

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
ANTI-CORRUPTION DIVISION
HOLDEN AT KOLOLO
CRIMINAL APPEAL 21 OF 2020
(ORIGINAL CRIMINAL CASE 5 OF 2019)

UGANDA PROSECUTOR.

VRS

- 1. BENON TWINOMUJUNI CHALLY**
- 2. NAMARA MICHAEL RESPONDENTS.**

BEFORE GIDUDU, J

JUDGMENT

The state appealed against the judgment of HW Pamela Lamunu Ocaya, Chief Magistrate, dated 9th December, 2020, in which she dismissed charges of Embezzlement and Abuse of office against the respondents.

The 1st respondent was Head teacher of Mbarara High School whilst the 2nd respondent was Bursar.

The brief facts are that in the Month of September, 2018, PW1, Fredrick Oketch, of the **IG** Mbarara office received instructions from the deputy IGG to investigate allegations of financial mismanagement at Mbarara High School.

PW1 analyzed payment vouchers between 1st January 2017 and May 2018 and noted that some of them did not have requisitions and accountabilities attached. The payments were also not posted in the petty cash book.

PW1 asked for the missing requisitions and accountabilities but the respondents failed to provide them in the time he gave them. Some money was withdrawn without vouchers. A total of **UGX**.



207,450,000 was found to have been withdrawn but was neither posted in the cash book nor did it have supporting requisitions or accountability. PW1 concluded that this money was stolen by the two.

The respondents denied stealing any money and contended that they withdraw the money at various times and spent it in accordance with work plans/budgets. It was their case that all planned activities were carried out. They compiled documents contained in defence exhibit D1 to account for the money. It was their case that they were out of the school by the time PW1 did investigations otherwise they could have provided him with all the required information. As regards the omission to post the cash book, they contended that posting was made to the various vote books which PW1 ignored to cross check.

The trial Chief Magistrate decided that the prosecution had failed to prove that the respondents had acted fraudulently and therefore the charges of embezzlement and Abuse of Office had not been proved. It was her finding that the respondents had explained the use of the money through defence **exhibit D1**. She acquitted the respondents hence this appeal.

The appeal is founded on four grounds which are summarized as follows: -

1. That the learned Chief Magistrate erred in law and fact when she considered the defence case in isolation of the prosecution case.
 2. That the learned Chief Magistrate erred in law and fact when she when she relied on **exhibit D1** which was doctored or tampered with.
 3. That the learned Chief Magistrate erred in law and fact when she held that failure by the prosecution to prove that the activities were not held meant that charges of Embezzlement and Abuse of Office were not proved.
 4. That the learned Chief Magistrate erred in law and fact when she did not exhaustively consider and evaluate the evidence on record.
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M/S Kinobe Rogers and Munaaba Philip appeared for the **IG** whilst Mr. Karigyenda appeared for the respondents.

Mr. Kinobe criticized the Chief Magistrate for believing PW2's testimony that all cheques had the requisite supporting documents. He submitted that the defence exhibit which was relied on by court to exonerate the respondents was tampered with rendering it unreliable.

He submitted further that failure by the respondents to provide accountability for the funds drawn from the bank meant they had stolen it.

It was his view that by failing to post the cash book for money drawn from banks exposed the school to the risk of loss of funds and since there was no accountability the respondents are culpable. He relied on a host of cases such as **Uganda Vrs Obore George and Ors criminal Appeal 24 of 2014 (HC)** for the proposition that where there is no accountability, it means the money is unspent making the accused liable; **Uganda Vrs Moses Papa and Onr criminal case 4 of 2017 (HC)** for the proposition that if an accused mixes genuine and false accountability, then the whole package is false.

In reply, Mr. Karigyenda supported the judgment contending that there could not be theft without proof of fraudulent intent. It was his view that the money, UGX 207,450,000= was not stolen because the defence explained it was duly recorded against their respective votes and used to carry out activities of the school.

He relied on the testimony of PW2 who said he signed the cheques as co-signatory and every cheque had supporting documents such as a requisition and payment voucher. He distinguished this case from **Uganda Vrs Obore George and Ors criminal Appeal 24 of 2014 (HC)** in that accountability was provided in exhibit D1. He submitted that even if the cash book was not posted, the respective votes were posted to capture receipt and expenditure.

As regards the case of **Moses Papa**(supra) learned counsel submitted that it was distinguishable in that **Moses Papa** was dealing with false accounting whilst the present case was dealing with theft. While Moses Papa mixed genuine and false accountability, there was no false accountability in the present case. The alterations on dates was to match the period under reporting otherwise the description of payment and figures did not change.

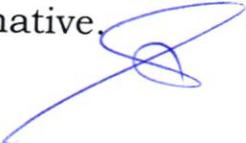
On the charge of causing Financial Loss he submitted that there was no proof of loss. He relied on cases of **Kassim Mpanga Vrs Uganda criminal appeal 30 of 1994(SC)** and **Godfrey Walubi Vrs Uganda criminal appeal 152 of 2012(COA)** for the proposition that actual loss must be proved and not assumed.

He concluded that there was no proof of prejudice to the school because there was no audit done to show that there was loss to the school as a result of failure to carry out the activities for which money was drawn.

My duty as a first appellate court is to review the evidence on record and subject it to fresh scrutiny and draw my own conclusions without ignoring the judgment and taking into account the fact that I neither saw nor heard witnesses testify.

Although the grounds of appeal were itemized, learned counsel for the appellant argued them omnibus.

The issue in the lower court was that PW1, a senior officer from the **IG** was detailed to investigate financial mismanagement of Mbarara High School. He interrogated bank withdrawals and concluded that money amounting to UGX 207,450,000= was withdrawn without supporting documents. Some had no requisitions or payment vouchers or accountabilities. He asked the respondents to provide the requisite documents but they failed to do so. PW1 charged them with Embezzlement and Abuse of Office in the alternative.



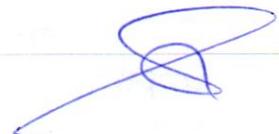
The respondents denied the charges. It was their evidence that PW1 did not look at all the accounting books such as vote control books where the disputed funds were posted. They also argued that since the investigations occurred whilst they were out of office, they could not provide the documents in time and needed more time to provide the accountability. Besides, they insisted any money withdrawn was spent as per work plan. They dared PW1 to point at any activity that was not carried out so that they plead guilty.

It is not in dispute that the respondents were mandated to manage the funds of the school. The first respondent was the principal signatory while the second respondent was a bank agent. The 1st respondent as Headteacher authorized payments. PW2, a member of the **BOG** was a co-signatory.

To sustain charges of embezzlement, the prosecution had to prove beyond reasonable doubt that the respondents stole the money in question. To constitute theft, the taking of the money must be with fraudulent intent or the money must be fraudulently converted to their use or use of any person other than the owner. **See section 254 PCA, Cap 120.** Fraud is the key element in the offence of theft which is embezzlement in the case of an employee.

The prosecution evidence on this aspect was that of PW1. He testified that he came to the conclusion that the money had been stolen because the withdrawn funds were not posted in the cash book and his investigations showed some cheques were cashed without requisitions while others did not have supporting vouchers. It was his evidence that the respondents did not provide accountability for this money.

A requisition is the primary document that triggers authorization of a payment. The requisition indicates the activity to be funded and the budget line from which funds are to be sourced. The funds must be contained in the work plan. Once the Accounting Officer is satisfied, he/she authorizes the



making of a voucher to support the payment. The voucher describes the payment, names the payee, the amount to be paid and the source vote to be charged. The payment is processed and the payee is paid. Where accounts are electronic, the accounts are settled on the system. But where funds are by a cash cheque, the money is drawn in cash and posted in the cash book as revenue and then paid out manually to the payee who signs the voucher. The payment is retired in the cash book detailing the payee, amount and purpose together with the voucher number.

Does failure to post money in the cash book amount to embezzlement? Does failure to provide a requisition amount to embezzlement? Does failure to provide accountability amount to embezzlement? Without more, this could be evidence of embezzlement.

The respondents denied theft of the money. PW2, who is a certified public accountant and former board member and co-signatory to the cheques testified in cross examination that he signed all the cheques in dispute. **"All the cheques the cheques I signed had requisition forms"**. He went on **"I don't remember if any activities in the questioned period were not done unless address my mind to the performance reports given."** In re-examination he stated **"my conclusion on money used and not posted on petty cash is that it might have been paid direct to suppliers but also must be justified"** On the importance of posting the cash book, PW2 stated in examination in chief thus **"postings are very critical because it is a financial record and it is a requirement for any financial information in terms of generating reports, income and expenditure balance sheet and it enables stakeholders to get expenses of the finance of the school"**

From the above prosecution witness, the following facts are clear. None of the questioned cheque was signed without supporting requisition forms justifying expenditure by way of activities. It is doubtful if any activities claimed to be done

were not done. A cash book is used for recording financial transactions to facilitate financial reporting- generating reports for the institution and stakeholders. Money used and not posted may have been paid to suppliers directly.

PW3, an assistant bursar of the school for 21 years testified in cross examination thus ***“Yes I know Mr. Oketch, the IGG officer in Mbarara over accountabilities that he had not seen. What we discovered were accountabilities that were not attached to vouchers by the time they took the books. They took the books and missed some documents. We had a lot of things in the office, when came across those accountabilities when we were cleaning the office. I then reported to the headmaster. I did not go with A1 to the office of the IGG. The documents were in the bursar’s office. The originals. The photocopies were given to the headmaster. The school kept on running, there is no activity that was not done. That is all.”***

From the above prosecution evidence by PW2 and PW3, there is no proof of theft of money against the questioned cheques. Failure to post a cash book without more, is not theft but indiscipline on the part of the accounts staff. PW1 who investigated the case carried away books leaving behind documents supporting the questioned expenditure. There was no activity that was not done at the school.

It was, therefore, critical to go a step further to establish if the said activities were carried out? The primary tool for tracking activities in the budget is the **approved work plan**. There was no witness including PW1 that testified about the work plan. There was no evidence that money was drawn for a particular activity which was not carried out- value for money audit.

During the trial, the respondents tendered **exhibit D1** through the testimony of the 2nd respondent. This was on 30th January, 2020. Mr. Kinobe who was the prosecutor in the lower court is recorded as offering no objection to the admission of exhibit D1.

This exhibit contains the missing documents complained of by PW1. This **exhibit(D1)** was compiled from documents recovered by a prosecution witness PW3 from the office of A1 who was by then out of school on interdiction. It was certified by the Ag. Headmaster of the school. It contains requisitions, payment vouchers and accountability receipts.

Mr. Kinobe criticized the trial Chief Magistrate for relying on this exhibit yet it had some alterations on dates. But the changes complained of were not shown how they perpetuated fraud. The amounts of money in the requisitions, payment vouchers and accountability receipts remained the same. The activities in the requisitions, vouchers and accountability receipts remained the same. The said altered dates matched the voucher and accountability receipts meaning that the alterations were just corrections and not fraudulent. The originals of **exhibit D1** are in the possession of PW1 according to the evidence of PW3.

I have no reason to believe that the respondents manufactured accountability in **exhibit D1**. They were out of office by the time PW3 discovered those documents. The complaint by Mr. Kinobe about **exhibit D1** on appeal is not sustainable. He did not object to this exhibit in the lower court and his objection on appeal is an afterthought. It is not justified. It exonerates the respondents of the charges. The criticism that it was wrongly relied on is unjustified. PW1 cannot be allowed to keep the originals of accountability and bring the respondents to court accusing them of failure to provide accountabilities. That is malicious.

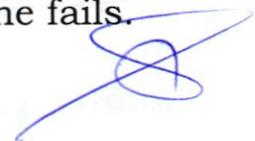
In conclusion, the cases cited for me by the appellant were not applicable to this case. **Moses Papa** was charged with embezzlement of 70,000,000. He was acquitted of those charges. He was convicted of false accounting. He provided accountability which a value for money audit found to be false. The activities were proved by evidence not to have been carried out. Suppliers denied providing goods and services to Moses Papa. No single supplier was called to testify in this case.

Similarly, in **Uganda Vrs Obore George and Ors(supra)** the accountability was proved to be false. The activity was not carried out. In the instant case, there was no value for money audit carried out. This was the only way the prosecution could have dismissed the accountabilities in **exhibit D1**.

Accountabilities in **exhibit D1** contain receipts which bear addresses and telephone numbers of suppliers within Mbarara town. PW1 should have contacted them to verify the supplies. Even the store keeper and caterer of the school should have been asked to verify deliveries. This is what is called **value for money audit**-to confirm if money was spent on the activities claimed in the accountabilities.

The trial Chief Magistrate was entitled to find as she did that there was no fraud proved in **exhibit D1** which is an essential element in a charge of theft. She also found that there was no proof of loss therefore, the charges of causing financial loss were not proved. Only a value for money audit could have established loss if any. The accused could not be guilty of Abuse of office because there was no prejudice to the school. The trial Chief Magistrate was entitled to accept the accountabilities in **exhibit D1**. Failure to post a cash book is not a crime. It can attract administrative sanctions but not criminal charges. Besides, there was undisputed evidence that there was shortage of staff. The person who used to do it left the school. This was not disputed.

The complaint in ground one was that the trial court considered the defence case ignoring the prosecution case. I have discussed the evidence of PW2 and PW3 in great depth. With respect, I do not find incriminating evidence in the prosecution case. If the court believes the prosecution evidence of PW2 and PW3, as I do, it would find, as I do, that the prosecution had no evidence to incriminate the respondents on charges of embezzlement or causing financial or Abuse of Office. Ground one fails.



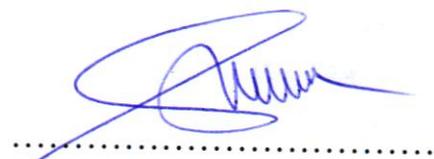
The complaint in ground two is that the trial court erred to rely on **exhibit D1**. I have found that it was a genuine accountability set discovered by prosecution witness PW3. It was not manufactured by the respondents. PW1 took possession of its original but strangely chose to charge the accused for lacking evidence already in his possession. There was no evidence adduced to prove it was false. Ground two fails.

In ground three, the complaint was that proving activities was not relevant. With respect, there was no way of faulting this accountability without a value for money audit or evidence by suppliers that they never supplied or that their receipts were forged. Proving that activities were not carried out was essential. Ground three fails.

Ground four which was about failure to evaluate evidence on record exhaustively is superfluous. It was not demonstrated to me how an exhaustive evaluation is done or where the trial Chief Magistrate fell short. There was no incriminating evidence on record. No amount of evaluation would find it. Ground four fails.

The strange scenario in this case is that if I believe the prosecution evidence, I would acquit, if I believe the defence evidence, I would acquit. The Chief magistrate was entitled to acquit the respondents of the charges. The prosecution of the respondents was, with respect, not justifiable.

The result is that the appeal fails and is dismissed. The judgment and orders of the Chief magistrate are confirmed.



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Gidudu Lawrence

JUDGE

17th August, 2021