THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[Coram: Odoki, CJ., Tsekooko, Kitumba, Tumwesigye & *Dr. Kisaakye,* JJ.S.C.*]*

Civil Appeal No, **32** *Of 2010*

TEDDY SSEEZI CHEYE::APPELLANT

VS.UGANDA:: RESPONDENT

{Appeal from the decision of the Court of Appeal at Kampala (Twinomujuni, Kavuma and Nshimye, JJA) dated 20th October, 2010 in Criminal Appeal No. 105 of 2009}

REASONS FOR THE JUDGMENT OF **COURT:**

This second appeal arises from the decision of the Court of Appeal dismissing an appeal by the appellant [Teddy Sseezi Cheeye] who was convicted by the Anti-Corruption Division of the High Court of the offences of embezzlement and forgery. He was sentenced to certain terms of imprisonment and was also ordered to pay a sum of 8hs.100,000,000/= as compensation to the Global Fund.

On 26th September, 2011, we heard the appeal and dismissed it because it lacked merit. We reserved our reasons and promised to give the reasons on notice to parties. We now give those reasons.

The facts of the case as accepted by both the trial judge and the Court of Appeal are as follows:-

An International Organization called Global Fund based in Geneva set up a fund to fight diseases such as TB, Malaria and AIDS. The Global Fund granted to the Uganda Government a sum of *Shs.120,000,000/=* after an agreement setting out the terms of the grant was signed between the Uganda Government and the Global Fund. It was the Ministry of Finance which signed the agreement on behalf of the Uganda Government. However, it was the Ministry of Health which was charged with the responsibility of the administration of the Fund. The Global Fund wanted the money to be channeled to Ugandans through Non-Government Organization [NGOS] like TASO, Community Based Organizations, Private Organizations and Government Departments. The Global Fund required all such organizations to enter into partnerships or agreements with the Ministry of Health [MOH], obviously setting out terms under which the organizations would spend the money. The MOH set up a Project Management Committee [PMC] to manage the day to day work of the Global Fund work.

Apparently the appellant saw an opportunity to make money. So he floated a company called Uganda Centre for Accountability [UCA]. It was a Company Limited by guarantee. The appellant was the sole Managing Director of the company and the sole signatory of the company Bank Account. He was also the sole

operator of the Company account No. 500371005, kept at the Crane Bank Ltd. His wife Annet Kairaba and Geoffrey Nkurunziza Banga [PW2] were the other ordinary directors of UCA. In addition, the wife was also the Company Secretary.

UCA through Annet Kairaba and Geoffrey Nkurunziza Banga [PW2] applied for funds from Global Fund for AIDS, TB and Malaria Project for monitoring HIV/ AIDS activities in the Western Uganda Districts of Rakai, Kabale, Mbarara and Ntungamo. The Company was granted the award ill the sum of UG.Shs.120,000,000/= and on 10th February, 2005 signed the required contract [Exh. PI]. The grant was for duration of twelve months. 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 the Company account on 13th March, 2005. On 19th March, 2005 barely six days after that deposit, the appellant withdrew the bulk of the money, namely, Ug.Shs.96,000,OOO/. Within the next nineteen days the account was virtually empty. All the funds were withdrawn by the appellant personally from the account. PW2 who was supervised by the

appellant to prepare false documents relating to false accountability testified about falsehoods and forgeries.

Apparently, many other entities and individuals who got the money mismanaged that money. Therefore, in 2008, at the behest of grantee of the money (the Global Fund), the Government set up a commission of inquiry led by Hon. Mr. Justice Ogoola, the retired Principal Judge of the High Court. The Commission's recommendations included prosecution of those entities and individuals [such as the appellant] found to have mismanaged the money granted to them. The appellant was accordingly charged. During his trial, the prosecution 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 3rd Company Director, Geoffrey Nkurunziza [PW2] to prepare forged documents in an attempt to account for the funds. Although the prosecution adduced necessary evidence proving, *inter alia,* that the documents were false and forged, the appellant decided to remain silent at the conclusion of the prosecution case. Naturally, the trial judge believed the prosecution case and convicted the appellant of the offences of embezzlement and forgery and sentenced him to terms of 10 years for embezzlement and 3 years for forgery. The appellant was not satisfied with the convictions and sentences. He appealed to the Court of Appeal on eight grounds challenging his convictions and sentences.

The Court of Appeal dismissed his appeal, upheld the convictions, sentences and the compensation order. Hence this appeal which is based on five grounds. At our prompting Mr. Kakuru sought leave which we granted to amend those grounds.

During the hearing of the appeal, the appellant was represented by Mr. Kenneth Kakuru of Kakuru & Co. Advocates assisted by Mr. Lumonya A. while the respondent was represented by Mr. Odumbi James Owere, Senior Principal State Attorney [SPSA].

Although Mr. Kakuru indicated at the beginning of his oral submissions that he wanted to argue grounds 1 and 2 together followed by grounds 3 and 4 also together and ground 5 separately, he essentially argued grounds 1 to 4 together and ground 5 separately. Mr. Lumonya argued the forgery aspect of the appeal which is part of the 1st ground of appeal. This is not surprising because the first four grounds refer basically to the same thing.

PREUMINARY OBJECTION:

Before Mr. Kakuru and his colleague could make submissions, Mr. Odumbi, SPSA, objected to the inclusion of grounds 3, 4 and 5 in the memorandum of appeal on the basis that they were not raised in the Court of Appeal and, therefore, there was no basis for including and arguing them in this Court because the appellant would be criticizing the Court of Appeal on matters upon which the Court of Appeal did not have opportunity to pronounce itself. He relied on the cases of Twinomugisha A and 2 Others vs. Uganda [Supreme

Court Criminal Appeal No. 35 of 2002] and Tarinyebwa Mubarak And Another Vs Uganda [Supreme Court Criminal No. 07 of 2000] Mr. Kakuru in response contended that the points raised in grounds 3, 4 and 5 were considered by the Court of Appeal at pages 4 and 6 and 7 of its judgment. He also contended that the order for compensation of Shs.l00,000,000/= was not illegal.

We overruled the objection because we were satisfied that the Court of Appeal had decided on the points forming the basis of the last three grounds of Appeal. For instance, at page 6 of its judgment, the Court of Appeal upheld the trial judge when the court stated that-

1) *The appellant was the Managing Director and Sole Bank account signatory for the Company called Uganda Centre for Accountability [UCA].*
2) *The Company solicited and obtained from Uganda Government Ug.Shs.12D,00D,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 whatever in Rakai, Mbarara, Kabale and Ntungamo Districts towards the fulfillment 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 chose 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 especia11y within the knowledge of that person is upon him or her, ..."*

Again at page 7 of the same judgment, the Court of Appeal expressed itself this way-

> *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:-*
>
> > *(Wow the question is: where is money? Is it reasonable to suppose that the accused who was the sole operator of UCA account does not know where the money went.*
>
> *The learned judge 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 is 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 on count 1."

The trial judge made the compensation order which was upheld by the Court of Appeal. From the foregoing quotations, we were satisfied that the three grounds arise from matters upon which the Court of Appeal had pronounced itself. It was because of these reasons that we overruled the objection to the three grounds.

COUNSEL'S ARGUMENT ON GROUNDS 1, 2, 3 AND 4:

We note that grounds 1 to 4 are about the conviction of the appellant for embezzlement 'and forgery. We propose to consider them together. They are worded as follows-

1) *The learned Judges of Appeal erred in law and fact when they upheld a judgment based on insufficient evidence and found that the charge of embezzlement and forgery had been proved against the appellant.*
2) *The learned Judges of Appeal erred in law and fact when they upheld the trial finding that the appellant was guilty of embezzlement of money belonging to a company without evidence that the said company ever lost any money or incurred any loss.*
3) *The learned Judges of Appeal erred in law and fact when they failed to find that the trial judge had erred when he found that the company was Sham without any evidence to that effect, and having found so went ahead to convict the appellant of embezzling money from a Sham non-functional none existent company.*
4) *The learned Judges of Appeal erred in law and fact when they failed to find that the trial Judge had erred when he found that the appellant had embezzled Global Fund money but*

went ahead to convict him of embezzling, Uganda Centre for Accountability money as Director.

When arguing grounds 1 and 2, Mr. Kakuru actually submitted on all the four grounds. Learned counsel begun by submitting that the prosecution did not prove embezzlement. He contended that the 1st count of the indictment did not state that Shs.120m/= belonged to UCA Company and therefore the ownership of the money was not set out in the indictment in terms of s.268 of the Penal Code Act. He referred to page 8 of the judgment of the Court of Appeal and argued that if UCA was a sham Company as described by the two Courts below, then the prosecution failed to prove that the appellant embezzled money from himself. Learned counsel argued that the trial judge shifted the burden of proof to the appellant by relying on the provisions of s.105 of the Evidence Act.

Mr. Lumonya made submissions as regards the forgery aspects of the appeal. This is part of the first ground in the memorandum of appeal. Learned counsel in effect criticized the trial judge and Court of Appeal for holding that the appellant procured the commission of the offence of forgery. He contends [we think erroneously] that the appellant was never charged with forgery nor did the appellant procure the commission of the offence of forgery in terms of section **19(2) of** the Penal Code Act.

In reply Mr. Odumbi opposed the appeal. He submitted in effect that counsel for the appellant failed to appreciate the import of

S.268 (g), and S.254 (2) (C) of the Penal Code Act which refer to a special owner. He submitted that there was sufficient evidence before the trial judge and the Court of Appeal proving that as the Managing Director of UCA, the appellant through UCA had access to money belonging to the Global Fund and MOH. That the description by the two courts of UCA as sham Company was used during sentencing. On forgery, Mr. Odumbi argued that there was sufficient evidence proving that the appellant procured another person to commit forgery. He relied on S.19 (2) of the Penal Code Act.

COURTS CONSIDERATION:

The excerpts we quoted earlier show the two Courts considered evidence on embezzlement. The first count in the indictment was framed this way

COUNT 1:
STATEMENT OF OFFENCE:
EMBEZZLEMENT CIS 268 *(b) and (g) of the PENAL CODE ACT:*

PARTICULARS OF OFFENCE

TEDDY SSEZI CHEEYE during the period from March to December, 2005 in Kampala District being a Director in a company known as "Uganda Centre for Accountability" stole Ushs.100,494,300/= [One Hundred Million Four Hundred and Ninety Four Thousand, Three Hundred 8hillings Only] to which he had access by virtue of his office.

S. 268 in so far as relevant states as follows-

"Any person who being-

(a) .....

(b) a director, officer or employee of a company or corporation;

steals any chattel, money or valuable security-

(c) .....

(g) to which he or she has access by virtue of his office,

Commits the offence of embezzlement and shall on conviction be sentenced to imprisonment for not less than fourteen years.

With respect, we think that Mr. Kakuru addressed us on the basis of the old law of embezzlement. We agree with the learned SPSA that the manner in which the appellant got the money for which he never accounted, brings him within the ambit of S.268 (b). We are not persuaded by the arguments of learned counsel for the appellant. 8.254 defines theft. For instance S.254 (2) (C) states-

A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents:

> *(c) an intent to part with it on a condition as to its return which the person taking or converting may be unable to perform, and "Special Owner" includes any person who has any charge or lien upon the thing in question or any right arising from or dependent upon holding possession of the thing in question.*

We are satisfied that the appellant was correctly convicted of the offence of embezzlement. We are equally satisfied that on the facts of this case, both the learned trial judge and the learned Justices of

Appeal correctly relied on S.105 of the Evidence Act for the view that the appellant was the only person who knew how the money put on UCA account of which he was the only and sole signatory was spent. The fact that the appellant supervised PW2 to make false vouchers and other false reports about accountability of money certainly shows he knew where the money was or went. It was upon him to explain. When he exercised his right wrongly not to testify, he took risk. There was no shifting of the burden of proof in the circumstances of this case.

Further we are of the considered opinion that the arguments by appellant's counsel about what he appears to refer to as a defective indictment on first count are technical and have not been shown to have occasioned any injustice to the appellant.

FORGERY:

In the High Court the appellant was charged with forgery in counts 11, 13, 15 17, 19, 21, 23 and 25. The learn trial judge considered these at pages 13 to 14 in the following words-

> *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 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 falsehood to induce a state*

of mind; to defraud is by deceit to induce a course of action. R.V. WINES [1953]2ALL E.R ER.1497. Hereinabove 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.

Here in 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 the following:*

> *(:2Any person who procures another to do any act of such a nature that if he or she had done the act or made the omission would have constituted all offence on his or 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 ('l1e 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. In complete agreement with the gentlemen assessors I find the accused guilty on each and every count charging him with forgery C/s* 342 *and punishable under section* 347 *of the Penal Code Act. And convict him.*

The Court of Appeal [pages9 to 13] evaluated the evidence on record after assessing the consideration of that evidence by the learned trial

judge before the court upheld his conclusions. We agree with the two courts that the appellant committed the offence of forgery.

It is true in counts 11, 13, 15, 17, 19, 21 and 23, the appellant was indicted for forgery. In their respective evidence PW2 and Kiberu Samuel [PW3] testified that the appellant instructed them to write out relevant documents. Those documents were forged. Indeed PW3 testified that he could not identify some of the signatures on those documents. It is our considered opinion that the evidence of PW2 and PW3 which was believed by the trial judge places the appellant squarely within the ambit of S.19 (2) of the Penal Code Act. That subsection (2) reads as follows-

> *Any person who procures another to do or omit to do any act of such nature that if he or she had done that 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 and is .liable to the same punishment as if he or she had done the act or made the omission; and he or she may be charged with doing the act or making the omission.*

There is no doubt in our minds that the evidence on the record proved that the appellant procured PW2 to commit the forgery. Grounds 1 to 4 must fail.

GROUND 5:

> *The learned Judges of Appeal erred in law and fact when they failed to find that the trial judge erred when he ordered the appe11a.nt to refund money to the Global Fund having convicted him of embezzling money from a Private Limited Company the Uganda Centre of Accountability Limited*

Mr. Kakuru submitted that the Global Fund was not an aggrieved party and, therefore, it was wrong for the trial judge to order the appellant to compensate money to the Global Fund. On the other hand Mr. Odumbi, SPSA, submitted that the appellant was not convicted of embezzling UCA money but of accessing Global Fund

The evidence of Muhamed Kezala [PWl] the former Permanent Secretary in the Ministry of Health at the time Government received the money from Global Fund clearly shows that the Global Fund had great interest in the proper use of its money. Thus, according to him, Global Fund caused the Uganda Government to create the Project Management Unit [PMU] to manage the day-to-day work of the Fund in Uganda. When the Global Fund discovered that its money in Uganda was being mismanaged, it requested the Government of Uganda to disband PMU which was done after the Ogoola Commission was established. It is the Global Fund which set out methodology for management of the money. In these circumstances it is very clear that the Global Fund is the aggrieved party envisaged by S.270 of the Penal Code.

On the evidence of PWl, therefore, there is no doubt in our minds that the order to compensate the Global Fund was proper. Ground five must, therefore, fail.

It was because of the foregoing reasons that we dismissed the appeal.

Delivered at Kampala this 21st.....day of December..2011.

BJ Doki,

Chief Justice

JWN Tsekooko,
Justice of the Supreme Court.

CNB Kitumba,
Justice of the Supreme Court,

J. Tumwesigye,
Justice of the Supreme Court.

Dr. EM Kisaakye,

Justice of the Supreme Court