**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**
**ANTI CORRUPTION DIVISION**

**CRIMINAL APPEAL N0. 22 OF 2013**

**(Arising from Anti Corruption Session Case No. 64 of 2010)**

**BETWEEN**

**KASAGGA JOSHUA ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT**

**AND**

**UGANDA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE LAWRENCE GIDUDU**

## JUDGMENT

The appellant, Kasagga Joshua, being dissatisfied with the judgment, conviction and orders of the Chief Magistrate **her worship Akankwasa Irene** delivered on the 14th day of May 2013, appealed to the High Court.

He was convicted of the offence of Transacting Financial Institutions Businesses without a license C/s 4(1) and (11) of the **Financial Institutions Act, 2004** and **Embezzlement C/s 268 (b) and (g) of the Penal Code Act Cap 120**.

He was sentenced to 7 years imprisonment on count 2, and was ordered to pay the complainants ¼ of UGX 3,366,926,390/= as compensation to the victims. An order was also made disqualifying him from acquiring a license under the Financial Institutions Act, 2004 and any other law authorizing the taking of deposits in respect of count one.

The Appellant was employed by a company called **Dutch International Ltd** as an ICT specialist.

He and other employees persuaded members of the public to make contributions/deposits to the company, promising to refund the same with interest/top up. The public got excited about this money generating scheme and made deposits. Some was refunded with interest called top ups but with time, the company started defaulting on refunds. The appellant and the Director of the company started dodging the depositors who reported the case to the police hence these charges.

He and another pleaded not guilty and after a long trial, the two were convicted and sentenced to a prison term of 7 years on count two.
The appellant was represented by two counsel, namely Mr. Godfrey Himbaza and Ms. Nakamate Esther.

The following grounds of appeal were filed and argued; that:-

1. The learned Chief Magistrate erred in law and fact when she failed to properly evaluate the evidence on record before convicting the appellant which occasioned a miscarriage of justice

2. The learned Chief Magistrate erred in law and fact when she convicted the appellant for transacting a Financial Institutions Business without a license contrary to section 4(1) and (11) of the Financial Institutions Act, when he was not a member or director of **Dutch international limited** within the meaning of the law.

3. The learned chief magistrate erred in law and fact when she held that 3,366,926,390/= came into the possession of the appellant by virtue of his employment and that the appellant stole the money from the members of **Dutch international limited**.

4. The learned Chief Magistrate misdirected herself on the burden of proof when she shifted the burden onto the Appellant and convicted the Appellant on insufficient evidence which occasioned a miscarriage of justice.

5. The learned Chief Magistrate erred in law and fact when she ordered that the appellant compensates the victims with ¼ of the embezzled money without proof or evidence that the said money came into the possession of the Appellant.

6. The learned chief magistrate erred in law and fact when she imposed an excessive sentence of seven years imprisonment and compensation at the same time.

My duty as a first appellate court is to re-evaluate the evidence on record and draw my own conclusions without ignoring the judgment of the lower court. I am also mindful that I neither saw nor heard the witnesses testify.

**Grounds 1, 3 and 5**

Learned counsel for the Appellant argued these grounds together.

He submitted that the ingredients of the offence of embezzlement were not proved by the prosecution against the appellant. He argued that the appellant was an employee and not a deputy country director of the company. Further, that he was not proven to have received and taken away money which would amount to asportation. Counsel contended that the evidence on record is clear that one Balikowa, a co-accused was the one who was a signatory withdrawing the funds from the bank. Further, that there was no evidence that he received money from complainants. He criticized the trial chief magistrate for finding the appellant guilty when an essential ingredient of theft had not been proved.

Learned counsel criticized the trial court for finding that the appellant went into hiding whereas he just stopped working once the offices were closed. He went on to state that the appellant was arrested from his home.

In response, Ms Jackline Atim, for the state conceded that while the appellant was an employee in the company, he was also an assistant country co-coordinator who was active in encouraging people to make deposits to the company. She also argued that the appellant's bank statement shows that his bank balances swelled once he joined the company which was circumstantial evidence that he was benefitting from the deposits of the contributors. She argued that the while the deposits in the appellant's account swelled, the company was failing to refund the deposits which connects him to the money owed to the depositors.

In her judgment, the learned chief magistrate held that the appellant who was A2, as a full participant in the scheme. She found that the appellant was the one supervising the cashiers and was the one together with one Shamilla Kabeja who was encouraging people to join the scheme. Indeed, the appellant in his defence admits that he would sensitize new members before they willingly joined the scheme.

On this basis, the chief magistrate found him culpable as a person transacting financial Institutions business without a license and convicted him.

The issue here is whether, the receipt of money from the public by this arrangement amounted to transacting business without a license under the Financial Institutions Act? The Financial Transactions Act, 2 of 2004 provides as follows:

**4. Prohibitions against transacting financial institution business**
**(1) A person shall not transact any deposit-taking or other financial institution business in Uganda without a valid licence granted for that purpose under this Act.**

**(4) For purposes of this section "deposit" means a sum of money paid on terms—**
***(a)* under which it will be repaid, with or without interest or a premium, and either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment and the person receiving it;**

It is clear from the above provisions of the law that any person who receives money from the public under an arrangement such as was the case with the appellant to repay it with or without interest is required to have a license. The evidence of the appellant is that they had an arrangement where money would be paid back after 31 days without interest. This arrangement falls within the definition of transacting a deposit taking business. The appellant rested his defence on the fact that the people paying money were doing so voluntarily after being sensitized. This in my view does not remove the requirement for a license. I understood the appellant to be saying that if money is taken voluntarily then it is okay if it not refunded. This would be gambling business which also requires a license under different laws.

In a nutshell the chief magistrate was justified in finding that the appellant was by his actions making the public to deposit money as a business where they would be entitled to payment after 31 days which for all purposes and intents amounted to deposit taking. The conviction on count one was proper.

I notice that because the appellant had been on remand for over four years yet the maximum sentence provided is two years, the chief magistrate did not impose any sentence on him. This was irregular. He should have been sentenced to any sentence that would expire with the rising of court. He could also be sentenced to a fine or cautioned. Under section 34 of the Criminal Procedure Code Act, I sentence him to a caution.

The order disqualifying him from being licensed is valid because it is the command of section 4 (12) of the Act.

Learned counsel asked me to find that the appellant was just an employee who was not proven to have stolen the depositors' money. That the fact of theft was not proved because one Balikowa, a co-accused, was the one who was a signatory to the accounts where the deposits were banked and not the appellant.

The chief magistrate found the appellant culpable on the evidence of PW6 who testified that the appellant would also sometimes bank the money deposited.

According to PW6 the appellant was the person in charge of the operations at Dutch International Ltd regarding the scheme. He was the supervisor and assistant Country director according to documents the witness saw. This evidence was not challenged.

As employee, he entered data of receipts and sometimes did banking. Did he steal this money?

According to the chief magistrate, he did steal some of the money because, evidence of his private banking showed that when the company was doing badly in refunding the money to depositors, the appellant's account was having healthy deposits which he would withdraw erratically.

The appellant explained that he was being paid an allowance of 30000= per day and also earned from his private computer businesses.

The chief magistrate found that this explanation was not reasonable. She found that there was a relationship between the failure to refund deposits by the company and the high deposits on the appellant's account.

The evidence of witnesses such as PW6 and PW7 is that the appellant and Balikowa would make good any shortages by availing funds to the cashiers. PW7 stated that the appellant would ensure that work was going on smoothly and if the

receptionist was rude to the depositors, it was the appellant who would cool the situation. The import of this evidence is that the appellant was a fulltime employee of the company and the argument that he had his private business from which he obtained money to swell his otherwise modest personal account can only be an afterthought.

The chief magistrate found that there was strong circumstantial evidence to connect the deposits in the appellant's private bank account with the deposits made to the company. The appellant was more than just an IT specialist. His modest allowance of 30,000= per day and private salary of about 640,000= from another company could not match the colossal sums (totaling 122 million) in his personal account as explained by PW24. The chief magistrate was in my view entitled to conclude as she did that the appellant was part of those who stole depositors' funds.

There was no reasonable explanation for the credits and erratic debts in his personal account at the time the company was failing to meet its customers' demands. It is not possible that the appellant who was fulltime at Dutch International Ltd could have been operating his private business by remote.

Circumstantial evidence is sometimes the best evidence which with intensified examination is capable of proving a proposition with the exactness of mathematics. Courts have in a number of cases laid down guidance on the application of circumstantial evidence to evidence adduced before them. Such guidance is found in the paragraph below.

***In a case depending exclusively upon circumstantial evidence, court must find before deciding upon conviction ensure that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis from that of guilt.***

***See Simon Musoke v R [1958] EA 715.***

***Further, it is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference***

In the instant case, the chief magistrate believed the prosecution evidence that the appellant would sometimes take out money to bank and that when there was a shortage; he and Balikowa would make good the losses by providing funds to

cover the gaps. This evidence was not challenged. The appellant could not have drawn funds from his private business to cover up company losses. Besides, he was fulltime doing work at Dutch International Ltd and could not have managed his so called computer business by remote. There were no other co-existing circumstances to explain the losses that resulted in failure to refund deposits other than the fact that the appellant and one Balikowa were stealing depositors' funds that they could lay their hands on. The appellant' actions at Dutch International Ltd and the subsequent loss of money leading to failure to refund deposits are incompatible with his innocence.

Like the chief magistrate found, i believe that the prosecution proved that the appellant was one of those that embezzled the deposits and was properly convicted.

The specific complaint in ground five was that the order to refund ¼ of the funds was not justified since the appellant was not proven to have received the company funds. I have already found as the chief magistrate did that evidence of PW6 is that the appellant would also take money for banking. It was the evidence of PW24 that the appellant's private accounts were swelling with cash as the company coffers dried up. I have also found that no reasonable explanation was given for this phenomenon. The inference of guilt is derived from this relationship between more deposits in his account as the company went broke.

The order of compensation is mandatory under section 270 of the Penal Code Act upon conviction. It provides as below.

> **"**Where a person is convicted under section 268 or 269 or where a convicted person is sentenced under section 271, the court shall, in addition to the punishment provided there, order such person to pay by way of compensation to the aggrieved party, such sum as in the opinion of the court is just, having regard to the loss suffered by the aggrieved party; and such order shall be deemed to be a decree under section 25 of the Civil Procedure Act, and shall be executed in the manner provided under section 38 of that Act.

The chief magistrate having heard all the witnesses used her discretion to apportion culpability or responsibility for the loss. She apportioned ¼ of the blame to the appellant and ordered him to refund ¼ of the embezzled funds. She is entitled to that finding on the evidence adduced before her.

Consequently, I find no merit in grounds 1,3 and 5 of the appeal.

**Ground two**

The complaint here is that the appellant was not a director of the company so he could not be guilty of transaction financial institutions business. In reply, Ms Atim for the state argued that the status of the person does not matter. The offence is committed by any person.

The offence in section 4 of the Act is committed by a **person**. And person is defined in section 3 of the Act as

**"person" means any individual, a personal representative, company, partnership, trust, fund, foundation or enterprise wherever located or incorporated;**

The appellant who is clearly an individual, is covered by this definition which leaves the complaint in ground two as unjustified. Ground two fails for technical reasons.

**Ground 4**

This ground faults the chief magistrate for shifting the burden of proof upon the appellant when she held that the appellant's explanation about the huge sums of money in his private account was not **satisfactory**. Counsel argued that the use of the word **satisfactory** meant that the appellant had a duty to prove his innocence which is not the law.

The offending words are found at page at page 21 of the judgment where the chief magistrate wrote:

"*In the circumstances, I do not agree with the defence counsel's submission that A2 satisfactorily explained his alternative source of income which would earn him such huge amounts of money in a short time*"

In all criminal matters, it's the duty of the prosecution to prove all the elements of the offence charged except in a few statutory exceptions and the standard of proof

is beyond reasonable doubt. The trail magistrate in her judgment on page 8 clearly pointed out who bore this burden.

The accused would be required to raise only a reasonable doubt if the court found that he has a case to answer. He is not required to prove himself innocent.

The use of the word satisfactorily instead of reasonable when evaluating circumstantial evidence did not in my view diminish the magistrate's appreciation of who clearly bore the burden of proof. No injustice was occasioned to the appellant because the before making that statement, the chief magistrate had evaluated the all circumstances surrounding the fertile deposits in the appellant's account in a period of two months during the time the company was defaulting. She believed the prosecution evidence that the funds in the appellant's account could not have come from his private businesses but must have been from depositors' funds.

There was, therefore, ample evidence to conclude that the appellant stole those funds when he put them to his private use. The chief magistrate did not demonstrate that she had shifted the burden to the appellant. I do not find that she did. I find no merit in the complaint. Ground 4 fails.

**Ground 6**

The Appellant complained that the sentence of 7 years and compensation at the same time were excessive.

The Appellant's complaint is that he had already stayed 4 ½ years on remand. Learned counsel submitted that this period should have been deducted from the starting point of 7 years in the sentencing guidelines, which would have translated into imprisonment of 3 years.

The learned state attorney asked me to maintain the sentence. Perhaps I should state here that the appellant was jointly charged with one Balikowa. The two were convicted and sentenced to the same prison term but ordered to pay compensation in different proportions. Balikowa was ordered to refund ¾ while the appellant was ordered to compensate ¼ of the funds.

This order of proportionate compensation can only be justified on grounds that the degree of culpability varied between the two convicts. It follows, therefore, that the sentence of imprisonment should reflect that degree of blameworthiness.

Consequently, I find merit in the complaint that the imposition of a uniform term of imprisonment is not justified. If Balikowa was considered the main architect of the scheme to steal peoples' deposits and was sentenced to 7 years, then the appellant should receive less than that. For these reasons, I do substitute the sentence of 7 years imprisonment with a term of three years imprisonment effect from 14th may 2013. The order of compensation in the proportion ordered by the chief magistrate is upheld.

The result is that save for the substitution of the sentence of 7 years with the sentence of three years, the appeal substantially fails and is dismissed.

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Lawrence Gidudu

JUDGE

14th May 2014.