

THE REPUBLIC OF UGANDA
IN HIGH COURT OF UGANDA
ANTI-CORRUPTION COURT KOLOLO

HCT-00-AC-CN-0023-2018

UGANDA:.....APPELLANT

VERSUS

TUMUKUNDE G, KIRENDA N& RWEHURURU C :..... RESPONDENTS

BEFORE GIDUDU, J

JUDGMENT

This is an appeal by the DPP against the judgment and orders of his worship Lochomin Peter Fred wherein he acquitted all the respondents of the charges of embezzlement, causing financial loss, abuse of office and false accounting.

The appeal arises from road works under Ntungamo District Local Government. The district was provided with funds from Uganda Road Fund to rehabilitate roads using three procurement methods i.e. **contracting out, force on account or petty contracts** depending on whether the situation is an emergency or not.

As road works progressed, the political leadership in places where road works were made complained that either the work was substandard or that some roads were not done to completion.

Consequently, the matter was reported to the **IGG** and later to the Police. The three respondents were charged in court and after the trial they were acquitted of all charges.

The state complains against the acquittal. Four grounds of appeal were formulated as follows;

1. That the learned trial magistrate erred in law and fact when he failed to properly evaluate the evidence on record

2. That the learned trial magistrate erred in law and fact when he disregarded the audit report made by PW7 and PW8.
3. That the learned trial magistrate erred in law and fact when he ignored the evidence of the hand writing expert(PW20)
4. That the learned trial magistrate erred in law and fact when he held that the prosecution case was full of inconsistencies.

My duty as the 1st appellate court, is to subject the evidence to fresh and exhaustive scrutiny without ignoring the judgment appealed from but bearing in mind that I neither saw nor heard the witnesses testify.

Mr. David Bisamunyu senior state attorney represented the appellant while M/s Mooli Albert and Mugogo Edward represented the respondents.

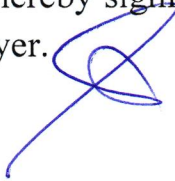
GROUND 1

Mr. Bisamunyu criticized the trial court for dismissing the audit report which is **exhibit P36** that was the basis of the charges of Embezzlement of **220,254,633/=** in Count 1 against the 1st respondent.

He faulted the trial magistrate for finding that there was no proof of embezzlement yet bank statements showed that all monies had been released totaling to **532,826,450/=**. He also submitted that although some vouchers were said to be missing, these had been seen by an internal auditor before they were lost.

On the issue of causing financial loss, Mr. Bisamunyu contended that government suffered actual loss of 220,254,633/= which was stolen by the 1st respondent. The basis for this loss is again the audit report which is **exhibit P36**. In other words it would appear that the money that was embezzled in count 1 amounted to a financial loss in count 2.

On the charges of abuse of office in count 3 Mr. Bisamunyu submitted that the 2nd and 3rd respondents failed to adhere to the **force on account** procurement procedure thereby signing off a total of 532,271,267/= which was prejudicial to their employer.



Finally, Mr. Bisamunya criticized the trial magistrate for failing to find that **exhibit P24** which is accountability for **514,320,000/=** was false because it includes **220,254,633/=** which money was embezzled by the 1st respondent.

In reply, Mr. Mooli who represented the 1st respondent submitted that there was no money embezzled by the 1st respondent. Further, that the Uganda Road Fund which was the source of the money used for rehabilitating the district roads did not query the accountability submitted by the 1st respondent. He referred to the evidence of PW4 Atuhaire Elijah the secretary for Works who had no complaint against the work done and did not fault the 1st respondent in any of the progress reports he made.

Mr. Mooli also referred to the evidence of PW3 Lucy Mujawimaana a senior accounts assistant who received accountabilities from the 1st respondent for monies spent on the road works. It was her evidence that some vouchers were lost by investigators such as PW18, and officers from the IGG. Mr Mooli submitted that there was no way the audit by PW7 could quantify money stolen or lost as 220,254,633/= when some of the documents that contained accountabilities had been lost by PW18.

He also criticized the evidence of PW8 the engineer from UNRA who had in cross examination conceded that he did not know the user coverage capacity of the roads nor did he know the total coverage of kilometers of the roads he was auditing.

It was Mr. Mooli's contention that neither PW7 a certified public accountant/auditor from the office of the Auditor General nor PW8 a civil engineer from Uganda National Roads Authority were qualified surveyors in order to quantify the cost of materials used vis a vis the amount of funds released for the purpose in order to establish whether there was value for money or not.

On the charges of false accounting, Mr. Mooli criticized the character of PW18 an internal auditor who lost some of the vouchers given to him. When PW3 brought to his attention that some vouchers were missing, he advised her to keep quiet about it. By the time PW7 and PW8 made their report which is **exhibit P36**, those expenditure vouchers were still missing. It was his view that

exhibit P36 does not contain factual information since some expenditure vouchers necessary for accounting for monies expended on road works were missing.

Mr. Mooli further criticized the audit report relied on to prosecute the respondents contending that PW7 Patrick Adema undertook the audit one year after the roads had been rehabilitated. Since they were murram roads, heavy rains had damaged parts of them. Several witnesses testified about heavy rains experienced in the district. It is for this reason that PW7 co-authored an audit report which stated that some works were either done while others were not done, and others were done partially. Mr Mooli contended that such conclusions in an audit report was confusing. He supported the trial magistrate for ignoring it.

Mr. Mugogo, learned counsel for the second and third respondent, supported the findings of the trial magistrate who acquitted the respondents contending that he analyzed evidence properly.

He criticized PW7 and PW8 for producing an audit report about the second and third respondent without interviewing them first. The report does not cover the issue of lost accountability vouchers which affect its accuracy.

On the issue of contradictions, he submitted that they run through the evidence. Key among them is the evidence of PW4, the secretary for works, Atuhaire Elijah, whose evidence is that he made progress reports to the district as sector councilor and that work was done.

It was his submission that the second and third respondent just played the role they were required to do. Funds were requisitioned for and paid out to prequalified firms while accountabilities were submitted as required.

Ground one essentially covers the entire appeal. The gist of it is that the trial magistrate erred in finding the respondents not guilty of all the charges against them.

I shall start with count one which is that the first respondent stole UGX. **220,254,633=** this figure is captured in the audit report (**exhibit P36**) made by PW7 an auditor from the Auditor General's office jointly with PW8 an engineer

from **UNRA**. Exhibit P36 makes reference to an internal audit report made by PW18, Karugaba, an internal auditor from Ntungamo district local government (**exhibit 53**).

PW7 and PW8 did what they called a special financial and engineering audit. They concluded that a total of **UGX 220,254,633=** was the amount recoverable from the first respondent. Among the findings were that there were no designs, no bills of quantities and no strip maps that would guide the implementation of the project. There were no progress reports that would enable supervision and monitoring. The first respondent was faulted for not preparing these documents.

There were no expenditure vouchers for fuel for road works. Fuel was drawn by the first respondent in large quantities. Drivers denied receiving the fuel. Some works were not done or partially done.

It was estimated that **UGX 220,254,633=** was lost by the district because of the above anomalies. This report is dated October 2012.

The methodology used in arriving at the money stolen included, review of available documents such as contracts, payment certificates, contract management file, annual road work plans for 2011, materials, equipment, personnel schedule, assessment reports and quarterly reports to Uganda Road Fund(URF). Review of the quarterly releases of funds, examination of books of accounts and accountability documents, physical inspections/verifications of the roads and bridges and clarifications from key stakeholders.

To prove theft that constitutes the charge of embezzlement, the prosecution had to establish by evidence that the first respondent took money purporting to use it for road works whereas not. This is the crux of the case against the first respondent.

A perusal of the audit report contained in **exhibit P36** reveals that there were no bench marks against which an assessment would be made to determine the value of what was to be done and what was actually done. For example, the audit report reveals that there were no bills of quantities. This means that the cost of materials used or required to be used could not be ascertained except through guess work.

Secondly the audit report reveals that there were no strip maps indicating the length of the road and the locations that required gravelling. The strip map would have given rise to the bill of quantities showing the exact quantities that would be executed. This means that the audit was hand capped and could not establish the difference between what was paid and what was done. Whilst the amount released is not disputed, the amount spent cannot be established with accuracy since there are no bills of quantities or strip maps.

The audit report also shows that there were no road designs. It therefore becomes difficult to ascertain what was to be done. The width of the road and water drainages could only be ascertained from the designs which were not available.

Some witnesses such as PW3, PW4, PW9, PW10, and PW11 support the first respondent that rain was a critical factor in spoiling the roads. By the time of audit which was over seven months since work was stopped by the LC V chairman's complaint, rain had pounded the area and no meaningful engineering audit could be made except through guesswork.

In his report to the district chairman contained in **exhibit P25**, PW4 complains that people had encroached on the road reserve and blocked workers from opening up drainage channels. This meant that during rainy seasons roads would flood causing silting and blockages of culverts. By the time of the audit in September 2012 there was sufficient damage to create a wrong impression of work done.

To this extent, the engineering audit could only be a matter of guesswork. A criminal charge cannot be proved on the basis of guesswork.

On the financial side, the prosecution was required to adduce evidence of drivers who are said to have signed for fuel whereas not. This was not done although it appears in the audit report. Some vouchers are said to have been lost by PW18. This casts doubt on the integrity of exhibit P36 since the primary documents for showing false accountability are missing. PW9, PW10 and PW11 are drivers who were called to testify but were not asked about fuel consumption or if they signed for fuel! No receipt was shown to them to dispute the fact that they never signed for fuel. This renders the audit findings about lost

funds at fuel stations doubtful. Criminal charges cannot be proved by doubtful evidence.

The first respondent's defence that he filed accountability reports to **URF**, the district committee and Ministry of works which was never queried when read together with evidence of the third respondent that no funds would be released unless earlier funds had been accounted for, renders the audit findings to have no basis. The trial magistrate was justified to find the audit wanting. It is inconclusive. He found that the issue of missing vouchers was not resolved by the audit report and that the respondents who were available were not interviewed to shed light on several aspects of the funds.

In fact **exhibit P25** dated 6th January 2012 which is itself a progress report by PW4 betrays the finding by the audit team that there were no progress or inspection reports. These are some of the contradictions that litter the prosecution evidence.

After subjecting the evidence to fresh scrutiny, I find no justification in the appellant's criticism of the trial magistrate. There was no proof of the charge of embezzlement against Tumukunde beyond reasonable doubt. The trial magistrate was justified in acquitting him. He could not be hanged for the vagaries of nature that wasted the roads or the residents that refused to let storm water drain through their land.

In regard to count 2 where the second and third respondents were charged with causing financial loss of the sum the first is charged with stealing. The criminality here depends on the criminality in the first count. Since I have found that the charges in count one were not proved, it follows that the charges in count 2 cannot stand. Indeed the audit report which the prosecution rested its case did not fault the second and third respondent with causing financial loss.

Perhaps, I should note here that the audit that the prosecution sought to rely on so much at page 18 makes a conclusion as follows-:

"Because of the significance of the issues highlighted, in the proceeding paragraphs, I am unable to confirm that the funds were utilized for the intended purpose and were properly accounted for in all instances. It is, therefore,

recommended that further investigations be undertaken by other arms of government to identify the perpetrators of the embezzlement with a view to recovery and prosecution as is deemed necessary”.

The implication of the above conclusion is that **exhibit P36** cannot be the basis of prosecuting the respondents without further supporting investigation and evidence. The trial magistrate in his judgment at page 24 held that the prosecution evidence was riddled with inconsistencies and untruthfulness. Further, that the prosecution failed to prove actual loss which is a key ingredient in a charge of causing financial loss. What the prosecution attempted to rely on is what it called **estimated loss**. Estimated loss cannot sustain charges of causing financial loss in law. There was no evidence that the second and third respondents knew or had reason to believe that the payments were going to cause financial loss. The charges in count two were perfunctory.

The trial magistrate was justified to find the respondents not guilty in counts 1 and 2.

It follows that the charges of Abuse of office against the second and third respondents in count 3 cannot be sustained. The prosecution faulted the second and third respondent in count 3 for not following the force on account procedure issued by the PPDA. However, the prosecution did not demonstrate by evidence how the two deviated from the force on account. No witness was called from **PPDA** to demonstrate how the two respondents failed to comply with the **force on account**.

On the contrary, the respondents insisted they followed the **force on account** and even tendered **exhibit D16** which should have been tendered by the prosecution if it was serious. **Exhibit D16** is **PPDA** circular number 3 which contains guidelines for implementing the **force on account method of procurement**.

There was no evidence of arbitrary acts by the two respondents which are prejudicial to their employer. The prosecution in my view called a lot of irrelevant witnesses that did not prove specific charges preferred. The lower record is full of stories that do not prove the charges preferred.

Lastly on the issue of false accountability, the trial magistrate held at page 27 of his long judgment that the first respondent was never given opportunity to answer any audit queries so he could not be faulted.

Be that as it may, the prosecution did not adduce any evidence to prove charges of false accountability. One would expect the prosecution to call witnesses that deny receiving fuel or providing any service. Indeed some drivers were called as witnesses number 9, 10 and 11 but none of them was shown any document which is false. Without false documents, charges in count 4 are just dormant. **Exhibit P58** is useless because it is talking about signatures which the respondents don't deny. It should have referred to any signature of either a driver or service provider who denies it. No wonder the defence did not cross examine the hand writing expert, PW20, at all because in my view his evidence did not add value to the charges in count 4. The trial magistrate was justified to ignore it.

After reviewing the evidence on record and perusing the judgment of the trial magistrate I have come to the conclusion that there was no credible evidence upon which the charges of embezzlement, causing financial loss, abuse of office and false accounting could be proved beyond reasonable doubt.

The complaint in ground one of the appeal fails.

GROUND 2 AND 3

The appellant complains that the trial magistrate dismissed the audit report contained in **exhibit P36** and the hand writing expert report in **exhibit P58** without giving reasons. With respect the trial magistrate gave reasons why he never believed in the report of PW7 and PW8. The reason he gave is that instead of the two interviewing the first respondent to answer any queries they had, they chose to write a report without his input and ended up making only **estimates**.

In law, financial loss or indeed embezzlement cannot be proved by mere estimates. It is proved by actual loss. Neither PW7 nor PW8 were conclusive about the task at hand. That is why at page 18 of their report they recommended further investigations. There is no evidence that further investigations were

done to establish the allegations made by the auditor and engineer in **exhibit P36**. The trial magistrate was right to dismiss that report.

As regards the handwriting expert who tendered the report in **exhibit 58** about signatures, there was no dispute about them. The issue of photographs being used to make requisitions has no evidence to back up that allegation. The prosecution didn't adduce experts in photographic interpretation to find the respondents culpable. Besides there was no duty imposed on the respondents 2 and 3 to interpret photographs in the course of processing or approving funds. Indeed photographs are not financial documents. They may be useful during audits but they are not financial documents required to process payments in the strict sense. Consequently, the complaints in grounds 2 and 3 are not sustainable with the result that the two grounds fail.

GROUND 4.

The appellant complained that the trial magistrate dismissed its case for being riddled with inconsistencies that the court never pointed out. Whilst the trial magistrate didn't list the inconsistencies in one place in his judgment, perusal of the proceeding shows that the prosecution adduced contradictory evidence and surprisingly hoped to prove its case. For example PW4 who is the secretary works gave evidence to the effect that progress reports were being made to the district about the road works. His evidence is that the district committee had never complained about the issues which are raised in the charges against the respondents. Clearly PW4's evidence contradicts the case against the respondents.

Similarly, the drivers who were summoned such as PW9, PW10 and PW11 didn't support the prosecution allegation that fuel was drawn in their name whereas not. Further PW3 who was in charge of receiving accountabilities testified that all accountabilities were provided before more funding was requisitioned for. She didn't allege that there were false receipts or ghost suppliers. One can conclude therefore that the prosecution evidence was contradictory. In law if the prosecution adduces evidence that is contrary to the charges preferred then there can be only one conclusion which is that the

charges have not been proved beyond reasonable doubt. The complaint in ground 4 has no merit and hereby fails.

In conclusion, after reviewing proceeding before the lower court and perusing the exhibits for both sides and after reading the judgment appealed from, it is my finding that the prosecution evidence in the lower court was so weak and contradictory that it could not prove the charges preferred against the respondents beyond reasonable doubt. The case was brought to court prematurely instead of following the advice of PW7 and PW8 to have the allegations properly investigated. The result is that the appeal is dismissed and the judgment and orders of the trial magistrate up held.

Before I take leave of this case, I wish to observe that civil servants in the performance of their duties are often times met with challenges which may be beyond their control. Some situations may call for creative thinking so that if guidelines are deviated from, it may be necessary to get answers why it happened rather than bundling up public officers and hounding them to court as if every error in the performance of public duties is corrected by penal sanctions. Some errors can be handled administratively. The court system should only be used where there is clear evidence of criminality especially the element of mens rea. Actus reus without the accompanying mens rea does not constitute a crime under the charge of embezzlement, causing financial loss, abuse of office or false accounting. There was no evidence of mens rea from all the 20 witnesses the state produced in this case.


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GIDUDU J

31st July 2019

*Proposed delivered in open court in
presence of Mr. Alito for Appellant &
Mr. Mushi for Respondents
Dita - clerk*



31/7/19