"At all material times the appellant was employed by the complainant NGO, as an administrator. He was a signatory to the organization's two bank accounts held at Stanbic Bank Uganda Ltd Arua branch. He was a signatory together with others but could singly withdraw money from both accounts..."

We find that there was agreement by the two lower courts that the appellant was indeed an employee of Malteser International. We find no merit in the submission by the appellant that he was a freelance collaborator rather than an employee of the said Malteser International. That was an afterthought.

We take exception to appellants or their counsel who bring up matters that were never raised in the lower court gambling on chances that they will be considered by this Court. This not only offends Rule 70(1) (a) of this Court's Rules but acts as an ambush on the other party.

The Court of Appeal in re-evaluation of other ingredients in the offences of embezzlement and forgery at page 189,190 and 191 stated as follows:

"This evidence was in form of waste cheques submitted by Bank official in court showing the amounts of money withdrawn by the appellant which money he had not indicated in his accountability. Further evidence was produced by them in form of genuine bank statements by bank officials in respect of the complainant organization's bank accounts. The contents of those statements were at variance with those the appellant had sent to his superior in Nairobi attempting to account for the funds he had stolen. They were produced in Court by his employers. It was upon being confronted with this evidence that he admitted to the theft...

She found that indeed the Bank statements submitted by the appellant to account for the lost money were forgeries. He relied on the evidence of PW6 Otim Ochera the Stanbic Bank Manager Arua, who disowned the forged statements and stated why in detail. Further, he produced the genuine ones and showed that they reflected the true entries when contrasted with deposits and withdraws as indicated on waste cheques.

The waste cheques are directly linked to the appellant in the same way as the false bank statements are linked to

him which were all exhibited in Court. We have found no reason to fault the trail judge in her findings in this regard.

We find that the learned trial judge meticulously evaluated all the evidence adduced and came to the correct conclusion that the appellant had embezzled the money set out in the indictment in doing so he had forged documents and presented false accounts.

We also find that, there was sufficient direct and circumstantial evidence to prove that the appellant is the only one who could have forged and presented the false bank statements and other books of accounts to his employer. Even if he had not been the very person who had physically made the false statements, there is no doubt that he is the one who masterminded the forgeries, presented the forged documents and falsified the reports. He would be guilty of the offence of forgery on the doctrine of common intention.

We find no reason to fault the trial Judge on her finding of fact. We also find that she applied the law correctly to the facts before her."

In our view, the Court of Appeal correctly applied the principles of law and re-evaluated the evidence well. We find no fault in its finding that the appellant committed offences in two counts of embezzlement and in eight of forgery. We, therefore, find no reason to interfere with the concurrent findings of the lower courts.

Having found in grounds 1 and 3 that the Court of Appeal re-evaluated the evidence on record and found correctly in our view that the appellant committed the offences as indicted, we find no merit in grounds 4 and 5. They are dismissed.

In ground 6, counsel for the appellant contended that the sentence of 5 years imprisonment was harsh and excessive and that the trial judge did not consider both aggravating and mitigating factors before arriving at the sentences. Counsel for the respondent opposed the appellant's contention.

In **David Chandi Jamwa vs Uganda, SCCA No. 02 of 2017,** this Court stated as follows;

> **"Section 5(3) of the Judicature Act provides:**
>
> ***'In the case of an appeal against a sentence and an order other than one fixed by law, the accused person may appeal to the Supreme Court against the sentence or order, on a matter of law, not including the severity of the sentence.'***

It is now trite law that this court will not entertain a ground of appeal based on the severity of the sentence.

In the case of Abelle Asuman Vs Uganda (Supreme Court Criminal Appeal No.66 of 2016) it was held as follows: -

'The sentence being harsh and excessive are matters that raise the severity of the sentence.'

This Court held in Criminal Appeal No.34 of 2014, Okello Geoffrey vs. Uganda as follows:

'... Section 5(3) of the Judicature Act does not allow an appellant to appeal to this Court on severity of sentence. It only allows him or her to appeal against sentence only on a matter of law. Accordingly, we shall not consider issues of the sentence being harsh or excessive since that goes to severity of sentence. The appellant has no right of appeal on severity of sentence.'

We shall not address the second limb of ground 3 as this is not allowed for by Section 5(3) of the Judicature Act and the Court of Appeal correctly ignored to address the same."

The appellant's submission that his sentence of 5 years imprisonment was harsh and excessive offends Section 5(3) of the Judicature Act as it raises matters of severity. Clearly the provision prohibits this.

Counsel for the appellant contended that the trial Judge did not take into account the aggravating and mitigating factors. Upon perusal of the record we find that at page 132 of the record the trial judge did consider the aggravating factors which were that corruption was a serious crime which affects the lowest members of society and that the appellant breached the trust of his employer who had put him in charge of finance. The judge further considered the mitigating factors which included; the advanced age of the appellant, cooperation with police, being a family man, being a sole bread winner and, finally, the period the appellant spent on remand.

In the result, we find no merit in the appeal which we accordingly dismiss. We uphold the convictions, the sentences and the order for compensation.

Since the appellant is on bail, that bail is hereby cancelled.

Dated this ....18th.........day of ....July..........2020

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Hon. Justice Bart Katureebe, CJ
Justice of the Supreme Court

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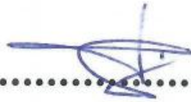
Hon. Justice Stella Arach-Amoko,JSC
Justice of the Supreme Court



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Hon. Justice Paul Mugamba, JSC
Justice of the Supreme Court

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Hon. Justice Richard Buteera, JSC
Justice of the Supreme Court

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Hon. Justice Mike Chibita, JSC
Justice of the Supreme Court