THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON. JUSITCE A. TWINOMUJUNI, JA
HON. JUSTICE S.B.K. KAVUMA, JA
HON. JUSITCE A.S. NSHIMYE, JA

CRIMINAL APPEAL NO.105 OF 2009

TEDDY SSEEZI CHEEYE……..……APPELLANT

V E R S U S

UGANDA ……RESPONDENT

[Appeal from the judgment of
the High Court at Kampala (Katutsi, J)
dated 8th April 2009 in Criminal Case No.1254 of 2008]

J U D G M E N T O F T H E C O U R T:

This is an appeal from the judgment of the High Court of Uganda in which the appellant was convicted of Embezzlement and Forgery and was sentenced to 10 years imprisonment. The undisputed evidence which was adduced by the prosecution and believed by the trial judge is that the appellant floated a company called Uganda Centre for Accountability (UCA). It was a Company Limited by guarantee.

The appellant was a sole Managing Director in the Company and the Sole signatory of its Bank Account. He was also the sole operator of the Company Account No.500371005 kept at Crane Bank Ltd. His wife ANNET KAIRABA and GEOFFREY NKURUNZIZA (PW2) were the other Directors of the Company. The wife was also the Company Secretary.

The company through Annet Karaba and Geoffrey Nkurunziza applied for funds from

Global Fund For AIDS, TB and Malaria Project for monitoring HIV/AIDS activities in the Districts of Rakai, Kabale, Mbarara and Ntungamo. The Company was granted the award in the sum of UG.Shs.120,000,000/= (One hundred and twenty million only). The purpose of the money was to implement the following activities:

a) Develop monitoring mechanism in Rakai, Kabale, Mbarara and Ntungamo Districts.
b) Train identified personnel.
c) Carry out visits to the Districts and delivery sites.
d) Hold fact finding workshops.
e) Carry out field monitoring exercises.
f) Write Reports.

The money was deposited in Company account on 13th March 2005 and on 19th March 2005 the appellant withdrew Ug.shs.96,000,000/= (Ninety six million only). Within the next 19 days the account was empty. All the funds were withdrawn by the appellant from the account.

The prosecution also adduced evidence showing that the appellant or his company did not carry out even a single activity that they had contracted to carry out. Instead the appellant instructed the Company Director Geoffrey Nkurunziza to prepare forged documents in an attempt to account for the funds. All such documents were found to be false and forged. The trial judge believed the prosecution case and convicted the appellant of Embezzlement and Forgery and sentenced him as aforesaid. The appellant did not make any defence nor did he adduce any evidence. He was not satisfied with the conviction and sentence, hence this appeal.

The Memorandum of Appeal contains eight grounds of appeal as follows:-

1) **The learned trial judge erred in law and fact in holding that the accused received Ugx120,000,000 (Uganda shillings One hundred and Twenty Million) from the Global Fund to Fight Malaria, Tuberculosis and Malaria.**

2) **The learned trial judge erred in law and fact by admitting and relying on the uncorroborated evidence of an accomplice to convict the accused of embezzlement and forgeries.**

3) **The learned trial judge erred in law when he admitted and relied on the evidence of a confessed liar.**

4) **The learned trial judge erred in law in shifting the burden of proof from the prosecution to the accused.**

5) **The learned trial judge erred in law and fact when he failed to properly evaluate the prosecution's evidence.**

6) **The learned trial judge erred in law and fact by holding that the prosecution's case was proved beyond reasonable doubt.**

7) **The learned trial judge erred in law and fact in holding that the accused had forged the documents the subjects of the counts of forgery.**

8) **The learned trial judge erred in law and fact when he sentenced the appellant to ten (10) years for embezzlement and three (3) years on each count of forgery, which sentences are harsh and excessive in the circumstances of the case.**

At the trial of the appeal, the appellant was represented by Mr. Peter Kabatsi assisted by Ms Aisha Kawola while Ms Josephine Namatovu, a Senior State Attorney, represented the respondent.

Mr. Kabatsi indicated that he would argue ground one of the appeal separately, grounds 2, 3, 4, 5 and 6 together and grounds 7 and 8 each separately. We propose to deal with the grounds in the same order.

GROUND ONE

Mr. Kabatsi conceded that the appellant was a Director of the Company. He submitted that what was disputed was whether he stole the money in question or not. He submitted that the prosecution had to prove:-

a) That the money was stolen.
b) That the appellant had converted it to his own use.

He submitted that the prosecution had miserably failed to prove that the company had lost any money as it did not call any evidence to that effect. The burden was on the prosecution to prove beyond reasonable doubt that the company had lost money.

Mr. Kabatsi submitted further that, there can never be larceny without conversion to one's own use of the money. In his view, the prosecution failed to prove that the appellant had converted the money to his own use. He relied on the cases of **R vs Development [1954] 1 ALL.ER. 602, Nassolo vs Uganda [2003] 1 EA 182** and **Henry Isiko vs Uganda SCCA 4 of 2003** to support his arguments. In conclusion on this ground Mr. Kabatsi called upon us to allow this appeal, not because the prosecution produced inadequate evidence but because the prosecution adduced no evidence at all to prove allegations on this ground of appeal.

In reply, Ms. Namatovu submitted that the prosecution had proved its case against the appellant beyond any reasonable doubt. The prosecution had by direct evidence proved that:-

a) The appellant was a Director of a Company.
b) That he stole the Company money.
c) That he had access to the money by virtue of his employment.

Ms Namatovu pointed to a number of prosecution witnesses whose evidence could only lead to one conclusion that the appellant had stolen the money he drew from the Company account.

We have carefully studied and evaluated all the evidence that was before the trial judge on this issue. It proves the following beyond reasonable doubt:-

1) The appellant was the Managing Director and the Sole Bank account signatory for the Company called Uganda Centre for Accountability (UCA).

2) The Company solicited and obtained from Uganda Government Ug. Sha.120,000,000/= to carry out HIV/AIDS, TB and Malaria related activities on behalf of the Government.

3) The money was deposited on the Company account No.500371005 to which only the appellant was the sole signatory.

4) The money was withdrawn by the appellant during the month of March and April 2005.

5) The appellant and his Company did not do anything whatsoever in Rakai, Mbarara, Kabale and Ntungamo Districts towards the fulfilment of his contractual obligation entered into by the Company with the Ministry of Health on 10th February 2005.

6) It is only the appellant who withdrew the money from the bank who is in position to tell us what happened to the money.

At the trial in the High Court, the appellant was given opportunity to tell the people of Uganda what happened to the money. He choose to keep quiet. That of course, was his constitutional right but the right is not absolute as it is fettered by section 105 of the Evidence Act which provides:-

> **"When a person is accused of any offence……. the burden of proving any fact especially within the knowledge of that person is upon him or her, …."**

In the instant case, the prosecution proved beyond reasonable doubt that the appellant withdrew the money in question from his Company's account. It is incumbent upon him to tell us where the money went since the matter is especially within his knowledge. After the appellant missed the opportunity in the High Court to explain

what happened to the money, his Lordship Justice John Bosco Katutsi wondered:-

> **"Now the question is: where is the money? Is it reasonable to suppose that the accused who was the sole operator of UCA account does not know where the money went?"**

His Lordship then concluded:-

> **In my humble judgment, it is not only unreasonable, but it is also ridiculous to suggest that the accused does not know where the money went."**
>
> **It went into his own stomach and to use the language of section 268(b) of the Penal Code Act, he embezzled it. The evidence may well be said to be circumstantial. It no derogation of evidence to say that it is circumstantial. Witnesses may tell lies, circumstances well interpreted cannot. In full agreement with the opinion of the gentlemen assessors, I have no hesitation in finding the accused guilty and convict him as charged on Count 1."**

We concur.

Mr. Kabatsi also submitted that the appellant should not have been convicted of the offence of embezzlement because the Company i.e. Uganda Centre for Accountability (UCA) has never complained that it had lost any money and therefore there was no proof of embezzlement at all. With respect to learned counsel, this argument cannot stand. It is apparent from the evidence on record that the appellant floated the company for the sole purpose of embezzling any funds destined to it. He made himself the Chief Executive Officer of the Company. He made himself the sole signatory to its bank account. The other two Directors of the Company were his wife, Annet Keiraba and his accomplice, Geoffrey Nkurunzinza (PW2). There is no way the appellant could have reported the theft of the company's money when it was stolen by himself. Moreover, the money he stole was not really the company's money. It was public money under the control of the Ministry of Health. The

appellant and his company had an obligation to account for the money. When the accountability failed, the Government instituted an inquiry which found that the appellant had embezzled the money. That's how this prosecution began. It was the Ministry of Health which complained. The appellant's company was incapable of complaining. This submission has no merit.

GROUNDS 2, 3, 4, 5 AND 6

On these grounds of appeal, Mr. Kabatsi raised four main complaints against the decision of the trial court:-

a) That there was no evidence on record to prove forgery on the part of the appellant.
b) That PW2, Jeffery Nkurunziza, upon whose evidence the trial judge relied to convict on these counts, was an accomplice who should not have been believed.
c) That the evidence PW2 was never corroborated as required by law.
d) That the trial judge shifted the burden of proof on to the appellant.

We propose to deal with these complaints one by one separately.

NO EVIDENCE OF FORGERY:

Mr. Kabatsi complained that at the trial, the documents he referred to as exhibit P5 were never tendered in evidence. They were only shown to the witness PW2 for identification but were not eventually exhibited as they should have. The consequence, according to him, was that they do not form part of the record and therefore, are not evidence against the appellant.

During the trial in the High Court, the prosecution called the evidence of PW2 Nkurunziza. He testified that all the money which had been given to their Company was withdrawn by the appellant alone. It was never used for the purpose for which it

was given. In an attempt to account for the money, the appellant gave him receipts to fill showing that the Company had used the money for various purposes e.g. accommodation, fuel e.t.c. which he prepared under the instructions and supervision of the appellant. This witness identified the documents including exhibit P5. Since he was the one who had prepared them, the documents were accepted in evidence and marked as part of the record of proceedings. During his submissions in the High Court, Mr. Kabatsi acknowledged that eight receipts (Part of Exhibit P5) were on record but his only complaint was that it was never proved that they were forged by the appellant.

With respect to learned counsel for the appellant, we are surprised that he now submits that the documents never became part of the proceedings. On close scrutiny of the record, we are satisfied that all the documents upon which the charge of forgery was founded were identified by PW2 and tendered in evidence by him. The court rightly accepted them since it is the witness who had prepared them.

As to whether this evidence implicated the appellant in the forgery, this is how the trial judge handled the issue:-

> **"I now turn to the group of counts charging the accused with Forgery c/s 342, 347 and 19(2) of the Penal Code Act. Section 342 defines the offence of Forgery as the making of a false document with intent to defraud or to deceive. Section 345(a) provides that a person makes a false document who makes a document purporting to be what in fact it is not.**
>
> **To defraud is to deceive by deceit and to deceive is to induce a man or woman to believe that a thing is true which is false. Shortly put, to deceive is by falsehood to induce a state of mind to defraud is by deceit to induce a course of action. *R.V WINES [1953] 2 ALL E.R. 1497*. Here in above I have given a graphic account of how exhibit P5 was false. Those documents told lies about themselves and were intended to defraud and deceive PMU (Programme Management Unit). I have here in above commented on the involvement of PW2 Nkurunziza Jeffrey. He testified that he prepared those documents on the instructions of the accused.**

Herein above I have said why I believe his evidence without an iota of hesitation. Section 19(2) of the Penal Code Act enacts as here under following:

'2. Any person who procures another to do or omit to do any act of such a nature that if he or she had done the act or made the omission the act or omission would have constituted an offence on his or her part is guilty of an offence of the same kind….."

A procurer uses the hands and eyes of the person procured to commit a crime as his own. The actions of the person procured become the action of the procurer. In fact the section says, not merely that a person who procures another to commit an offence may be convicted of the offence but that "he or she may be charged with doing the act or making the omission". In my humble opinion citing section 19(2) of the Penal Code Act in the indictment was superfluous. Mentioning the act of procuring in the particulars of the offence in my opinion would suffice."

The learned trial judge believed the evidence of PW2 Nkurunziza. The judge observed:-

"Nkurunziza Jeffrey PW2 testified that he prepared these documents on the instruction of the accused. I subjected the demeanour of this witness while in the witness box. He gave his evidence in a straightforward manner without prevaricating. He gave reasons for accepting to be used as a robot."

Once his evidence was believed, and the trial judge was entitled to do so, the evidence implicated the appellant in forgery of a series of documents in an attempt to account for the money his Company received from the Ministry of Health.

THAT PW2 WAS AN ACCOMPLICE AND NON-CORRABORATION OF HIS EVIDENCE.

The competence of an accomplice as a witness in criminal trials is well settled. Section 132 of the Evidence Act states:-

> **"An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."**

There is no doubt that PW2 was an accomplice. But he was competent to give evidence against the appellant. The trial judge put his evidence under scrutiny and having observed his demeanour as he gave evidence, found him to be a truthful witness. There is a lot of witness and circumstantial evidence showing that the money the appellant's company received did not do what it was received for. It was natural that an attempt to account for it would be made. Since the money was gone, forgery was the easiest option available. The evidence of PW2 and PW3 is very categorical on this issue. The trial judge and gentlemen assessors believed all this evidence. We think that the evidence of PW2 and PW3 was credible and there was more than sufficient evidence to corroborate their evidence. There is no merit in these complaints.

THAT THE TRIAL JUDGE SHIFTEED THE BURDEN OF PROOF

After the learned trial judge read the judgment in which he found the appellant guilty, he considered the sentence and under

> **"SENTENCE AND REASONS FOR THE SAME"** he observed:-
>
> **"The number of cases that are reaching our court seem to suggest, unfortunately that this type of crime *"pays"*. What is more alarming is that this type of crime is being committed with impunity! How do we explain the mentality of a man, whom in order to account for the money received, states that he transported people on a caterpillar wheel loader!**

That a caterpillar wheel loader that uses diesel this time was using petrol! Is this stupidity or impunity? Again how do we explain the mentality of a man against whom there is evidence that he received money, and that in a bid to account for the money received used forged documents and who beats his chest and says: *'there is no case against me. Do what you can, I will say nothing!"* if this is not impunity, then what else can it be?"

Mr. Kabatsi complained that this observation was prejudicial to the appellant because the trial court should not have adversely commented on the exercise of the appellant's right to silence.

With respect to learned counsel for the appellant, we think this argument is misconceived. First, we have already pointed out that the right to silence is not absolute. Under section 105 of the Evidence Act, the appellant had the burden to prove any fact especially and exclusively within his own knowledge. Whatever happened to the money he drew from his Company's account was exclusively within his knowledge. The trial judge was in order to comment about his failure to discharge that burden and to do so adversely.

Secondly, the learned trial judge made his observation after the conviction of the appellant. There is no evidence that he took those observation into account in arriving at the conclusion that the appellant was guilty of the offence charged. The observation of the trial court did not in any way prejudice the appellant. We find no merit in this complaint.

Finally, we have considered the arguments of counsel on both sides on whether the sentences passed on the appellant were excessive or not. We think the offences committed by the appellant were very serious indeed. The appellant may have been a first offender, but given that he was a public officer, holding a very high responsibility as Director for Economic Monitoring in the Office of the President, being entrusted with the duty, among other things, to fight corruption, he should have been the very last person to engage into the type of criminal activities he was convicted of. He should have led by example. We think the sentences of 10 years and 3 years were on the lower side. We are content, however, to leave the matter as the learned trial judge,

in his wisdom, found suitable. We also uphold the order for compensation.

In the result, we find no merit in this appeal which we dismiss accordingly. The conviction and sentences of the lower court are upheld. Bail granted to appellant by this court is hereby cancelled. He should proceed to serve his sentence.

Dated at Kampala this …**20th** …day of…**October**...2010.

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Hon. Justice A. Twinomujuni
JUSITCE OF APPEAL.

……..
Hon. Justice S.B.K. Kavuma
JUSTICE OF APPEAL.

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Hon. Justice A.S. Nshimye
JUSITCE OF APPEAL.