THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

ANTI CORRUPTION DIVISION

HOLDEN AT NAKASERO

CRIMINAL APPEAL 16 OF 2023

OLEGA GEORGE ..... APPELLANT

VRS

UGANDA ..... RESPONDENT

BEFORE GIDUDU, J

JUDGMENT

Olega George, the appellant, was tried and convicted by Nabende Moses, Ag. Chief Magistrate of the offences of **Embezzlement C/S 19(a)(i)&(iii) of the ACA, 2009 and Abuse of Office C/S 11 of the ACA, 2009**.

He was sentenced to four years' imprisonment on the charge of embezzlement and to two years' imprisonment on the charge of abuse of office on 28th July 2023. The two sentences run concurrently. He appeals against the conviction and sentence.

The brief facts as gathered from the record are that in FYs 2013/14 and 2014/15, Maracha district assigned the appellant who was the district engineer to supervise the grading of two roads in the district. The Uganda-DRC road 33 km and Agii-Okabi road 11 km.

According to prosecution witnesses who were mainly employees of Maracha District Local Government, the appellant did not do any work on the Uganda-DRC road 33 km yet he used all the money budgeted for in terms of tractor fuel and allowances. As regards the Agii-Okabi road 11km, only 6.5 km were cleared of bush but no grading was done.

Investigations by the **IGG** revealed that the appellant did not use UGX. 17,186,066= of the requisitioned for the purpose of bush

clearance and grading. Instead, he filed accountability which showed he had done all the work. The prosecution case is that the accountability is false meaning he stole those funds and abused the authority of his office.

On the other hand, the appellant denied the charges contending that he was harassed by the **CAO** for delaying to file accountability for the road works and when he did he was charged. It was his defence that all works were executed and accountability filed.

It was his defence that on the Uganda- DRC road he worked on 10 km out of 38.5 km before he was interdicted. He tendered the performance reports about the works he had made to the **CAO**. He also presented copies of accountabilities he made to the **CAO**. It was his further defence that these complaints had been made much earlier for which he was interdicted but contested the matter in the high court against the Attorney General. A consent judgment was filed after which he was reinstated before being arrested on the present charges.

He attributed the present charges to grudges with PW3, Rashid who wanted to be in charge of the money for the road works. He believes PW3 took the road Inspector (PW1) to a wrong road instead of the roads the appellant had worked on just to put the appellant into trouble.

The trial chief magistrate held that the accountability the appellant made was false and that when the prosecution witnesses testified, issues of grudges or evidence of executed works was not put to them in cross examination to challenge their evidence. He concluded that the accused presented doctored accountability as an afterthought after the prosecution witnesses had testified. He found him guilty and convicted him. He sentenced him to four and two years' imprisonment to run concurrently hence this appeal.

The following grounds of appeal were filed and are summarized below: -

1. The learned trial magistrate erred in law and fact when he considered /relied on evidence /report of findings of PW1, Ochaya Solomon who was not a qualified certified engineer.
2. The learned trial magistrate erred in law and fact when he neglected, ignored, disregarded and did not consider the accountability presented by the appellant.
3. The learned trial magistrate erred in law and fact when he wrongly convicted the appellant on the offence of embezzlement without proof of fraud.
4. The learned trial magistrate erred in law and fact when he failed to consider mitigating factors when sentencing the appellant.

M/S Alaka and Co Advocates filed submissions on behalf of the appellant whilst M/S Dr. Ernest Katwesigye and Ms Diana Nantabaazi filed submissions for the respondent.

Ground One.

It was submitted for the appellant that since PW1, Ochaya Solomon, was not a registered engineer, he could not make a report of work done by the appellant who is a registered engineer. Counsel faulted the trial magistrate for relying on such a report to convict the appellant.

Counsel canvassed the view that the appellant could only be faulted by a registered engineer and that the report of PW1 was void for want of competence. Further, that PW1 did not even use a spirit level as a tool for assessing work done or not done.

In reply it was contended for the respondent that it had not been demonstrated by any law that a diploma holder cannot make an inspection report such as the one PW1 made. It was submitted that PW1 had the competence to make the observations captured in his report. I was asked to consider that PW1 was employed by **UNRA** as a maintenance technician and road over seer. He holds a diploma in engineering and building construction and was capable of executing the assignment of establishing if the roads in question were graded and cleared of bush. Besides all other prosecution witnesses did not

see any work on the Uganda-DRC road whilst the Agii-Okabe road was partially cleared of bush but road grading was not done.

Ground Two.

The complaint here is that the trial chief magistrate neglected, ignored, disregarded and did not consider the accountability presented by the appellant. In his defence, the appellant tendered **exhibits D4 and D5** which are expenditure details on the roads he worked on including Uganda- DRC and Agii-Okabe roads.

It was submitted that the appellant showed photographs of works done which he attached to the accountabilities. Further, it was submitted for the appellant that the investigating officer did not ask the appellant to show him the roads he claimed to have worked on thus condemning him unheard.

The respondent's reply was that the trial court had two conflicting pieces of evidence. The prosecution contended that no work was done to merit the expenditure whilst the appellant insisted he had done all the work and accounted for it.

It was submitted that after evaluating the two versions, the trial magistrate found that the prosecution evidence out-weighed the defence and was entitled to hold that the defence exhibits were false.

Ground Three.

The appellant complained that he was convicted of the offence of embezzlement without evidence of fraud. The justification here is that the appellant did not steal the money but spent it by paying staff and purchasing fuel for which he provided accountability.

I was asked to find that some witnesses lied to say that they received money but it was not for work because they did not perform any activity.

In reply, it was submitted that since the appellant admits that the tractor broke down and did not complete the work, how come his accountability does not include a refund of money for uncompleted

works? It was the view of the respondent that any accountability purporting to account for all the work is false.

Ground Four.

The complaint here was that the sentence was imposed in disregard of the mitigating factors such as the age, family responsibilities, and character of the appellant.

The respondent criticized the appellant for not demonstrating how the trial magistrate ignored the mitigating factors in arriving at the sentence. It was contended that the sentence of four years fell within the sentencing guidelines which provide for a starting point of 7 years down to 2 years or up to 14 years. It was argued that a sentence of 4 years was below the starting point.

It is the duty of the first appellate court to reconsider the evidence, evaluate it and draw its own conclusions in order to satisfy itself that there is no failure of justice. It is not enough for the first appellate court to merely scrutinise the evidence to support the trial court's findings and conclusions. (***Ruwala v. R (1957) EA 570***. I will resolve the grounds framed in the order they were argued.

Ground One

Did the review of the work of bush clearing and grading a road by a single tractor grader require to be done by a certified engineer registered by the Engineers' Registration Board? What was there to review? Counsel for the appellant suggested a spirit level to perform the job. What tools are required to see that a tractor has cleared a bush beyond normal eye sight? Does one need a magnifying glass or telescope to distinguish a graded and ungraded road?

I understood the complaint in ground one to be that a person holding a diploma in engineering cannot review the work done by a degree holder in engineering. I was referred to the **Engineers Registration Act, Cap 271** but I was not shown any provision in the **Act** that prohibits a diploma holder from doing what PW1 did.

Courts have stated in a number of cases how to treat evidence of experts. Expert evidence is opinion evidence. It is considered together with other evidence to support or contradict a fact. **See S. 44 of the Evidence Act.**

An expert is not necessarily one decorated with academic papers. It refers to **"one who has acquired special knowledge, skill or experience in any science, art, trade or profession. Such knowledge may be acquired by practice, observation, research or careful study**". See *Sakar on Evidence 11th Edition, p 497.* See also *section 43 of the Evidence Act, Cap 6.*

Expert witnesses however eminent cannot give more that an opinion and do not usurp the function of the judge to evaluate evidence and form his/her own independent judgment on the fact presented. Expert opinion is not binding on the court. The court has to consider expert opinion together with other evidence to arrive at an independent decision. See *Rajab V Rep (1970) 1 E.A 395 at 397; Kimani V Rep (2003) 2 E.A 417; Sharma kooky V Uganda Cr App 44 of 2000(SC)*

The task required of PW1 was to "**inspect and evaluate works**" on Uganda-DRC and Agii-Okabe roads among others. The works on these two roads were expected to be **bush clearance** and **road grading** only. Did this task require a registered engineer?

I have perused the provisions of the **Engineers Registration Act, Cap 271,** I have not found any provision relevant to the issues in this case. The **Act** provides for the establishment of an **Engineers Registration Board**, its powers and functions and to provide for the registration of engineers. There is even no evidence that the appellant is a registered engineer under the **Act**. Even if he was, his registration has no relevancy to the case against him.

The scope of work required to be done was just regular maintenance of the two roads. Bush **clearance and grading** is a matter with in the regular competence of road inspectors who possess ordinary or higher diplomas. The actual works are executed by tractor operators who have never attended an engineering class.

It is not the same as road construction which require interpreting road designs and bills of quantities.

PW1's report which is **exhibit P7** is that for Agii-Okabi road whose length is 11 km, bush clearance was done up to 6.5 km. It follows that 4.5 km was not worked upon. No grading was done on the entire road. He took photos to support his findings.

As regard Uganda- DRC road there was neither bush clearance nor grading for the entire stretch of 33 km.

These observations were confirmed by other witnesses such as PW3, Rashid Kaum, who was present when PW1 was inspecting the roads and is an assistant district engineer in the same office as the appellant.

PW4, Andrionzi Moses, a grader/tractor operator testified that he never graded the Uganda-DRC road. PW6 Edria Herbert, engineering assistant testified that the Uganda-DRC road was not cleared of the bush nor was it graded. Similarly, Abiribale Paul, PW8, the internal auditor who was detailed to do a value for money audit reported in **exhibit P12** that funds were spent for no work done and recommended that the appellant be investigated.

The appellant in his defence tendered **exhibits D4 and D5** including photos of work being done. Evidence of the prosecution is that the tractor worked for two days and broke down. It was repaired and broke down again. Even the appellant gave evidence to that effect. He agreed that the tractor broke down and work was not completed.

But in his report of 25th April 2017 (exhibit D4) the appellant wrote to the CAO in respect of Agii-Okabi road, and concluded thus "*Generally the 100% of works was achieved in satisfactory quality*"

And in respect of Uganda- DRC border road, the appellant filed another report in exhibit D5 of 17th April 2017 where he concluded thus "*Generally the 28% of works were achieved in satisfactory quality*"

Evidence of PW4 who was the tractor operator is that he never worked on Uganda-DRC road because the grader broke down. He is supported by other witnesses from the appellant's office such as PW3 and PW5 both engineering assistants of Maracha **DLG**. Further, the appellant's own driver denied driving the appellant to work on the said road because there was no work being done. Who is lying because the eye witness accounts do not support the appellant's case!

The appellant referred to the prosecution witnesses as liars who were saved from prosecution to give false evidence against him. I have not seen evidence to back up that allegation especially during cross examination of the said prosecution witnesses.

Besides, when PW1 testified about his findings in **exhibit P7**, he was not cross-examined on the contrary reports in **exhibits D4 and D5** in order to test the veracity of the prosecution case that no work was done on Uganda-DRC road. There was no way the appellant could achieve what he purports to have done when he had no tractor grader and its operator. PW4, the tractor operator denied doing what the appellant claimed to have done in **exhibits D4 and D5**. This leaves the appellant's version to be a lie and any accountability submitted must logically be false.

I find on the basis of evidence on the record that no expert evidence was required to review the work done or not done. Even ordinary villagers could tell correctly if any bush or tree had been felled or the road surface cleared by any tractor grader.

The criticism against the trial chief magistrate for relying on evidence of PW1 plus others like PW3, PW4, PW5, PW6, PW8 etc to conclude that only limited work was done on Agii-Okabi road whilst no work was done on Uganda-DRC road was, with respect, not justified.

No equipment such as a *spirit level* could establish work where there was none. The appellant himself admits in **exhibit D5** that only 28% of the work was done. How can he maintain that all work was done!

I find that the job of bush clearing and road grading to create drainage channels for storm water did not even require to be done by an engineer registered by the Board. This was an ordinary job. It did not require road designs and bills of quantities. It was executed following the ordinary natural terrain of the road. The report of eye witnesses including the **UNRA** road inspector, PW1, was valid.

PW1 who has a diploma in engineering and construction and an employee of **UNRA** charged with inspecting and doing road maintenance on public roads was an experienced and qualified person to give an observation opinion whether the roads were cleared of bush or graded by tractor.

The chief magistrate considered ample evidence on record and found that the version given by the prosecution was more credible than the defence version. Consequently, the complaint in ground one fails.

Ground Two.

The appellant complained that the trial chief magistrate ignored his accountability and called it doctored. I have found in ground one that the two reports relied tendered by the appellant tell a lie about work that was done on the basis of abundant evidence by prosecution witnesses including the tractor operator and the appellant's own driver!

There is no evidence that the appellant operated a tractor grader which had broken down. So how did he achieve the results for which he has accounted for the money? **Exhibits D4 and D5** are false to the extent that they claim to account for complete works on Agii-Okabi road and Uganda- DRC road. The two defence reports do not stand a value for money audit test in view of the abundant evidence to the contrary adduced by the prosecution.

Accountability filed by the appellant told lies about the truth on the ground. The findings of the trial chief magistrate that the accountability is false, is supported by abundant evidence on record. I concur with the trial court that there was no credible

challenge to the prosecution case on the aspect of actual work done or not done. The issue of grudges is an afterthought just like allegations that prosecution witnesses testified to avoid being charged. The record is silent about allegations of grudges and possible prosecution during the testimony of PW3 to PW6 and PW8. Ground two fails.

Ground Three.

It was submitted that the trial chief magistrate wrongly convicted the appellant without proof of theft. Theft is a key ingredient on the charge of embezzlement which is technically, theft by an employee.

In count one the appellant was charged with embezzlement of UGX. 17,186,066=. It was submitted for the appellant that he did not steal this money because all the money he received was spent and accountability filed. I was asked to find that witnesses lied in court when they claimed to have signed for the money but did not know what it was for.

The trial chief magistrate at pages 18 and 19 of his judgment held thus-

"***As clearly stated, money paid to PW2, PW3 and PW6 was paid out to them but for unknown activity and the money alleged to have been paid PW4 and PW5 did not reach out to them and was not acknowledged by them. The accused went ahead to account for it as if it was paid to all of them for the purpose it was requisitioned yet not. In the circumstance, having received and accounted for it as if it had been paid out to the beneficiaries for the purpose it was intended for yet not, I find that the accused is accountable for the loss occasioned for this part of the money....***"

"Regarding money for fuel, a requisition attached to exhibit P9 had 12,460,000=. P.10 reveal that money was paid to Abu Fuel Station and according to copy of fuel consumption register, accused closed indicating that the fuel was all consumed..... only 6.5 km of the road was bush cleared and

4.5 km was not cleared. That no grading was done on the entire 11 km road"

The above two excerpts from the judgment are supported by the testimonies of witnesses from PW2 to PW6. In fact, **exhibit P8** shows that two of the alleged recipients did not even sign the acknowledgement sheet- that is Onet William and Moses Andrionzi (PW4) the tractor driver.

The trial chief magistrate heard and saw the witnesses testify. He saw their demeanour and believed them. Their testimonies were consistent with results on the ground (**exhibit P7**) which showed that very little work was done and on the Uganda-DRC road, no work was done at all. When money is paid for no work done and if money is said to have been received by a person who never even signed for it or when fuel is drained from a fuel station with no work being done on the ground, then that can only be fraud.

The complaint that there was no theft because accountability was filed which accounted for money is betrayed by the fact that the accountability was false. False accountability does not exonerate the appellant of charges of embezzlement. In fact false accountability is evidence of embezzlement. The complaint in ground three is not justified.

Ground Four.

It was contended that the sentence imposed by the trial court ignored a number of mitigating factors raised by the appellant. These factors were said to include age, family responsibilities and opportunity for reform.

The sentence imposed was four years' imprisonment out of a possible maximum of 14 years. It was not suggested what would have been the appropriate sentence. The respondent countered this complaint by stating that the sentence of four years was within the limits of the guidelines applied by the trial magistrate.

Sentencing powers are discretionary and an appellate court that never saw or heard parties testify would not ordinarily interfere

even when it would have imposed a different sentence unless it is shown that a wrong principle was applied or not followed. The appellate court may also interfere if the sentence is manifestly excessive or too low as to cause injustice. ***See Ongalo s/o Owoura V.R. (1954). 21 [E.A.C.A] 270 and R.V. Mohemedali Jamal (1948) 15 [E.A.C.A] 126.***

During the allocutus, the appellant who stated he was unrepresented during the reading of judgment stated thus-

"***I shall refund the money. I pray for a non-custodial sentence. I have school going children who I take care of"*** The issue of his age and what that age means in law was not canvassed. Similarly, the issues of reform were not put up for consideration.

The trial chief magistrate considered submissions by both sides and the sentencing guidelines. He stated "***....I find accused to be first offender. That notwithstanding, the offence is rampant, no remorse has been demonstrated by convict***...."

He sentenced the appellant to 4 years' imprisonment on count 1 and 2 years' imprisonment on count 2. The sentences run concurrently. The sentencing guidelines (**Legal Notice 8 of 2013**) provide for a starting point in cases of embezzlement at 7 years down to 2 years or up to 14 years. This renders the 4 years imposed to be on the lower side of the scale. Ordinarily there is no valid ground for interference with the sentencing powers exercised by the trial court.

Having a family and being a sole bread winner is a mitigating factor but not an exemption from serving a prison term. The fact that the appellant offered to refund the money does not by itself exclude him from serving a prison term. The trial court weighed the aggravating and mitigating factors and tilted the scale in favour of a reduced sentence of four years from the starting point of 7 years. The appellant should not complain.

However, the sentence as clearly seen from the notes of the trial chief magistrate was influenced by lack of remorse by the

convict/appellant. Courts have held in cases such as **Mattaka and Ors V Republic (1971) EA. 495** that to expect a person who has pleaded not guilty to express repentance rather than to face a higher sentence would interfere with his right of appeal; accordingly lack of repentance cannot be an aggravating factor on sentence.

Would this be a ground for interference? If the sentence was above the middle point, it would have compelled intervention. But the sentence is far below the starting middle point of 7 years and given the fact that corruption offences are serious crimes for which serious sentences should be imposed, I don't find room for intervention. Even in the case of **Mattaka (supra),** the court did not interfere with the sentence because of the seriousness of the crime the appellant was convicted of. The same reasoning applies here with equal force.

In conclusion, after re-evaluating the evidence on record for the appellant and respondent, I come to the same conclusion that the appellant was guilty of the charges of embezzlement and abuse of office. The trial chief magistrate was justified in finding him guilty. The sentence imposed reflects the seriousness of the crimes of corruption. Where civil servants steal money meant for grading public roads, this court finds that the community is deprived of services for private gain. Corruption deprives citizens of essential services. This court was established to punish such crimes.

The appeal is dismissed. The sentence and orders of the trial court are upheld.

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Gidudu Lawrence

JUDGE

17TH APRIL 2024.