THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KISAAKYE; MWANGUSYA; OPIO AWERI; TIBATEMWA-EKIRIKUBINZA; MUGAMBA; JJ.SC]

CRIMINAL APPEAL NO. 8 OF 2016

BETWEEN

BIREETE SARAH :: APPELLANT

AND

UGANDA :: RESPONDENT

[Appeal against the judgment of the Court of Appeal N0. 0079 of 2011 before Hon. Justices: Kasule, Bossa, Barishaki, JJA dated 21st April 2016].

Representation

The appellant was represented by Mr. Jude Byamukama of JByamukama & Co. Advocates whereas the respondent was represented by Ms. Josephine Namatovu- Assistant Director of Public Prosecutions.

JUDGMENT OF COURT

This is an appeal against the judgment of the Court of Appeal regarding the conviction of the appellant for the offence of embezzlement.

The brief background to this appeal is that in 2004, the appellant was employed in the Ministry of Foreign Affairs as a National Coordinator for the International Conference at the Great Lakes Region (ICGLR).

Uganda was one of the Member States participating in the organization and had to contribute to its operations. In 2009, Uganda paid an excess sum of 114,160 US Dollars as its membership contribution. The appellant who was the National Coordinator to the ICGLR secretariat, through an email requested for refund of the excess sum. The email was sent together with an attachment in the form of a letter signed by Ambassador James Mugume - the Permanent Secretary to the Ministry of Foreign Affairs - instructing the Bujumbura secretariat to deposit the funds on account No.00010172403 at Tropical Bank. The account was in the names of Great Lakes Youth League. The sum was later refunded to Uganda by the conference secretariat in Bujumbura. However, on 22nd April 2009 the Ministry of Foreign Affairs received a letter claiming that the refund was a grant for Uganda National Coordination Mechanism for payment of salaries and office administration.

It was alleged that the appellant by virtue of her position had withdrawn part of the money from the account and left a balance of 2000USD.

Furthermore, it was alleged by the Permanent Secretary that the letter which was attached to the email sent by the appellant requesting for the refund bore his signature which was forged. Investigation concerning the forged signature was inconclusive. Suffice to say that while the Permanent Secretary denied signing the letter, he testified that the signature on it resembled his. Notably, the handwriting expert did not expressly conclude that the signature was not that of the Permanent Secretary.

Subsequently, the appellant was indicted in the Anti-Corruption Division of the High Court on two Counts. Count one was for Abuse of Office contrary to Section 11 of the Anti-Corruption Act and Count two for Embezzlement contrary to Section 19 (a) (iii) of the same Act. The High Court Judge found the appellant guilty on the two Counts. He sentenced her to serve a term of 5 years imprisonment on Count one and 10 years imprisonment on Count two. The convict was also ordered to refund 70,160USD. Furthermore, the High Court Judge ordered that the appellant be disqualified from holding any public office for a period of 10 years after release from prison in accordance with Section 46 of the Anti-Corruption Act.

The appellant appealed to the Court of Appeal against the conviction, the sentences and the orders.

The Court of Appeal found that the appeal was partly successful in that the conviction of the appellant on Count one was not proved beyond reasonable doubt. Consequently, the court quashed the conviction and set aside the sentence under Count one. Regarding Count two, the Court of Appeal upheld both the conviction and

sentence of the High Court Judge as well as the orders for refund of 70,160 USD and disqualification of the appellant from service in any public office for a period of 10 years.

Dissatisfied with the Court of Appeal decision, the appellant appealed to this Court on the following grounds:

1. The learned Justices of the Court of Appeal erred in law when they upheld the Appellant's conviction for the offence of embezzlement whereas essential ingredients of the offence had not been proved.

2. The learned Justices of the Court of Appeal erred in law when they affirmed a conviction for embezzlement based on prosecution evidence that was inconsistent with the particulars of the offence alleged in the indictment presented before the High Court.

3. (a) The Learned Justices of the Court of Appeal partly failed in their duty to re-evaluate the evidence on record and came to erroneous conclusions that:

(i) The Prosecution proved beyond reasonable doubt that USD 114,000 was deposited on Great Lakes Youth League account.

(ii) The appellant did not explain where the missing funds went.

(iii) The loss of acknowledgment forms during the break in at the appellant's office was a mere excuse for not knowing where the money went.

(iv) The appellant participated in the transactions relating to the deposit and withdraw of the missing funds.

(v) The prosecution proved beyond reasonable doubt that the funds withdrawn from the bank disappeared into thin air and were never passed on to Government.

(b) The Learned Justices of the Court of Appeal failed to re-evaluate evidence on record demonstrating grave inconsistencies in the prosecution evidence regarding the movement of the money in question from the Great Lakes Region Youth League Tropical account to the Ministry of Foreign Affairs.

4. The Learned Justices of the Court of Appeal erred in law when they held that the trial Judge had not exhibited bias against the appellant.

5. In the alternative but without prejudice to the above, that the Learned Justices of the Court of Appeal erred in law when they upheld an unlawful order of compensation of USD 70,160 and an illegal sentence imposed upon the appellant.

The appellant prays that the conviction for the offence of embezzlement upheld by the Court of Appeal be set aside as well as the order to refund USD 70,160.

In the alternative, the appellant prays that in case the conviction is upheld, a non-custodial sentence be imposed to replace the illegal sentence.

Application for grant of Leave

Both in the written submissions and at the hearing of this appeal, counsel sought leave of this Court to introduce two new grounds of appeal. That is grounds 2 and 5.

The application was made under **Rule 98 (a)** of the **Rules of this Court** which provides as follows:

> **"At the hearing of an appeal—**
>
> **(a) no party shall, without the leave of the court, argue that the decision of the Court of Appeal should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the Court of Appeal on any ground not relied on by that court or specified in a notice given under rule 88 of these Rules."**

The respondent counsel on the other hand objected to the application. Counsel submitted that it would be unfair to fault the learned Justices of Appeal on matters that were never put before

them and on which they never made any findings. To buttress her arguments, counsel for the respondent relied on the decision of this Court in **M/S Fang Min vs. Belex Tours and Travel Ltd**[1] where it was held:

"... in a second appeal, an appellant is not at liberty to raise matters that were not raised and considered by the trial court and the first appellate court."

Ruling of Court on the application

We would first and foremost clarify on the Rule under which counsel for the appellant moved this Court to hear the application for the grant of leave to raise new grounds.

Whereas Counsel moved Court under **Rule 98**, the correct provision should have been **Rule 70 (1) (a)** of the **Rules of this Court**. Although both Rules 98 and 70 provide for motions seeking the leave of Court to introduce new grounds, their application varies. **Rule 98** governs civil appeals while Rule 70 governs criminal appeals.

This Court shall now move to consider the merits of the application.

Rule 2 (2) of the **Rules of this Court** provides that:

> **"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and**

[1] Supreme Court Civil Appeal N0.06 of 2013.

that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."

The above Rule starts with a proviso, "Nothing in these Rules" shall be taken to limit or otherwise affect the inherent power of court to make such orders as may be necessary for achieving the ends of justice. We are aware that **Rule 98 (supra)** in effect bars a party from raising new grounds of appeal which were not considered in the lower courts save with the leave of Court. Nevertheless, **Rule 2 (2)** stipulates that even if a certain Rule provides for a particular subject, the inherent powers of Court override the said Rule.

We will therefore be guided by **Rule 2 (2) (supra)** in handling the application before us.

We have carefully studied the two new grounds as well as the submissions made thereunder. In respect to ground 2, counsel drafted the ground as follows:

The learned Justices of the Court of Appeal erred in law when they affirmed a conviction for embezzlement based on prosecution evidence that was inconsistent with the particulars of the offence alleged in the indictment presented before the High Court.

Counsel's main argument was that whereas the indictment read that the appellant stole US Dollars 114, 160, the evidence led at trial was that she stole money in the sum of Ushs. 223,245,827/=. Counsel

argued that the disparity in the currency of the embezzled amount was a gross error.

In resolving the above argument, we shall also address a similar argument raised by the appellant's counsel under Ground 5 regarding the illegal order to refund US Dollars 70,160 which he considered to be illegal. Counsel argued that whereas the order of refund was in US Dollars, the evidence led at trial was for a sum in Uganda shillings. Furthermore, that the sum of US Dollars 70,160 an equivalent of Uganda Shillings 260,000,000/= was in excess of the sum alleged to be embezzled.

It is trite law that a ground not canvassed in the lower court cannot be raised before this Court unless it raises an issue of illegality[2] and this is because Court cannot ignore an illegality once brought to its attention.[3] Furthermore, **Section 45** of the **Criminal Procedure Code Act** is to the effect that on second appeals, a party may appeal on a matter of law and not on a matter of fact or mixed law and fact. The error must be as a result of misapplication or misapprehension of the law.

The issue of whether the appellant stole funds in Uganda shillings or US Dollars is a factual issue and not a matter of law. On this premise alone, this Court cannot entertain the new grounds.

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[2] Imere Deo vs. Uganda (Supreme Court Civil Appeal No.16 of 2015).
[3] Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor (Supreme Court Civil Appeal No. 4 of 1981) reported in (1982) HCB at page11.

In any case, it is a fact on record that although the money which was sent to Bujumbura secretariat was in US Dollars, the refund was received in Uganda Shillings because the designated account in Tropical Bank was operated as a Shillings account. Consequently, it cannot be said that the appellant was prejudiced by what she referred to as an inconsistence.

Furthermore, we take note of the fact that counsel for the appellant argued grounds 1 and 2 together. The essence of the arguments raised in both grounds was that the appellant had been convicted for the offence of embezzlement without proving the essential ingredients. It can therefore be safely concluded that ground 2 is covered by ground 1. It is not an independent and new ground.

Thus, we decline to grant leave to argue Ground 2 of the appeal.

In respect to ground 5, counsel drafted the ground as follows:

In the alternative but without prejudice to the above, the learned Justices of the Court of Appeal erred in law when they upheld an unlawful order of compensation of US Dollars 70,160 and an illegal sentence.

We have already dealt with the order for compensation in US Dollars. What remains under Ground 5 is whether the prison sentence passed by the Court of Appeal was illegal. We have however found it prudent to first delve into the merits of the conviction and then handle issues surrounding sentencing.

Arising from the Ruling above, this Court shall only consider grounds 1, 3 and 4 of the Memorandum of Appeal.

Ground 1

Appellant's Submissions

Counsel contended that the Court of Appeal upheld the appellant's conviction against the offence of embezzlement yet vital ingredients of the offence were not proved.

Counsel argued that the ingredients of embezzlement that the Prosecution had to prove beyond reasonable doubt are the following:

(a) That the appellant was an employee in a public body;
(b) The appellant stole money;
(c) The money was property of her employer;
(d) The appellant received or took into possession the said money;
(e) The appellant received the money on account of her employer and she had access to that money by virtue of her office.

In particular, counsel submitted that the prosecution never proved that the appellant received the sum of 116,400USD into her possession. Counsel argued that the trial Judge erroneously stated that PW9 who withdrew the money in question passed it on to the appellant whereas the testimony of PW9 does not indicate so. Counsel contended that this was evidence of the prosecution's failure to prove the element of theft and that therefore this should have resulted into an acquittal of the appellant.

Respondent's reply

Counsel for the respondent pointed out the two ingredients that formed the appellant's arguments in ground 1 as theft and participation of the appellant.

Counsel submitted that the element of theft by the appellant was proved through PW1 who in his testimony stated that the payment or movement of funds from the ICGLR account to the Tropical Bank account was prompted by the appellant through an email correspondence. Furthermore, the respondent relied on the testimony of PW9 (the appellant's sister and a signatory to the Tropical Bank account) who confirmed that the funds were credited onto the Tropical Bank account from Burundi.

Counsel referred Court to **Section 254** of the **Penal Code Act** which provides in part as follows:

Definition of theft.

(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

(2) .....

(3) .....

(4) .....

(5) .....

(6) A person shall not be deemed to take a thing unless he or she moves the thing or causes it to move.

(7) Without prejudice to the general effect of subsection (6), a person shall be taken to have moved money if that person moves or causes it to be moved from one account to another or otherwise out of the original account.

In light of the above Section, the respondent argued that the act of asportation by the appellant was complete once the funds were moved from ICGLR to the account in Tropical bank.

It was also submitted by the respondent that the accountabilities of the funds in question were within the knowledge of the appellant. In counsel's view, this indicated that the appellant actually utilized the funds; otherwise there would be no justification for her to account for funds which she had no knowledge of. Counsel added that this evidence proved the ingredient of theft.

Court's Consideration

It is trite law that as a second appellate Court, we are not expected to re-evaluate the evidence or question the correct findings of fact by the High Court and Court of Appeal. However, where it is shown that the courts below did not evaluate or re-evaluate the evidence or where they are proved manifestly wrong on findings of fact, this Court is obliged to do so and ensure that justice is properly and truly served.[4]

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[4] Areet Sam vs. Uganda (SCCA No.20 of 2005).

In the present case, neither the High Court nor the Court of Appeal evaluated the evidence linking the appellant with the offence. In light of this fact, we shall proceed to re-evaluate the evidence.

Section 19 of the **Anti-Corruption Act** under which the appellant was charged provides for the offence of embezzlement as follows:

> **"A person who being—**
>
> **(a) an employee, a servant or an officer of the Government or a public body;**
>
> **(b) a director, an officer or an employee of a company or a corporation;**
>
> **(c) a clerk or servant employed by any person, association or religious or other organization;**
>
> **(d) a member of an association or a religious organization or other organization, steals a chattel, money or valuable security—**
>
> **(i) being the property of his or her employer, association, company, corporation, person or religious organisation or other organisation;**
>
> **(ii) received or taken into possession by him or her for or on account of his or her employer, association, company, corporation, person or religious organisation or other organisation; or**

(iii) to which he or she has access by virtue of his or her office;

commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or a fine not exceeding three hundred and thirty six currency points or both." (Emphasis of Court)

Looking at the record, we note that in the High Court, the indictment brought against the appellant for embezzlement purported to be under Section 19 (a) (iii) of the Anti-Corruption Act. The particulars of the offence in the indictment stated as follows: "*Bireete Sarah between February and May 2009 in the Kampala District being employed by the Ministry of Foreign Affairs/ National Secretariat to the International Conference for the Great Lakes Region stole US Dollars 114,160 property of the Government.*"

However, the Court of Appeal in the course of its judgement referred to Section 14 (a) (iii) as well as Section 19(a)(iii) of the Anti-Corruption Act before upholding the conviction.

From our reading of the offence of embezzlement as contained in the Anti-Corruption Act, none of the Sections cited by the two courts and indeed the Prosecution in the indictment defines the offence alleged. The proper provision to refer to should be section 19 (a) and (d) (iii) because the elements of the offence that the Prosecution was required to prove against the appellant are contained in Section 19 (a) which is that she was an employee, a servant or an officer of the Government or a Public body; Section 19 (d) which is that she stole

the money in question; Section 19 (d) (iii) which is that she had access to the money by virtue of her office.

That notwithstanding, improper citing of the Section under which the offence was brought was not fatal since the particulars of the offence were properly stated in the indictment. As such, the appellant was not surprised and was aware of the charge against her. We shall therefore proceed to substantively deal with the appeal regardless of the shortcomings we have pointed out.

The question central for consideration in this appeal is: *whether the Court of Appeal correctly arrived at the conclusion that the appellant by virtue of her office as a Coordinator of ICGLR had access to the money which she stole.*

In order to comprehensively answer this question, we shall reproduce in detail the evidence adduced by the Prosecution as well as that of the defence.

PW 6 (Oryema Lazourous) Branch Manager of Tropical Bank testified that the funds in US Dollars were converted into Uganda Shillings to the tune of 223, 827,000/=.

It is not in dispute that of the said sum, PW 3 (Cashier of Ministry of Foreign Affairs) testified that he deposited 80,000,000/= on the Ministry of Foreign Affairs account. During examination-in-chief, PW 7 (Ambassador Mugume) - who was the Permanent Secretary for the Ministry of Foreign Affairs -when asked what happened to the 80,000,000/= testified that, part of it went into project work and the balance into Ministry work.

The sum of 4,500,000/= which remained on the Tropical Bank account was frozen by police through a court order to aid their investigation.

When the undisputed sums are deducted from the original sum of 223,827,000/=, the balance is 139,327,000/=.

The respondent argued that the appellant is linked to the missing funds because she was the originator of the email to Bujumbura to have the refund sent into the account operated at Tropical Bank.

We have carefully studied the record as well as the evidence of the Prosecution witnesses. The record reveals the following trail of events.

PW 1 (Charles Kapekele Chileya), Deputy Executive Secretary of ICGLR in Bujumbura testified that it was the appellant who sent an email to the Bujumbura secretariat with a letter signed by Ambassador Mugume requesting for the surplus funds. That the letter included instructions to bank the money in Tropical Bank.

PW1 further testified that the Bujumbura secretariat advised the Uganda Government to find private accounts if they wanted to recall some money from Burundi. The reason given by PW1 for using a private account was because of the complicated process and technicalities that would be involved if the money was to be sent through the Bank of Uganda account. Therefore, he testified, in order to avoid the technicalities, a private account was appropriate.

PW7 (Ambassador James Mugume) testified in cross-examination that the Accountant General had authorized the Ministry to open an account for receiving the funds from Bujumbura.

PW 9 (Miriam Kyomugasho) who was a signatory to the Tropical Bank account to which the sum of 223,827,000/= was credited testified as follows:

"When the money was credited on the account, Ministry of Foreign Affairs officials called me together with the other two signatories (Patrick Onen and Oscar Nduwimana) for a meeting. We were requested to help receive the money on behalf of the Ministry."

She testified further that together with Patrick Onen, she proceeded to Tropical Bank and withdrew the money less 4,500,000/= and that it was handed over to PW3 (the Ministry's cashier).

PW10 (Detective Inspector Mugisha Eldard) testified that of the 223,827,000/= sum, only 80,000,000/= and 4,500,000/= was traced. The rest of the money could not be traced.

The appellant in her testimony did not dispute the fact that she sent the email together with the letter requesting for the surplus funds to be deposited on the Tropical Bank account.

The appellant in her defence also testified that Ambassador Mugume told the Youth League team that the funds could not be remitted through Bank of Uganda accounts and that he needed their support.

The appellant testified that:

"we (Youth League Company) had all agreed that the money has to be fully acknowledged by whoever receives if from the Youth League account."

When asked who acknowledged receipt of the money, the appellant testified that it was acknowledged by PW3 (the cashier) on behalf of the Permanent Secretary less 4,500,000/=. That subsequently, PW3 took to the appellant's office a banking slip for 80,000,000/=.

The above testimonies nowhere disclose that the appellant was ever a signatory to the account on which the funds alleged to have been embezzled were deposited. Furthermore, the consistent testimonies of the prosecution witnesses also reveal that the decision to have the funds deposited on a private account in Tropical Bank was not originated by the appellant but rather by Ambassador James Mugume.

The Court of Appeal re-evaluated the evidence adduced to support the charge of embezzlement as follows:

On the offence of embezzlement, the appellant's sister Kyomugasho (PW9) testified that a sum of 223,245,827/= (114,000 USD) was credited to the account of the Great Lakes Region Youth League of which the appellant was the President. She further testified that she and Patrick Onen signed for the money. The appellant confirmed the above position during cross-examination. The question is, where did the money go?

[It was] *testified that it was handed over to the Ministry of Foreign Affairs Cashier, less by 4.5 million shillings. The 4.500.000/= (Four*

Million, five hundred thousand shillings only) was exhibited by police. The appellant does not exactly say where the money went after withdrawal, she only testified that the acknowledgment forms were at her office but had been stolen during a break in her office. In our considered view, this is an excuse on the part of the appellant for not knowing at all where and how such a colossal sum of money belonging to the Government was expended.

After re-evaluating the evidence, the Court of Appeal held as follows:

The appellant was aware and participated in the said transactions and admitted to knowing the same. The prosecution proved beyond reasonable doubt that after the money had been withdrawn from the bank it simply disappeared into thin air and was never passed on to Government. We accordingly uphold the finding of the trial Judge that the appellant was rightly convicted of the offence of embezzlement. (Our emphasis)

We note that the Court of Appeal based its conviction of the appellant on the fact that she was in possession of the acknowledgment forms and could not explain how the funds in dispute went missing. This was the same line of argument advanced by the respondent in the present appeal. The respondent specifically submitted that: *"not only did the payments start with the appellant, they also ended with her as she claimed to have had the acknowledgment as well as the accountabilities in her office."* The respondent further argued that the appellant actually received the disputed funds otherwise there would have been no justification for her to account for funds not received. That therefore, the Court of Appeal was justified in convicting the

appellant of embezzlement. The appellant on the other hand disputed having accessed the funds.

It is important to reproduce the evidence surrounding the "acknowledgment" in question.

The appellant in her defence testified as follows:

"The scanner, two laptops and my file of documents/ correspondences and my accountability file among others were missing from my office.

This accountability file had acknowledgment forms for the funds given to Mwanje and the copy of the original letter that was sent to Bujumbura recalling the funds."

The appellant further testified that:

"The money was acknowledged by the Cashier- Mr. Mwanje which had been picked from the Permanent Secretary's office."

During cross-examination, when asked why she was the one keeping acknowledgment forms, the appellant replied:

"I was still the President of the Youth League. And had these acknowledgments not been stolen through a break in to my office, different people would be in the position I find myself in today."

Question by State: *You have told Court that Ambassador Mugume requested you that this money should be sent on that account and you said you would only accept if he would acknowledge.*

Appellant: *Yes*

State: *Why were you concerned that he needed to sign for this money just before it was sent on that account?*

Appellant: *I have been conducting accountability for the conference activities since 2004. By then, I was using strict guidelines so I got to know that whenever you give somebody money he or she acknowledges for it.*

What Ambassador Mugume had agreed with Miriam and Patrick was that once the money comes, it was to be handed over and acknowledged and this is what was done. The acknowledgments would clearly show where the money went and then those persons would explain what they used the money for."

What can be deduced from the testimonies above is that nowhere does it show that the appellant accessed the funds. What was testified is that the money was handed over to PW3 (the cashier). Nobody testified that PW3 thereafter handed over the money to the appellant. Our understanding of the appellant's testimony is that she had been in possession of the forms - on which PW3 had acknowledged receipt of the funds – which nevertheless disappeared when her office was broken into.

In our analysis, the only defined role by the appellant is that she, through an email forwarded the Permanent Secretary's letter to Bujumbura requesting for remission of the excess contribution; which was done. The issue of whether or not the letter was a forgery was raised but the handwriting expert did not find that the signature

was not that of the Permanent Secretary. His evidence was inconclusive.

We wish to emphasize that it is apparent that the transaction which commenced with the requisition of the funds from Bujumbura and culminated into the withdrawal of funds by the Ministry of Foreign Affairs was authorized by the Permanent Secretary. As a matter of fact the Permanent Secretary does not deny having received some of the money whose expenditure he explained.

The evidence of PW9 together with that of PW3 clearly shows that the appellant played no role in the withdrawal and disbursement of the money allegedly embezzled by her. PW9 categorically stated that the appellant had no bank role in respect of the money. She testified that the Ministry requested for the money less Shs4.5M. She also testified that PW3 picked the money the amount of which she did not specify. Significantly, PW3 did not testify that he picked the money from PW9 but that he found it on his desk with instructions to Bank it on the Great Lakes Project. PW3 did not mention the amount of money he picked from his desk.

Counsel Lillian Omara (representing the state) asked:

"Instructions from who?

PW3 replied: Permanent Secretary's Office.

Lillian Omara: Was that instruction given by Sarah?

PW3: I don't know."

During re-examination of P.W.3,

Lillian Omara asked: "Did Sarah play any role on project accounts?

PW 3: No my Lord."

The question which needs to be answered is: if according to PW9 the money was requested for and remitted to the Ministry of Foreign Affairs how did the appellant who was not even a signatory to the account access it? This question was not resolved by the prosecution evidence. Interestingly, the Court of Appeal made a finding that the money disappeared in thin air which is not the same as saying that the appellant embezzled it.

And yet as stated in this judgment, the Court of Appeal held that:

"The appellant does not exactly say where the money went after withdrawal, she only testified that the acknowledgment forms were at her office but had been stolen during a break in her office. In our considered view, this is an excuse on the part of the appellant for not knowing at all where and how such a colossal sum of money belonging to the Government was expended."

We find that in the above holding, the first appellate court shifted the burden of proof from the Prosecution to the appellant. This was contrary to the fundamental principle in criminal law that the burden of proof is borne by the Prosecution throughout the trial.

In light of the above, we find that the evidence above falls short of proving beyond reasonable doubt that the missing funds were ever accessed by the appellant.

We therefore hold that the Court of Appeal erred when they held that the prosecution had proved the offence of embezzlement beyond reasonable doubt.

It follows that the conviction of the appellant cannot stand.

Our holding in ground 1 disposes of the rest of the grounds of appeal and makes it unnecessary for this Court to deal with them.

Nevertheless, we find it worthwhile to make comments on the sentence.

Counsel for the appellant argued that the prison sentence given by the Court of Appeal was illegal because whereas the trial Judge sentenced the appellant to 10 years imprisonment, the Court of Appeal sentenced her to 7 years. Counsel referred to the decision of the Court of Appeal as a confirmation of sentence.

A look at the record reveals that indeed the trial Judge had sentenced the appellant to 10 years in prison. It was therefore an error for the Court of Appeal to state that it was upholding the sentence given by the trial Judge and then proceed impose a sentence of 7 years imprisonment.

So the question is: *what sentence of imprisonment did the Court of Appeal intend to give the appellant?* To deal with this issue, the appellant's counsel should have proceeded under **Rule 36** of the **Court of Appeal Rules** which provides for correction of errors as follows:

"(1) A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in a decree, be corrected by the court concerned, either of its own motion or on the application of any interested person so as to give effect to what was the intention of the court when judgment was given.

(2) An order of the court may at any time be corrected by the court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment or ruling it purports to embody or, where the judgment or order has been corrected under sub rule (1) of this rule, with the judgment or order as so corrected."

Conclusion and Orders

Since we have already held that the Prosecution did not prove the case against the appellant beyond reasonable doubt, this appeal is allowed with the following orders:

1. The conviction for embezzlement is quashed.
2. The sentence of 10 years imprisonment as well as the order to refund USD 70,160 is set aside.

3. The order barring the appellant from Public Service for a period of 10 years is also set aside.

We so order.

Dated at Kampala this ..... day of..... 2020.

.....
DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT.

.....
ELDAD MWANGUSYA
JUSTICE OF THE SUPREME COURT.

.....
RUBBY OPIO-AWERI
JUSTICE OF THE SUPREME COURT.

.....
PROF. LILLIAN TIBATEMWA- EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT.

.....
PAUL MUGAMBA
JUSTICE OF THE SUPREME COURT.

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UGANDA :: RESPONDENT

[Appeal against the judgment of the Court of Appeal No. 0079 of 2011 (Kasule, Bossa, Barishaki), JAs dated 21st April 2016]

JUDGMENT OF DR. KISAAKYE, JSC (DISSENTING)

The appellant brought this appeal against part of the Judgment of the Court of Appeal which confirmed her conviction and sentence for Embezzlement.

The background to this appeal is that the appellant was charged and convicted by the High Court (Anti Corruption Division) of the offences of Abuse of Office and Embezzlement contrary to Sections 11 and 19(a) (iii) respectively, of the Anti Corruption Act. She was sentenced to serve a term of 5 years imprisonment for abuse of office and 10 years imprisonment for Embezzlement.

Dissatisfied with the decision of the High Court, she appealed to the Court of Appeal. The Court quashed her conviction for Abuse of Office. However, the Court upheld her conviction for Embezzlement and sentence of 10 years but it inadvertently stated to be 7 years. The Court also confirmed the orders of the

Trial Court, namely that the appellant (i) was disqualified from holding any public office for a period of 10 years upon release, and (ii) refunds USD 70,160.00.

The appellant was dissatisfied with part of the Judgement that confirmed her conviction and sentence for Embezzlement. She filed the present appeal against the Judgment of the Court of Appeal in this Court. The appellant was represented by counsel Jude Byamukama, while the respondent was represented by Ms. Josephine Namatovu, the Assistant Director of Public Prosecutions.

I have had the benefit of reading in draft the majority Judgment of this Court, in which my colleagues in this appeal have, among others, made the following findings and conclusions:

a) That in order to prove Embezzlement under the Anti-Corruption Act, the prosecution had to prove that the appellant took possession of the embezzled money.
b) That nowhere does the record of appeal show that the appellant took possession of the funds and converted them to her personal use.
c) That the evidence of the handwriting expert was not conclusive because the expert failed to find that the signature of the letter the appellant forwarded to the Inter Governmental Conference of the Great Lakes Region Secretariat in Bujumbura (hereinafter referred to as the ICGLR Secretariat), was not of the Permanent Secretary Ambassador Mugume (PW7).
d) That the Ministry of Foreign Affairs had requested, received and banked all the money allegedly embezzled, less UGX

4,500,000/= which was left on the Youth League Bank Account.

e) That the alleged acknowledgement forms which were also allegedly stolen from the appellant's office had been signed by the Ismail Mwanje (PW3).

f) That nobody testified that Mwanje Ismail (PW3) handed over the money to the appellant.

g) That the Court of Appeal confirmed the appellant's conviction basing on the fact that she was in possession of the acknowledgement forms and could not explain how the funds in dispute went missing.

h) That in so doing, the Court of Appeal shifted the burden of proof from the prosecution to the appellant.

i) That there is no difference between Theft and Embezzlement, hence failing to distinguish between the two offences.

j) That for a person to be convicted of Embezzlement, he or she must be a signatory to the Bank Account, must have withdrawn money and must have been in physical possession of the funds.

k) That the only defined role the appellant played was that she sent an email and forwarded the Permanent Secretary's letter to Bujumbura requesting for remittance of the surplus contribution which was done.

l) That the appellant played no role in the withdrawal and disbursement of the money allegedly embezzled by her and that therefore she was wrongly convicted.

With all due respect to my learned colleagues, I do not agree with the analysis, findings, and conclusions of the majority Justices in this appeal.

For the reasons I will give in my Judgement, I disagree with the decision of my learned colleagues to allow this appeal, quash the appellant's conviction and to set aside her sentence. Save for a few changes I will indicate later in this Judgment, I would instead uphold the Judgment of the Court of Appeal and dismiss this appeal.

Before I proceed to consider the merits of this appeal, I wish to address the following preliminary matter which relates to the appellant's grounds 2 and 5 of appeal out of the five grounds of appeal she filed in her Memorandum of Appeal.

At the hearing of the appeal, counsel for the appellant prayed for the leave of Court to introduce and argue grounds 2 and 5 of appeal which raised new matters. He contended that although the appellant did not canvas these grounds at the Court of Appeal, the two grounds raise substantial questions of law that ought to be considered by this Court.

Ground 2 of appeal was framed as follows;

"The learned Justices of the Court of Appeal erred in law when they affirmed a conviction for Embezzlement based on prosecution evidence that was inconsistent with the particulars of the offence alleged in the indictment presented before the High Court."

I agree with the majority Judgement that ground 2 raises similar issues with ground 1 of appeal. I will therefore not treat it separately as a new ground.

With respect to the alternative ground 5 which relates to sentence, I will deal with it after my analysis of Grounds 1, 3 and 4 which are challenging the appellant's conviction.

Ground 1 of Appeal.

This ground was framed as follows:

> ***"That the learned Justices of the Court of Appeal erred in law when they affirmed the appellant's conviction for the offence of Embezzlement whereas essential ingredients of the offence had not been proved."***

A review of the charge sheet reveals that the appellant was charged under Count 2 with the offence of Embezzlement as follows:

> "***Bireete Sarah between February and May 2009 in the Kampala District being employed by the Ministry of Foreign Affairs/National Secretariat to the International Conference for the Great Lakes Region stole US Dollars 114,160 property of Government of Uganda, to which she had access by virtue of her office."***

Before I proceed to discuss the merits of this ground, I would like to highlight a drafting anomaly in sub-section 19(d) of the Anti Corruption Act which needs to be corrected by Parliament. The sub-section reads as follows:

"(d) a member of an association or a religious organization or other organization steals a chattel, money, or valuable security-"

The preceding sub sections (a) - (c) of section 19 list persons who are also covered by this section but who are employed in other capacities as follows:

> ***"(a) an employer, a servant or an officer of the Government or public body;***
>
> ***(b) a director, an officer or an employee of a company or Corporation;***
>
> ***(c) a clerk or servant employed by any person, association or religious or other Organization."***

My reading of the entire section 19 of the Act shows that the clause "***steals a chattel, money or valuable security***" was not intended to only cover those persons falling under sub section 19(d). Rather, it is my conviction that the clause was also intended to and that it actually applies to all persons who fall within the ambit of the other three subsections 19(a) - (c). My interpretation is grounded and based on the following reasons.

First of all, I have noted that section 268 of the Penal Code Act, which was repealed by section 69 of the Anti Corruption Act had similar wording to section 19. A review of this repealed section reveals that the clause "*steals any chattel, money, or valuable property*" was applicable to all the four categories of persons who are similarly covered by section 19 of the Anti Corruption Act.

Secondly, the charge sheet for the appellant clearly indicates that she was charged under section 19(a)(iii) of the Anti Corruption Act. If I were to literally read and apply the section of the law as it is currently laid out, it would mean that this sub section does not have a component of stealing in it. If that was the case, it would mean that no government employee or any other person falling under sub-sections (a) – (c) could ever be successfully charged under this section with the offence of embezzlement.

Thirdly, it could certainly not have been the intention of those who drafted and enacted the Anti Corruption Act to have unenforceable provisions written into section 19(a)-(c) of the Act. If we are to exclude the sub clause in question from being applicable to these sub sections, section 19(a) - (c) would not make sense and not be enforceable. I am therefore convinced that it was the intention of Parliament for each of these sub sections to be operational in law and enforceable by Courts of law.

Fourthly, a review of the record of appeal shows that all the actors in this appeal - namely the prosecutor, the accused/now appellant, the trial Court, the Court of Appeal and the Supreme Court up to the time of hearing this appeal construed this section in the material aspects to read in the same way as I have done. I agree with them for the reasons I have stated above. While recognizing the need for Parliament to address this anomaly, I have accordingly proceeded to consider and determine this

appeal on the basis that the appellant was charged under section 19(a)(iii) which I have construed to read in the relevant parts as follows:

"A person who being __

a) an employee, a servant or an officer of the Government or a public body;

b) .....

c) .....

d) .....

steals any chattel, money, or valuable property __

(i) .....

(ii) .....

iii) to which he or she has access by virtue of his or her office;

Turning to the submissions, counsel for the appellant contended that the prosecution, which bears the burden of proof, failed to prove all the ingredients of the offence of Embezzlement beyond reasonable doubt as provided for under Section 19(a)(iii) of the Anti Corruption Act.

Counsel for the appellant contended that the prosecution failed to prove the following ingredients which are necessary before a conviction for Embezzlement can be made:

a) That the appellant was an employee in a public body.

b) That the appellant stole the money;

c) That the money was the property of her employer;

d) That she received or took into her possession the said money,

e) That she received the money on account of her employer and she had access to that money by virtue of her office.

Counsel for the appellant further contended that the prosecution did not adduce evidence to support the following ingredients:

a) That the appellant stole money or committed any theft in this regard.

b) That the appellant received or took into her possession the stolen money.

c) That the appellant received the money belonging to her employer and had access to the same by virtue of her office.

d) The sum of money which was stolen was USD 114.160.

Counsel for the appellant contended that the prosecution failed to prove that the appellant received 114,160 United States Dollars into her personal possession. He further contended that failure by the prosecution to prove the element of theft, which is a vital ingredient of the offence of Embezzlement should have automatically resulted into an acquittal of the appellant on the Count of Embezzlement.

Before I proceed to consider the respective submissions of the parties and the merits of this ground, I note that counsel for the appellant attempted to and succeeded in misleading the majority Justices regarding the ingredients of the offence of Embezzlement that the prosecution was required to prove.

Counsel for the appellant contended that one of the ingredients prosecution had to prove was that the appellant received or took into possession the said money of her employer. I note that this ingredient is covered under section 19(a)(ii) of the Anti Corruption Act and not subsection (iii) under which the appellant was charged. A reading of section 19(a)(iii) of the Act shows that the prosecution was only required to prove three ingredients of this offence of embezzlement. The first ingredient for this offence was that the appellant was an employee of the Government of Uganda. Interestingly, counsel for the appellant did not make any submissions on this ingredient.

However, counsel for the respondent supported the decision of the Court of Appeal to the effect that the appellant was employed as a Conference Coordinator by the Ministry of Foreign Affairs under the National Coordination Mechanism of the International Conference of Great Lakes Region (ICGLR).

The Court of Appeal considered this ingredient at great length before it confirmed the conviction of the appellant for Embezzlement as follows:

> ***"Ground 2 relates to the appellant's status of employment. The appellant maintains that she has never been an employee of Government and was never paid out of the Consolidated Fund and was therefore wrongly charged under the Anti-Corruption Act. Counsel for the respondent described the appellant as a person employed in a government undertaking at the time the offences were committed by virtue of the Pact***

[Exhibit 6]. Counsel for the appellant strongly disagreed with the said contention because the appellant was charged as a person employed by Ministry of Foreign Affairs/National coordination mechanism of the Great Lakes Region. Indeed a look at the indictment confirms this position. It is also important to note that the Anti-Corruption Act, 2009 is not only applicable to Government employees. The Long title provides thus:

> ***'An Act to provide for the effectual prevention of corruption in both the public and private sector...'***

... on the source of funding for her salary, PW7 testified that a person can be a government employee but funded from a donor project, which was the situation of the appellant. We therefore find that at all material times the appellant was a person employed for the Government of Uganda by virtue of her position as a Conference Coordinator for ICGLR, which is a Government undertaking. Ground 2 of the Appeal fails."

After re-examining the definition of who is an employee and re-evaluating the evidence on record with respect to the appellant's employment, the learned Justices of Appeal concluded as follows:

> ***"We therefore find that at all material times the appellant was a person employed by the Government of Uganda by virtue of her position as a Conference***

Coordinator of ICGLR, which is a Government undertaking."

The question that I need to resolve here first is whether the learned Justices of Appeal properly re-evaluated the evidence on record which the prosecution adduced to prove the appellant's employment by the government, before they arrived at the above conclusion. This necessitates me to review the evidence that was on record concerning the appellant's employment with the Government of Uganda.

During the trial, the prosecution adduced the evidence of Ambassador James Mugume (PW7). During his examination in chief by the state lawyer, Lilian Omara, he testified as follows:

Omara: I want you to look at the lady over there and tell me whether you know her.

PW7: Yes, I know her. She is Sarah Bireete.

Omara: How did you come to know her?

PW7: ... I met her in the Ministry of Foreign Affairs in 2004 and since I took over as an acting and then confirmed as P.S, she was our Conference coordinator for the activities of the Great Lakes region in Uganda.

During his cross examination by the appellant's counsel Anthony Ahimbisibwe, Ambassador Mugume (PW7) further testified as follows:

Ahimbisibwe: She was an employee of the Ministry but funded from voluntary contributions.

PW7: *You can be a Government employee but funded from a donor project.*

Ahimbisibwe: *Okay was Madam Sarah Bireete a Government employee or an employee of the Ministry?*

PW7: *She was an employee of the Ministry but funded from voluntary contributions*

Ahimbisibwe: *Yes Mr. Ambassador what was the procedure of recruitment in Government Service?*

PW7: *There are two procedures; one is through the Public Service Commission but also one can come through contract."*

Ahimbisibwe: *In this case Sarah came by contract?*

PW7: *I found a contract and the handover they said she was on contract, but I took it that she was an employee of the Ministry but on contract.*

Ahimbisibwe: *Isn't that a confirmation to this Court then that this was never a Government project?*

PW7: *My Lord, all of us were participating because it was Government work, it was the duty of Government.*

The appellant confirmed the testimony of Ambassador Mugume (PW7). During her examination in chief, the appellant confirmed that she started working with the Great Lakes Conference in early 2004 as a coordinator for the Youth in Conference process

and as a conference manager, coordinating all stakeholders' activities in Uganda and then participation in the regional conference activities. She also confirmed that her terms of reference included preparing budgets for national activities, coordinating stakeholder regional participation, carrying out the approved national activities, ensuring all stakeholder consultations are conducted and that the Conference decisions are implemented. She further confirmed that she shared the same office building with the Ministry.

The appellant was cross examined by the state representative and confirmed that she used to report to Ambassador Mugume during her course of work at the Ministry. She testified as follows:

Omara: Who were you reporting to?

DW1: The National Coordinator

Omara: And who was your national coordinator at the time of your arrest?

DW1: Ambassador James Mugume

Omara: ... you worked with him from 2006 up to the time you were arrested?

DW1: Yes my Lord.

Omara: And you continued performing your duties as a National Coordinator?

DW1: Yes my Lord.

As the above testimony shows, the appellant's own testimony during her examination in chief and cross examination confirmed the prosecution evidence that she was the Conference Coordinator of the International Conference Mechanism based in the Ministry of Foreign Affairs. The appellant's testimony tallies with the testimony of Ambassador Mugume (PW7) that she was an employee of the Ministry who was funded from voluntary donor contributions given to the Government of Uganda.

Secondly, the appellant confirmed that she used to report to Ambassador Mugume (PW7) who without question was an employee of the Government of Uganda.

The testimony of Ambassador Mugume (PW7), coupled with that of the appellant thus confirmed that indeed the appellant was employed in the same capacity as was indicated in the charge sheet. The Court of Appeal therefore correctly re-evaluated the evidence that the appellant was an employee of the Government and I cannot fault them. I am satisfied that the Court of Appeal properly came to the right conclusion that the prosecution had discharged its burden of proving that the appellant was an employee of Government.

The second ingredient the prosecution was supposed to prove under section 19(a)(iii) of the Anti Corruption Act was that the appellant stole money belonging to her employer, the Government of Uganda.

The question for this Court to decide is whether or not the learned Justices of Appeal properly re- evaluated the evidence on the ingredient of stealing or theft of money by the appellant?

Counsel for the appellant contended that one of the ingredients prosecution had to prove was that the appellant received or took into possession the missing money of her employer. However, a review of the charge sheet shows that the appellant was not charged under Section 19(a)(ii) of the Anti Corruption Act which requires the accused person to have received and taken into possession the stolen funds.

Secondly, there is need to distinguish between the offence of Theft under section 254 of the Penal Code Act and stealing under Section 19(a)(iii) of the Anti-Corruption Act. Under the Penal Code Act, Theft is a stand-alone offence. Its ingredients are provided for under section 254(1), (6) and (7) of the Penal Code Act as follows:

"(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.

---

(6) A person shall not be deemed to take a thing unless he or she moves the thing or causes it to move.

(7) Without prejudice to the general effect of subsection (6), a person shall be taken to have moved money if that person moves or causes it to be moved from one account to another or otherwise out of the original account."

In spite of the offence of theft having been and is still being a stand-alone offence under the Penal Code Act, the people of Uganda through their duly elected representatives found it necessary to enact the Anti Corruption Act in 2009. The people of Uganda chose to provide for the offence of Embezzlement under Section 19 of the Act to address the practice of employees who got involved in white collar crimes and abusing the trust of their employers by stealing chattels, money or valuable security belonging to their employer.

It is my view that stealing money is only one of the three ingredients of the offence of Embezzlement provided for under Section 19(a) (iii) of the Anti Corruption Act. However, for one to have stolen as an ingredient of the offence of embezzlement (section 19(a)(iii), it does not necessarily require the accused to have received or taken into possession the stolen money. Unlike section 19(a)(ii) of the Anti-Corruption Act which requires receiving or taking into possession, section 19(a)(iii) of the Anti-Corruption Act only requires access to the stolen property by virtue of an accused person's office.

In my view, section 19(a)(iii) of the Anti Corruption Act is broad enough to cover acts of the appellant where an employee can still be charged and convicted of Embezzlement, even if he/she is not a signatory to an account or even if he/she was not the one who was legally supposed to or who initially received the embezzled funds in cash. In my view, one can be guilty of Embezzlement even where they did not handle the cash personally or even if

they are not the only ones who physically handled the money in question.

Turning to the present case, prosecution adduced evidence to show that through the appellant's actions, USD 114,000 belonging to her employer (Government of Uganda) was moved from the Secretariat in Bujumbura ICIGR to the Youth League Bank account where the appellant had access and control because she was the President of the Youth League and her sister was one of the signatories to the account.

The Court of Appeal re-evaluated the evidence on this ingredient of stealing money as follows:

> ***"On the offence of Embezzlement, the appellant's sister Kyomugasho (PW9) testified that a sum of 223,245,827/= (114,000 USD) was credited to the account of the Great Lakes Region Youth League of which the appellant was the President. She further testified that she and Patrick Onen signed for the money. The appellant confirmed the above position during cross examination. The question is, where did the money go? PW8 testified that it was handed over to the Ministry of Foreign Affairs Cashier, less by 4.5 million shillings. The 4,500,000/= (Four Million, five hundred thousand shillings only) was exhibited by police. The appellant does not exactly say where the acknowledgement forms which were at her office but had been stolen during a break in her office. In our considered view, this is an excuse on the part of the***

appellant for not knowing at all where and how such a colossal sum of money belonging to the Government was expended.... The prosecution proved beyond reasonable doubt that after the money had been withdrawn from the bank, it simply disappeared into thin air and was never passed on to Government. We accordingly uphold the finding of the trial Judge that the appellant was rightly convicted of the offence of embezzlement."

Before arriving at its finding, the Court of Appeal re-evaluated the evidence of the prosecution witnesses; Ministry Cashier Mwanje Ismail (PW3); Ambassador Mugume (PW7) as well as that of the appellant.

The evidence of PW3 (Mwanje Ismail) was that he received 80,000,000/= Shillings which he banked on the account of the Great Lakes Project in the Bank of Uganda.

The prosecution also adduced the evidence of Ambassador Mugume (PW7) who testified that he had never written any letter to Bujumbura requesting for the refund of the surplus money due to the Uganda Government. He testified as follows:

Omara: Whenever there is a surplus like in this year what do you normally do with the surplus?

PW7: Your Lordship when there is a surplus we normally run it over the next year so that the statement for next year's consumption for that year minus any surpluses then we indicate the funds due for payment for the member state. ...

Omara: *Now for example Uganda can't it request for the return of the surplus?*

PW7: *We have never.*

Omara: *There is a document and it is alleged you are the author of that document requesting for a refund a surplus of 114,000 dollars. What do you have to say about that?*

PW7: *The letter of 13th February, that document your lordship was shown to me by Mr. Eddie Kwizera the Deputy coordinator on 21st of May 2009 and it had two pages one page requesting that the 114,000 dollars be transferred to an account in Tropical Bank under the title Great Lakes Youth League and page two had two sentences one sentence thank you for your corporation and the signature that looks like my signature. But maybe I can state that I did not sign that letter although the signature clearly resembles mine.*

Omara: *... you have never written to Bibarata requesting for the refund of that surplus?*

PW7: *No your Lordship, I have never written a letter requesting for refund of that surplus.*

Omara: *I want you to have a look at that document, there are two copies attached to each other look at the signatures there is one marked 'M' and another one look at it clearly. I want you to tell Court*

whether those signatures resemble yours or they are yours.

PW7: *They resemble mine.*

Omara: *I want you to confirm to Court that you acknowledge the signatures of this letter requesting for the refund of surplus funds.*

PW7: *The signature looks like mine but I never signed that document."*

Prosecution further adduced the evidence of Samuel Ezati (PW8) a forensic examiner at the police headquarters who examined the letter that sought for a refund, which was alleged to have been written by Ambassador Mugume (PW7). He testified as follows:

Omara: *So what were your findings?*

PW8: *... Finding 3- questioned signature on exhibit 3 has the strong similarities with the specimen b. All the characters are significantly similar in general and individual characteristics like manner of execution, character combinations, alignment, etc. I have not observed fundamental differences between them and similarities between them are significant. However, it is important to state that I never got access to the original document and could not therefore give a conclusive opinion. The original document sent before it was faxed was never availed. My Lord that is the end of my findings."*

Prosecution also adduced the evidence of Miriam Kyomugasho (PW9) who is the appellant's sister and who was one of the signatories of the Great Lakes Youth League account in Tropical Bank. This is the account through which the refund of USD 114,000.00 was channelled back to Uganda from Bujumbura at the request of the appellant. Kyomugasho (PW9) testified as follows:

Omara: What role was Sarah doing?

PW9: She was the elected President of the Youth League.

Omara: Who signed for the money?

PW9: I signed for the money together with Patrick Onen, the other signatory.

Omara: How did you know about this money?

PW9: We had a meeting at the Ministry of Foreign Affairs and we were requested to help receive the money on their behalf."

The appellant's testimony at her trial confirmed that she was the President of the Great Lakes Youth League and that Kyomugasho Miriam (PW9) was her sister. The appellant also confirmed that Kyomugasho Miriam (PW9) was one of the signatories to the account through which the money was wired from Bujumbura. During cross examination, the appellant also testified as follows:

Omara: Sarah you said this organization the Great Lakes Youth League, are you the director of that organization?

DW1: *I am the President of the Great Lakes Youth League.*

Omara: *Were you one of the signatories*

DW1: *No my Lord. My sister was one of the signatories and she has already testified in this Court.*

Furthermore, the appellant also laid out in detail during examination in chief her role in sending back the surplus funds from Bujumbura to the Great Lakes Youth League Account. She testified as follows:

Ahimbisibwe: *What happened next?*

DW1: *The next morning Ambassador Mugume told me that he is exploring options of having the surplus returned to Uganda and was yet to conclude with the Executive Secretary.*

Ahimbisibwe: *Did you ask him why?*

DW1: *No because my job had nothing to do with the Government expenditures or Government funds.*

Ahimbisibwe: *What followed next?*

DW1: *When we got back, I told him that he needs to request the signatories of the Account for the Youth League if he wants to pass there money.*

Ahimbisibwe: *Yes, that's true. How did the funds come back?*

DW1: I sent a letter written by Ambassador Mugume to Bujumbura. He was requesting for the funds to be sent back and it also gave the account details where the money should be sent. But this was after a fax had been sent for the same.

Testifying in her defence, the appellant admitted that she is the one who sent the email and attached the letter with details of the bank account, which was allegedly written by Ambassador Mugume (PW7), to the ICGLR Secretariat in Bujumbura. This is the letter that requested for the refund to be sent back to Uganda through the Youth League Bank Account.

Although the evidence of Samuel Ezati (PW8) a forensic expert was not conclusive on whether the letter had been written by Ambassador Mugume was a forgery or not, this does not point to the appellant's innocence as the majority Justices in this appeal have concluded.

I have noted that the majority Justices in this appeal have opted to believe the appellant's testimony that the letter she sent to the ICGLR was written by Ambassador Mugume (PW7). The majority have gone against concurrent findings of the two lower courts which found the appellant guilty after they believed the prosecution version of the case, as opposed to the appellant's version.

It should be remembered that it was the appellant who was in the dock and whose conduct was being scrutinized to establish if she had engaged in criminal conduct amounting to embezzlement. The appellant's culpability started when, among others, she sent

the email and the forged letter seeking diversion of Government of Uganda funds to a Bank Account of the Youth League, where she was President and where she had control through her sister as one of the signatories to the Account.

The appellant's testimony in chief confirmed that she was part of the criminal scheme that was hatched and executed to divert Government money (the surplus) by sending it back to Uganda through the Youth League Bank account. The Youth League was an organisation where the appellant was the President and her sister was one of the signatories. The appellant testified as follows:

> *Ahimbisibwe:* *Did you anticipate any danger at that moment?*
>
> *DW1:* *<u>We</u> had all agreed that the money has to be fully acknowledged by whoever receives it from the Youth League account.*

The process to refund the money from Bujumbura was initiated by the appellant and it also ended with her as the custodian of the "lost acknowledgement forms". The appellant did not deny that she sent an email with a letter alleged to have been written by Ambassador Mugume requesting for the surplus money to be remitted to Account No 0010172403 which belonged to Great Lakes Region Youth League. Secondly, the appellant admitted that she was the President of the Great Lakes Youth League. Being the President of this Organisation, the appellant must have had influence in this organization.

Kyomugasho Miriam (PW9) one of the signatories of the account through which the surplus money was diverted and remitted back to Uganda, is a sister to the appellant. She testified that the surplus funds the appellant requested for were received and withdrawn from the Youth League Account. This confirms that the diverted surplus funds were received and withdrawn by the Youth League organization of which the appellant was the President and where she was well positioned and had an upper hand.

The appellant confirmed that she was the custodian of the acknowledgement forms which she later claimed were stolen from her office during an alleged break in into her office. The appellant testified as follows:

Ahimbisisbwe: What was missing?

DW1: The scanner, two laptops, and my file of documents/correspondences and my accountability file among others. This accountability file had acknowledgement forms for the funds given to Mwanje and the copy of the original letter that was sent to Bujumbura recalling the funds."

As the above testimony indicates, the fact that the appellant did not deny that she was in custody of the acknowledgement forms for the surplus funds means that she had at one point had access to the diverted surplus funds less the 4,500,000/= shillings that remained on the Youth League Bank account.

I have noted that the majority Justices in this appeal, without giving any reasons opted to depart from the concurrent findings of the two lower courts with respect to the appellant's guilt. The undisputed evidence on record is that the appellant, without claim of right, spearheaded the process of diverting and remitting back Government funds consisting of the surplus sum of USD 114,000, from the ICGLR Secretariat in Bujumbura to the Tropical Bank account of Great Lakes Youth League.

The appellant had the acknowledgement forms under her custody and she by all means knows how the money was disbursed. The fact that the forms were stolen from her office would not have ended the story. This is because under normal circumstances, if it is indeed true that the diverted funds were later banked on a correctly designated Bank Account of the Government of Uganda, the appellant could still have accessed the documents from the Bank where the funds were deposited and tendered in that evidence in her defence.

Alternatively, if the funds were received by a properly designated employee or employees of the Government of Uganda in accordance with the established procedures for making such payments, the appellant would have requested the recipients of the money to sign new acknowledgement forms so that the Youth League could account for it. The fact that she did not or that she was unable to produce duplicate documentation or secondary evidence in support of her case, confirms the conclusion of the Court of Appeal that the part of the surplus funds which had been received by the Youth League which the appellant headed had disappeared into thin air.

Given all the above evidence on record, I am unable to fault the learned Justices of Appeal in their re-evaluation of the evidence with respect to the second ingredient of the offence of embezzlement. As counsel for the respondent rightly contended, the element of theft was duly proved against the appellant when the prosecution proved that Government funds (the surplus) was received from the ICGLR Account in Bujumbura and credited onto the Great Lakes Youth Account in Tropical Bank. I agree with the respondent that once asportation was completed, how the funds (which were now proceeds of crime) were used or shared was only a matter of detail. It is therefore my finding that this ingredient was well proven by the prosecution and that the Court of Appeal correctly confirmed the appellant's conviction of Embezzlement.

The third and last ingredient of Embezzlement the prosecution was required to prove is that the appellant had access to the embezzled funds by virtue of her office.

As I found earlier, the prosecution proved that the appellant was employed by the Government of Uganda as the National Coordinator for National Coordination Mechanism. Through its witness Ambassador Mugume (PW8), the prosecution adduced here is whether or not the appellant had access to the embezzled funds by virtue of her office.

The appellant admitted that in the course of her work, she was reporting to PW7, Ambassador Mugume, who was the Permanent

Secretary in the Ministry of Foreign Affairs. She also testified and confirmed that by virtue of her office, she got access to the information that Uganda had surplus funds at the ICGLR Secretariat in Bujumbura.

The appellant was part and parcel of the criminal scheme that she hatched to divert and send the surplus money belonging to the Government of Uganda back through the Bank Account of Youth League, where she was President. The appellant learnt about the surplus funds by virtue of her office. When she did, the appellant used her office to divert and access these surplus funds when (a) she wrote and sent an email to the ICGLR Secretariat in Bujumbura and attached a forged letter that was acted on; and (b) when the said funds were sent back to Uganda through the bank account of Youth League, an organisation where the appellant was the President and had great influence.

During her examination in chief, the appellant testified that she was the one who advised Ambassador Mugume (PW7) to seek for the consent of the Youth League signatories to pass the money on the Youth League Account. She testified as follows:

DW1: When we got back, I told him that he needs to request the signatories of the Account for the account of the Youth League if he wants to pass there money.

Ahimbisibwe: Did he request them?

DW1: Yes they were called for a meeting and they all agreed."

Just like the two lower courts did, I do not find the appellant's evidence above credible. Mere signatories to a bank account could not have had more authority and power than the appellant, who was the President of the Great Lakes Youth League to make such critical decisions on behalf of the organisation. The appellant was not only part and parcel of the arrangement to channel the money through the Youth League account. She was also a critical player as borne out by among others, her following testimony:

Ahimbisibwe: *Did you anticipate any danger at that moment?*

DW1: *We had all agreed that the money has to be fully acknowledged by whoever receives it from the Youth League account.*

Note should be made of the fact that the appellant used the word we, which included her in the decision to divert the surplus funds belonging to the Government of Uganda.

The appellant confirmed that she is the one who sent the email and the letter to Bujumbura which turned out to be forged, requesting the ICGLR Secretariat in Bujumbura to remit Uganda's surplus funds to the Youth League Account.

I note that neither section 19(a)(iii) nor the definition section of the Anti Corruption Act defines the term 'access'. However, according to the Merriam Webster dictionary available at www.merriam-webster.com, the term 'access' among others, means ***the ability to use, enter or to get near something."***

According to the same source, the term can also mean 'the ability to obtain or make use of something.

In most cases, access refers to those who have a right to do something. However in this particular case, the law makers used this term to bring into the ambit of section 19 of the Anti Corruption Act, persons such as the appellant, who can use the access they have by virtue of being an employee, to steal or put to their use, money belonging to their employer. In my view, it is immaterial in this case that the appellant was not the signatory to the Youth League Account where the surplus money belonging to her employer, the Government of Uganda was diverted.

The prosecution adduced the following evidence which was also confirmed by the appellant that left no doubt whatsoever that the appellant was the key player in this whole criminal scheme and transactions which resulted into the embezzlement of Government funds.

a) The appellant was the President of the Great Lakes Youth League;

b) The appellant was the one who coordinated the signatories to Ambassador Mugume/ Ministry of Foreign Affairs officials;

c) The appellant is the one who sent the email with a forged letter to the ICGGR Secretariat;

d) The alleged forged letter nevertheless contained the right account number of the Youth League, and the right Bank where the diverted Government funds were to be sent;

e) The funds were sent to this account by the ICGLR Secretariat in Burundi;

f) The funds were dully received on the said Account and withdrawn by the Youth League; and

g) Save for the 80,000,000/= that the Ministry of Foreign Affairs admitted to receiving and banking and the 4,500,000 that was left on the Account but was later withdrawn and exhibited, the appellant failed to adduce evidence of the recipients of the Government money that came into her organization's hands, the Youth League;

h) While she was doing all the above, the appellant knew that she was part of a criminal scheme to divert funds belonging to her employer, the Government of Uganda from being credited to the Consolidated Fund or any other properly designated Bank Account belonging to the Government of Uganda, to an account where she had access - the Youth League Account by virtue of her Presidency of this organization and her proximity and influence of her sister and other signatories;

i) The appellant's testimony in chief and in cross examined confirmed that the Youth League had accessed these funds with the express knowledge and participation of the appellant.

If the appellant had no knowledge of the matters relating to the diversion, withdrawal or the distribution of the diverted surplus funds, she would have simply stated so in her defence. But she had personal knowledge of these matters and accepted so and

gave detailed descriptions of how much was received, who signed for it from the Bank, how much remained in the Bank, who received part of the money and who kept the acknowledgment forms.

j) The appellant admitted that she had custody of the acknowledgment forms of the remitted funds.

It is therefore my finding that the prosecution adduced sufficient evidence to prove that the appellant by virtue of her office had access to the embezzled funds and that the learned Justices of Appeal properly re- evaluated the evidence on record.

The evidence on record, coupled with my other findings earlier in this Judgement support the Court of Appeal's decision to uphold her conviction. I have found no merit in the appellant's submissions and contentions under this ground. On the contrary, I agree with the findings of the Justices of Appeal who upheld the appellant's conviction for the offence of Embezzlement. Ground 1 of Appeal therefore fails.

Ground 3 of Appeal.

This ground was framed as follows:

"3)(a) The learned Justices of the Court of Appeal partly failed in their duty to re-evaluate the evidence on record and came to erroneous conclusions that:

i. ***The prosecution proved beyond reasonable doubt that US Dollars 114,000 was deposited on Great Lakes Youth League account.***

ii. ***The appellant did not explain where the missing funds went.***

iii. ***The loss of acknowledgement forms during the break in at the appellant's office was a mere excuse on her part for not knowing where the money went.***

iv. ***The appellant participated in the transactions relating to the withdrawal of the missing funds.***

v. ***The prosecution proved beyond reasonable doubt that the funds withdrawn from the bank disappeared into thin air and were never passed on to Government.***

(b) The learned Justices of the Court of Appeal failed to re - evaluate evidence on record demonstrating grave inconsistencies in the prosecution evidence regarding the movement of the money in question from the Great Lakes Region Youth League Tropical Bank account to the Ministry of Foreign Affairs."

The essence of this ground of appeal is that the learned Justices of the Court of Appeal partly failed in their duty to re-evaluate the evidence on record and came to the listed conclusions, which the appellant contended were erroneous.

Arguing this ground, counsel for the appellant faulted the learned Justices of the Court of Appeal for failing to re-evaluate the evidence regarding the money that was embezzled. Counsel for

the appellant contended that whereas the prosecution evidence of two prosecution witnesses Oryema Lazarus, a Bank Manager (PW6) and Kyomugasho Miriam (PW9) one of the signatories to the account confirmed that the Great Lakes Youth League account was credited with an equivalent of USD 114,070, the bank automatically converted it into UGX 223,827,000/=, because the account was in shillings.

Counsel for the appellant faulted the learned Justices of the Court of Appeal for concluding that USD 114,070 had been deposited on the account of the Great Lakes Youth League Account yet the money deposited was in Uganda Shillings and not in Dollars.

On the other hand, counsel for the respondent contended that there was no contradiction in the evidence of prosecution witnesses regarding funds that were embezzled by the appellant.

Counsel submitted that the evidence of Charles Kapekele Chileya (PW1) clearly showed that the funds were requested for and transferred in USD currency. She further contended that this was supported by Rose Mary Atim (PW4) a witness from Stanbic Bank, who confirmed receipt and transmitting of the funds to the account of Great Lakes Region Youth League Account in Tropical Bank.

Lastly, counsel for the respondent contended that the witness from Tropical bank Lazarus Oryema (PW6) admitted that the Bank received the funds in USD currency. Tropical bank automatically converted the funds to Uganda Shillings currency and it became UGX 223,827,000/= after the conversion, because

the Great Lakes Region Youth League Account was a shillings account,

I have reviewed the respective submissions of the parties. With due respect, I do not find any merit in the appellant's submissions. As counsel for the respondent rightly observed, Lazarus Oryema (PW6) testified that the account was credited with an equivalent of USD 114,070. The bank automatically converted it into shillings because the Youth League account was in shillings.

Secondly, the appellant did not dispute the fact that the funds were transferred to and received on the Great Lakes Youth League Account. I cannot therefore fault the Director of Public Prosecutions for preferring to charge the appellant with the amount in dollars that was diverted through the appellant's actions to the Youth League Account. The act of Embezzlement was completed when the Funds were diverted and received with the appellant's express consent and involvement on the Youth League Account.

I do not see a problem with the prosecution and Court referring to the amount in Dollars. Conversion of the embezzled funds into Uganda shillings was not at the request of Government. If the appellant and her accomplices had not sent the email and the forged letter requesting the ICGLR Secretariat in Bujumbura to remit the surplus to the Great Lakes Youth League account, the funds would have been remitted back to Uganda in the currency of choice of the Uganda Government. The conversion was part of the appellant's criminal scheme. The appellant cannot therefore

turn around to complain that the money was received on the Great Lakes Youth League account in shillings but that she was charged with the equivalent amount in dollars. Therefore, I do not find any merit in the appellant's contention that the learned Justices of Appeal failed in the duty to re-evaluate the evidence on the money embezzled and that they reached a wrong conclusion.

Under ground 3(a)(ii) of appeal, the appellant also faulted the learned Justices of the Court of Appeal for reaching an erroneous conclusion that the appellant did not explain where the missing funds went. The respondent did not respond to this particular contention.

Again there is no merit in this contention. I have already held that the appellant along with others, embezzled funds that belonged to the Government of Uganda. The charge for embezzlement can only be sustained if the funds are missing. The prosecution adduced evidence that showed that Government funds had been diverted to a private account of an organization where the appellant was the President during the time when she was employed by the Government of Uganda.

Secondly, the prosecution adduced evidence showing that part of these funds were lost. The appellant would not have been convicted of embezzlement if she had explained where the funds which were received by the Great Lakes Youth League where she was the President but which were not passed on to the Government/Ministry of Foreign Affairs went.

The above answer also disposes of the appellant's contention faulting the finding of the Court of Appeal that the loss of acknowledgement forms by the appellant was a mere excuse on her part for not knowing where the money went. I have found no basis for faulting the reasoning and finding of the Justices of Appeal on this issue.

The appellant herself testified that the acknowledgement forms were "*stolen*" from her office. By their nature, the acknowledgement forms should indicate the respective recipients of money, how much each recipient has been paid and the purpose for which he or she was paid. So, even if the appellant's version that the forms had been stolen during the break into her office was true (which both Courts declined) to believe, the appellant did not give any reason that stopped her from requesting the recipients of the money in question to sign new acknowledgment forms for money they had earlier received from the appellant or the signatories.

The mere fact that the appellant admitted that she had in her possession acknowledgement forms confirmed the prosecution evidence that she embezzled the money. The Court of Appeal cannot be faulted for finding that she was responsible for the embezzled funds, given her employment with the Government of Uganda and her role in the entire criminal scheme.

Otherwise, if the reverse was true as the appellant would want us to believe that she had nothing to do with these funds and that she did not have access to these funds, why would she be the one entrusted to keep the acknowledgement forms?

I take judicial notice of the fact that in the ordinary course of things, Acknowledgement Forms are usually kept by a person who has had custody of funds which have been entrusted to him or her for making authorized payments to designated persons or institutions. These forms are the primary evidence that money was passed on to the proper recipients. It is inconceivable that someone else was responsible for paying out the funds in question and that the appellant was then entrusted to only keep these forms after payment. If that had been the case, then the person who had made the actual payments would have kept another set which the appellant could have accessed and produced in Court, in her defence.

The appellant's own testimony below, during her cross examination underscored the above point as follows:

Omara: *You have worked with the International Conference on the Great Lakes Region since 2004?*

DW1: *Yes my Lord.*

Omara: *Uganda was not making any contribution. When Ambassador Mugume took over office as the National Coordinator for the Conference that is on behalf of Uganda you worked with him from 2006 up to the time you were arrested?*

DW1: *Yes my Lord*

Omara: *You have told Court that Ambassador Mugume requested you that this money should be sent on*

that account and you said you would only accept if he would acknowledge?

DW1: *Yes my Lord.*

DW1: *My Lord I have been conducting accountability for the conference activities since 2004 by then I was using strict guidelines so I got to know that whenever you give somebody money he or she could acknowledge for it.*

Omara: *... Why didn't Youth League write a cheque to Bank of Uganda account because all of you were aware that the money did not personally belong to Ambassador Mugume. It was Government money for surplus contribution that we are talking about. You were aware. Why didn't you write a cheque or send the money to Bank of Uganda directly where the account was?*

DW1: *What Ambassador Mugume had agreed with Miriam and Patrick was that when the money comes, it was to be handed over and acknowledgements would clearly show where the money went and then those persons would explain what they used the money for.*

The appellant is an adult who is expected to follow the laws of this country. She was knowledgeable about the Government of Uganda procedures and processes. The appellant's testimony quoted above confirmed the fact that despite her being knowledgeable of the correct established procedures to take, she

nevertheless consciously went against them to plan with her accomplices to divert and embezzle Government funds. This evidence removed any reasonable doubt that might have remained from the evidence adduced by the prosecution witnesses.

Even if the appellant's version of events was true that Ambassador Mugume asked her and the signatories of the Youth League to do what she claims they did, well knowing that it was contrary to the Government procedures, which I do not believe, the appellant accepted that she willingly took part in a criminal scheme to divert Government funds to a private account. That was criminal. The appellant's admissions point to her guilt and not to her innocence, as the majority Justices of the Court have surprisingly held.

Secondly, the prosecution through all the witnesses, adduced evidence showing that Government owned USD 114,160 and it was remitted to the ICGLR Secretariat. Prosecution also adduced evidence showing that the appellant sent an email requesting money to be diverted to an account where she was the President and in control. When the money was remitted to the Youth League Account, the appellant together with the signatories knew about the withdrawal of the money and its movement up to the time when it was allegedly acknowledged by Mwanje the cashier in the Ministry of Foreign Affairs. But when the time came to provide accountability, the forms disappeared and she could neither produce the original nor the duplicate forms nor name the recipients of these funds.

The main thrust of the appellant's argument which the majority Justices in this appeal have believed was that she was not a signatory to the Youth League account and that therefore she never handled or received the money. She contends that the Court of Appeal therefore wrongfully confirmed her conviction for Embezzlement when prosecution had not proved the ingredients of this offence.

The contentions of the appellant have no basis in law because under Section 19 of the Anti Corruption Act, the third ingredient that the prosecution has to prove is that the accused was an employee of Government or body which owned the money and the accused had access to the money that was stolen. Contrary to the contentions of the appellant that she was wrongly convicted because she was not a signatory and never had possession and access to the money, the appellant admitted in her cross examination.

Omara: *Do you admit that a sum of 114,000 USD was sent through this account?*

DWI: *Yes my Lord.*

For strange reasons, the prosecution opted to use persons who were the appellant's accomplices such as her sister as its witnesses. When read alone, some of the prosecution witnesses deliberately left some gaps in the role of the appellant. However, the appellant's own testimony filled and sealed those gaps. At the end of the day, when the prosecution and the defence evidence was tendered, there was no reasonable doubt that the appellant was the engineer and/or an active participant in this

whole embezzlement scheme. Otherwise if she was not involved, why did she implicate herself in her own testimony? The appellant's own testimony put her at the center of the criminal scheme as well as the movement and stealing of part of the diverted Government funds.

The appellant herself clearly brought out her role during her examination in chief and cross examination. This is brought out in the quotes already cited. When the appellant knew about the excess money, it is her who told Ambassador Mugume about getting authority to get money back through the Youth League account. Much as the appellant was not a signatory of the Youth League, and in her evidence she went out of her way to distance herself from the signatories and their actions, she was however unsuccessful in absolving herself from the responsibility for the embezzled funds. This is because the organization which received the funds was the Youth League, where she was its President and her own testimony confirmed that she had actively participated in the conception and execution of this criminal scheme.

I therefore find that the mere fact that the appellant was not a signatory to the Youth League Account did not absolve her from the criminal responsibility. This is because all her evidence clearly shows the signatories were working at her direction and she was present at the meeting to plot the diversion of Government funds as well as transactions involving the receipt and disappearance of the money.

In her own testimony, the appellant described with clarity that she advised Ambassador Mugume where the funds should be

sent. She is the one who knew from whom she picked the forged letter which transferred the funds. She describes the signatories who withdrew the funds, what transpired in the alleged meeting with Ambassador Mugume and the signatories to the Youth League Account where the diversion of the funds was going to be concretized. She sent the email to Charles Kapekele (PW1) with the correct account number and bank details necessary to remit the funds.

Although the appellant was not a signatory to the Youth League Account, she testified as to where the funds were taken. Whereas she tried to distance herself from the decisions surrounding the receipt and what transpired after the funds had been received by Youth League, she clearly admits that she had been conducting accountability since 2004. Despite this knowledge and under her watch, she willingly participated in a criminal scheme where Government funds were diverted to the Youth League account. On one hand, she tried to distance herself from the transaction but on the other hand, she knew everything that transpired with respect to the embezzled funds!

It is also inconceivable that the appellant who was the President of the Youth League, would participate in meetings where signatories who work under her, would privately agree with a third party, Ambassador Mugume to divert Government funds and that she would not be party to such criminal scheme and yet she would neither object to it nor to report it to the Police. The appellant wants to give an impression that the signatories were her bosses, which in ordinary course of things is not, because she was the President. The titles of the signatories are not even

known. If they had been her bosses, she would have indicated so in her defence but she did not. But even if they were, it is not an acceptable defence that her "bosses" directed her to break the law.

The appellant claimed that she was not an employee of the Ministry. Yet in her own testimony, she admitted that she sent a letter to Bujumbura for funds to be sent back through an account where she was President. If the appellant did not have a role in this matter, how did a mere participant in a Conference send an email and a letter to an Inter Government Agency to refund back the money and it was indeed acted on?

Relying on *Mulindwa James V Uganda, SCCA No. 23 of 2014*, counsel for the appellant contended that prosecution bore the burden of proving all the ingredients of the offence of Embezzlement beyond reasonable doubt. Counsel further contended that mere suspicion, however strong, is not sufficient to make a person criminally responsible.

I do not agree with the reasoning of the appellant. The decision of *Mulindwa* (supra) is distinguishable from the instant appeal. This is because in the present appeal, the Court of Appeal was not dealing with mere suspicion of the appellant. In her own testimony, the appellant confirmed the prosecution evidence that she was the originator of the email which accompanied the forged letter. Her email and forged letter led to the diversion and embezzlement of Government funds. The appellant also confirmed that she had the acknowledgement forms which had the evidence of how the funds had been disbursed.

The appellant, through her own testimony, confirmed how the process to refund the money started and also ended with her when the acknowledgement forms were allegedly stolen from her office. It is therefore my finding that the learned Justices of Appeal did not rely on mere suspicion to confirm the appellant's conviction for the offence of Embezzlement.

Given all the above, I have found no merit in submissions made by the appellant that there were inconsistences in the prosecution evidence and that the learned Justices of Appeal failed in their duty to re-evaluate the evidence on record. Ground 3 of Appeal also fails.

Ground 4 of Appeal.

This ground was framed as follows:

> ***"The learned Justices of the Court of Appeal erred in law when they held that the trial Judge had not exhibited bias against the appellant."***

Counsel for the appellant relied on our decision, *Salongo Senoga Sentumbwe v Uganda, SCCA No.3 of 2014* and contended that the Justices of the Court of Appeal erred in law when they held that the trial Judge had not exhibited bias against the appellant. He further contended that the Court of Appeal did not re-evaluate the evidence on record pointing to the fact that the trial Judge had indeed prejudged the appellant as guilty.

I am not persuaded by the appellant's argument. In Grounds 1 and 3 of the Appeal, I found that the Court of Appeal properly re-evaluated the evidence on the ingredients relating to the offence

of Embezzlement and the evidence of both prosecution and appellant. It was my conclusion that the Court arrived at the right conclusion in upholding the conviction of the appellant because there was enough evidence to uphold the conviction of the appellant. The *Salongo* decision can therefore be distinguished. I therefore concur with the Court of Appeal finding that the trial Judge was not biased. Ground 4 of Appeal fails.

Ground 5 of the Appeal

This ground was framed as follows:

> ***"In the alternative but without prejudice to the above, that the learned Justices of the Court of Appeal erred in law when they upheld an unlawful order of compensation of USD 70,160 and an illegal sentence imposed upon the appellant."***

I cannot find any reason why the Order requiring the appellant to refund US Dollars 70,160 would be illegal. The prosecution proved that USD 114,000 was received and the equivalent in Uganda Shillings 223,827,000/= was credited on the account of the Youth League where the appellant was President and had control. Out of this amount, prosecution adduced evidence to show that 80,000,000/- Uganda Shillings was received by the Cashier in the Ministry of Foreign Affairs and deposited in Bank of Uganda. There was also evidence that 4,500,000/= was left on the account.

The trial Judge must have taken this evidence into account and computed the funds which were not accounted for as totaling to

USD 70,160. Ideally, the trial Judge and the Court of Appeal should have stated the exchange rate which they used to arrive at this figure.

However, I do not find this error to be fatal and to warrant a reversal of the order. Since the Government made the contribution in dollars and it was through the appellant's criminal actions that the money was converted, it was only fair that refund should be made in the currency it was originally paid by the Government.

Secondly, the appellant and her co-conspirators deprived the Government and the people of Uganda from utilizing the funds these funds since 2009 to date. Yet, she was not ordered to pay an interest on these funds which she has used the funds since 2009. I have not found any merit in her contentions.

The other part of the sentence relates to the period of imprisonment. Section 19(a)(iii) of the Anti Corruption Act provides for the sentence for a person who has been convicted of embezzlement. Such a person "*is liable on conviction to a term of imprisonment not exceeding fourteen years or a fine not exceeding three hundred and thirty six currency points or both.*" So a sentence of 10 years cannot be illegal.

The only faults I have found with the order of the trial Court and the Court of Appeal is that both Courts did not impose interest on the embezzled funds and that they also did not put a timeframe when the appellant should have refunded the money to the Government. The Order should have required the appellant to refund the funds not later than one year from the

date of Judgment. The order should also have imposed interest at the court rate for the period the money remained unpaid after the one year period.

Other than these two errors, I have found no error on the part of the learned Justices of Appeal when they confirmed the sentences imposed on the appellant. This ground also fails.

Conclusion

In conclusion, I find it very surprising that the majority Justices in this appeal have declared the appellant innocent, in spite of all the prosecution evidence and appellant's admissions on record, which evidence was properly evaluated by the learned Justices of Appeal. Save for the few changes which I have already pointed out in this judgment, I would dismiss the appeal, uphold the judgment of the Court of Appeal and with some modifications confirm the following orders:

(a) That the appellant serves her 10 year sentence;
(b) The appellant's bail is cancelled;
(c) That the appellant refunds 70,160 United States Dollars to the Government of Uganda not later than one year from the date of this Judgment;
(d) The appellant, being the President of the Youth Great Lakes League should also ensure that the Youth League refunds the Government 4,500,000/= not later than one year from the date of this Judgment.
(e) That any amount that remains outstanding after one year will attract interest of 8% per annum until payment in full; and

(f) That the appellant is disqualified from holding any public office for a period of 10 years upon release;

Before I take leave of this appeal, I would like to note the following matters. First, it is also important to note that the Anti Corruption Act was created to specifically cater for white collar crimes, such as embezzlement, which differ from ordinary crimes under the Penal Code Act. Embezzlement of public funds needs to be effectively curbed by bringing culprits to book. Such crimes are committed by people who hold public offices and who betray the position of trust they hold, for their own personal gain. Such white-collar criminals have the capacity to cover their tracks and operate from the background, although they may be the master mind. It is therefore important that when these white collar crimes are being prosecuted before the Courts of Law, all the actors have in mind the objective which the Anti Corruption Act intended to achieve with respect to these kinds of crimes.

In this particular case, the record clearly shows that the appellant was part of a well thought out and coordinated criminal scheme with other persons to divert public funds from the Government of Uganda into a private account. The funds were diverted so that they could be easily accessed and used for the appellant's own benefit as well as that of her fellow conspirators. Indeed, a review of the evidence shows that the appellant was not acting alone and that some of the prosecution witnesses should have been jointly charged with the appellant to ensure that all members of the scheme are brought to book.

Prosecution should stop making a mockery of the Courts by bringing up cases which are poorly prosecuted like this one where culprits who should be in the dock with the accused, are instead turned into state witnesses. Such witnesses end up giving evidence in a half-hearted manner with the intention to secure the acquittal of the accused and to also possibly extinguish their own culpability. I advise the Director of Public Prosecutions to revisit this case and bring other culprits who are evident on record and are still at large to book so they can join the appellant to answer for their actions in the diversion and disappearance of the embezzled Government funds.

There is also need for the Courts to be more analytical and avoid superficial analysis which will defeat the purpose of the Anti Corruption Act and leave culprits such as the appellant enjoying the spoils of the carefully plotted Embezzlement schemes, instead of being brought to book to answer for their criminality.

Lastly, I appeal to the Executive and Parliament to rectify the current anomalies in Section 19 of the Anti Corruption Act which I discussed in this Judgment, to ensure that the section can be fully implemented to bring all those culprits involved in embezzlement before the law.

Dated at Kampala this..... day of 2020

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JUSTICE DR. ESTHER KISAAKYE JSC