

GHANA / JUDGMENT

REPUBLIC VRS. GYAMERA (D6/25/23)

[2025] GHACC 26 (28 April 2025)

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COURT

Circuit Court

CASE / FILE NUMBER

D6/25/23

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IN THE CIRCUIT COURT “A”, TEMA, HELD ON MONDAY, THE 28TH DAY OF APRIL, 2025, BEFORE HER LADYSHIP JUSTICE AGNES OPOKU-BARNIEH, SITTING AS ADDITIONAL CIRCUIT COURT JUDGE SUIT NO: D6/25/23 THE REPUBLIC VRS: KWAME OWIREDU GYAMERA ACCUSED PERSON PRESENT INSP. EMMANUEL ASANTE FOR PROSECUTION PRESENT RICHARD CLARK, ESQ. HOLDING THE BRIEF OF SOLOMON KOFI ADDO, ESQ. FOR THE ACCUSED PERSON ABSENT RULING ON SUBMISSION OF NO CASE

FACTS:

The accused person was charged and arraigned before this court on 13th July 2023 on a charge of Fraudulent Breach of Trust contrary to Section 128 of the Criminal Offences Act 1960 (Act 29). The brief facts presented by the prosecution are that the complainant, Bernard Kofi Amegbor, is a warehouse manager and resides at Medie-Kotoku and the accused person is a businessman residing at Community 7, Tema. The prosecution alleges that on 27th January, 2023, the complainant supplied 250 bags of granules valued at GH¢138,750 to the accused person to be delivered to a business partner at Kasoa. The prosecution alleges that the accused person successfully delivered the goods and was paid GH¢140,000.00. He was instructed by Mohammed Fawzy, the CEO of MF Lawzy Company, to hand over GH¢ 138,750.00 to his brother Mr. Adel Mahlonj in Tema. However, when the accused person delivered the money and it was counted, an amount of GH¢68,750.00 was missing. A complaint was made to the police and investigations revealed that the accused person had dishonestly appropriated the missing amount. He was subsequently charged and brought before the court. THE PLEA The accused person pleaded not guilty to the charge after the charge had been read and explained to him in the English Language. The case proceeded to trial and the prosecution called four witnesses and tendered in evidence the following exhibits; Exhibit “A”: Echo Poly Industries Ltd Invoice for GH¢139,457. Exhibit “B”: Investigation Caution Statement of the accused person. Exhibit “C”: Charge statement of the accused person. At the close of the case for the prosecution, Learned Counsel for the accused person submitted that there was no case made out sufficiently to call upon the accused person to open his defence and filed a submission of no case on 9th April, 2025. THE LAW ON SUBMISSION

OF NO CASE It is provided for under Section 173 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30), that: "Where at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the accused sufficiently to require him to make a defence, the Court shall, as to that particular charge, acquit him." In the Canadian case of RVP (mb) 1994 1CR 55, Lamer CJ stated that: "Perhaps the single most important organising principle in criminal law is the right of the accused not to be forced into assisting in his or her own prosecution. This means, in effect that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case, against him or her". In the oft-cited case of *Apaloo v. The Republic* (1975) 1 GLR 156-192 C. A per Azu Crabbe C. J @ page 175, the court laid down the principles succinctly in the following terms; "There has recently sprung up the practice by some counsel to make a submission of no case to answer in the teeth of direct cogent evidence implicating the accused in the crime charged. This invariably delays the dispatch of work in the criminal courts, and this court now considers it necessary to re-state the tests for making a submission of no case. The circumstances in which a submission of no case may successfully be made are: (a) when there has been no evidence to prove an essential element in the crime charged; and (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it:" The Supreme Court in the case of *Tsatsu Tsikata v. The Republic* [2003-2004] 1 SCGLR, 1068, put to rest the long-standing debate on whether the standard of proof required of the prosecution at this stage is beyond a reasonable doubt or a lesser burden. The Court stated that the standard of proof at this stage is a prima facie case and not beyond reasonable doubt since the court has not had the opportunity to hear the defence and the defence has not had the opportunity of punching holes in the evidence adduced by the prosecution. Section 19 of the Evidence Act, 1975(NRCD 323) states that "an enactment providing that a fact or group of facts is prima facie evidence of another fact creates a rebuttable presumption." The term prima facie evidence was defined in the case of *Kwabena Amaning Alias Tagor and Anor. v. The Republic* (200) 23 MRLG 78, to mean evidence which on its face or first appearance, without more could lead to a conviction if the accused fails to give a reasonable explanation to rebut it. The duty of the court at this stage is not to make conclusive findings of fact. The consideration is whether the prosecution has been able to lead cogent and admissible evidence to establish the essential ingredients of the offence charged to lead to conviction should the accused person fail to open his defence to tell his side of the story to rebut the evidence of the prosecution. The evidence led by the prosecution is evaluated to determine whether at the close of the case of the prosecution, they succeeded in establishing the essential ingredients of the offence charged and that the evidence adduced is on its face so reliable that a reasonable court can safely convict upon it to warrant calling upon the accused person to open his defence.

ANALYSIS

Here, the accused person is charged with Fraudulent Breach of Trust contrary to Section 128 of Act 29 which provides as follows; “A person who commits a fraudulent breach of trust commits a second degree felony. Section 129 of Act 29 defines fraudulent breach of trust in the following terms; “A person commits a fraudulent breach of trust if that person dishonestly appropriates a thing the ownership of which is invested in that person as a trustee for and on behalf of any other person.” The three essential ingredients of the offence are;

1. That ownership of the thing must have been vested in the person charged as a trustee for or on behalf of another person;
2. The accused person must have appropriated the thing while it was so vested in him as a trustee for another person.
3. That the appropriation must have been dishonest. The circumstances under which the ownership of the thing became vested in the person charged must be proved. On the first ingredient of the charge, the prosecution must prove that the ownership of the money was vested in the accused person as a trustee. A. K. P. Kludze in his book *Modern Principles of Equity* 2014 edition page 268, identifies different types of trusts including implied trusts. The learned author states that “an implied trust arises when there is a presumption that there is an intention to create a trust, even though there is not enough proof of the use of express words to that effect and the formalities for creating a trust is lacking.” Although the facts and the evidence adduced by the prosecution do not support the creation of express trust, on the evidence, a trust can be implied. P. K. Twumasi in his book, *Criminal Law in Ghana* @ page 332, states as follows’ “there must be proof in all cases (fraudulent breach of trust) of a subsistence of a trusteeship. However, it is not necessary to allege in a charge or indictment for fraudulent breach of trust that the accused was a trustee on some express trust created by an instrument in writing; it is sufficient if it is proved that the ownership of the property in question was vested in him as a trustee for or on behalf of another person” From the evidence led by the prosecution, the money was invested in the accused person as a trustee to deliver to one Adel Mahlon at Tema and the fact of the trusteeship was not challenged through cross-examination. I find that the accused person is an implied trustee of the money alleged to have been appropriated. On the second ingredient of the offence, the prosecution is to prove that the trustee appropriated the money. Section 122(2) of Act 29 defines appropriation of a thing as; “...any moving, taking, obtaining, carrying away, or dealing with a thing, with the intent that a person may be deprived of the benefit of the ownership of that thing or of the benefit of his right or interest in the thing, or in its value, or a part of a thing.” The first prosecution witness, Bernard Koffie Amegbor testified that he is the warehouse manager and knows the accused person as an agent of MF Lawzy Company, dealers in granules products. According to his testimony, on 27th January, 23, the CEO of the company, Mr. Mohammed Fawzy, called to inform him that the accused person would be picking up 250 bags of granules valued at GH¢139,475.00 to be delivered to a business partner at Ksoa. He loaded a truck with the products in the company of one

Owusu Boateng Joseph and Michael Blur to meet the accused person for him to deliver the products to the business partner and take the money. He also instructed the said Owusu Boateng Joseph to collect the money from the accused person and bring it to him. Later, his boss had a conversation with the accused person and directed him to personally send the money to his brother, Mr. Adel, who resides in Tema on the same day. Based on that Owusu Boateng Joseph called to inform him of the changed arrangement of the directives of the CEO. Owusu Boateng called again later to inform him that the accused person said he could not reach Mr. Adel on his phone and was going to look for a place for them to sleep and then send the money the following day. On 28th January, 2023, he got a call from Owusu Boateng Joseph informing him that the accused person sent the money to Mr. Adel and when he counted the money, it was short of GH¢ 69,475.00 out of the total amount of GH¢ 139,475.00 and they had gone to the Police Station to report the case. He proceeded to the police station and met the accused person and after ascertaining the facts, he lodged a formal complaint with the police. In support, he tendered in evidence the waybill admitted and marked as Exhibit "A". The second prosecution witness, Owusu Boateng Joseph, a supervisor at MF-Lawzy Company testified that on 27th January, 2023, the warehouse manager engaged him to meet the accused person and deliver some products to a business partner at Kasoa with a driver and collect an amount of GH¢139,475.00 from the said business partner and bring it to him. After delivering the products to the business partner with the accused person, he paid GH¢140,000.00, which was counted by the accused person and himself and found to be correct. He collected the money and put it in his bag. Shortly after that, Mr. Mohammed Fawzy called to inform him that he should hand over the money to the accused person. The accused person also called the said Mr. Fawzy and he informed him after receiving his call that he had been instructed to send the money to his brother Mr. Adel Mahfonz. The second prosecution witness further testified that the CEO gave his brother's phone number to the accused person to contact him before they sent the money to him but the accused person told him that he was not getting the said Adel after several calls. They were instructed him to go and spend the night with the accused person at his place at 12:30 am. The accused person sent him and one of their loading boys to his company and gave the money to one other person in one of the rooms at the company's premises but he did not know the conversation they had together, as it was a short period there. The accused person then took them to the main yard, got a place for them to sleep and left for a different room close to where he was. At about 5:30 am to 6 am, the accused person woke him up and sent him to a small room where he told him that he had gone for the money. The accused removed the money from a sack and put it into his bag but he noticed that some of the papers wrapped over the money were torn. The accused person along with him and the loading boy, sent the money to Mr. Adel Mahfonz and when it was counted, he realised a shortage of GH¢ 69,475.00. He was surprised by this development and did not know how part of the money was taken out. He states that the accused person did not involve him in his dealings with the person who kept the money in his room neither did he know how the money was taken out of the room. He immediately called PW1 to inform him about the incident. The second prosecution witness under cross-examination by the accused person testified that when the accused person sent

them to his company's premises to pass the night, the next morning he came to wake him up with the money with him and he noticed that the wrappers of the money were torn but he did not tell the accused person anything. He further testified under cross-examination that he allowed the accused person to put the money in his bag because they needed to put the money in his bag and that the amount he took to be given to the manager was GH¢139,475. The third prosecution witness, Shadrach Agyeman, testified that he works as an operator at Primana Enterprise, where the accused person is his senior. On the 28th of January, 2023 at about 2:00 a.m., he was asleep when he overheard someone calling his name and banging on the burglar-proof door and upon enquiry, he found out that it was the accused person. He asked what the problem was and the accused person replied that he should take something down for him. When he inquired further about what it was, he initially hesitated to tell him the contents of the sack. However, when he asked again, he told him it was money. Upon opening the door, he saw the accused person standing there with two others. He handed him a sack and asked him to keep it for him. He took the sack and placed it in his room after which the accused person requested the keys to the room and left with them. The third prosecution witness further testified that around 6:30 a.m., the accused person returned alone, unlocked the door and retrieved the sack containing the money. He asked him where he had gotten the money from and he replied that it belonged to his sister. He further stated that he was going to use it for something for her and then left the room. He then followed the accused person into the main yard to begin work and saw him entering a small room in the yard with the money. Later, he moved to the main factory where the two others were seated. He observed that the accused person transferred the money from the sack into a bag and handed the bag to one of the two men who carried it on his back before they all left. According to him, at no point did the accused person disclose the amount of money in the sack nor was the money counted before or after it was taken away. Later, the accused person called to inform him that the money he had given him was not complete. He asked him to check the sack he had left behind and see if there was a leakage underneath it. After checking, he informed him that there was no leakage. When their boss arrived, he informed him about the incident. Shortly afterwards, the police arrived and arrested him. He was taken to the room where he had slept and the police conducted a search but nothing was found. He was then taken to the police station where he met the accused person. Both of them were detained for investigation, after which the accused person was charged with the offence. The fourth prosecution witness, D/Sgt. Collins Nkrumah, stationed at Kpone Police Station also testified that on 28th January, 2023, the first prosecution reported that on 28th January, 2023, the accused person failed to account fully for an amount of GH¢139,475.00, which was entrusted to him to be given to Mohammed Fawzy, the CEO of MF Lawzy. The total shortage amounted to GH¢69,475.00. Based on the complaint, the accused person was arrested. He proceeded to Primana Company for enquiries. The third prosecution witness was identified to him by the accused person as the person who was in the room where the money was kept. He was arrested and brought to the police for investigation and obtained their statements. During investigations, he was led to the Director of Youth Employment Authority, Mrs. Rayne Agyemang as the one who bought the products from the company. He

interviewed the director and she admitted buying the products but stated that she paid an amount of GH¢140,000 to the accused person and one other who both counted the money before leaving her place. The accused person later disclosed to him, upon further interrogation that he gave the money to PW3 for safekeeping because he was on the night shift on the same date. The accused person and PW3 were then charged with the offences of conspiracy to steal and stealing. Upon careful study of the case docket, the accused person was investigated for fraudulent breach of Trust. The investigator further testified that the accused did not comply with the instructions to deliver the money to Adel but instead placed it in the room of the third prosecution witness without accounting for it. He also retrieved the money without involving anyone else. It was only when PW3 asked him about the contents of the sack that the accused claimed it was money meant for his sister, a statement which was false. Additionally, the accused failed to count the money after retrieving it from the room to ensure its amount before delivering it. He also neglected to involve PW2 in the placement and removal of the money from his company's premises. Based on this evidence, the accused was charged and brought before the court. Learned Counsel for the accused person in cross-examining the fourth prosecution witness suggested that he was alone in the room when PW2 was collecting the money into his bag. Learned Counsel for the accused person in his written submission of no case strenuously contends that the evidence led by the prosecution in support of the appropriation against the accused person is purely circumstantial and must lead to one and only one conclusion only that is, the guilt of the accused person. In support, Counsel cites the case of *State v. Brobbey and Nipa* [1992] 2 GLR 101 at 103 SC. I agree with Counsel for the accused person that for circumstantial evidence to lead to conviction, it must lead to one conclusion only that an offence has been committed and that it was the accused person and no one else who committed it. However, at the close of the case for the prosecution, the consideration is not whether the prosecution has proved its case beyond reasonable doubt but rather, whether the evidence, albeit circumstantial, establishes a *prima facie* case against the accused person to require him to open his defence. In the same case of *Kwabena Amaning Alias Tagor and Anor. v. The Republic*

- (200) 23 MRLG 78, (*supra*) referred to by counsel for the accused person on what is meant by *prima facie* evidence, the court held that: “*prima facie* evidence is evidence, which on its face or first appearance, without more, could lead to conviction if the accused fails to give reasonable explanation to rebut it. It is evidence that the prosecution is obliged to lead if it hopes to secure conviction of the person charged. At this stage, the trial court is not supposed to make findings of facts since the other side has not yet spoken to determine who is being factual. What the trial court has to find out at this stage that the prosecution has closed its case is whether or not the evidence led has established all the ingredients of the offence charged for which the accused person could be convicted if he failed to offer an explanation to raise doubts in the said evidence” It is important for the accused person to give evidence to explain how the money came to be in his possession, the condition in which the money was given to him and the chain of custody of the money for the court to

determine on the totality of the evidence if appropriation by the accused person is the only inference that can be made on the evidence or that someone other than the accused person could have appropriated the money. The last ingredient of the offence which the prosecution must prove is that the appropriation was dishonest. Dishonest appropriation is defined under Section 120 (1) of Act 29. P. K. Twumasi in his book, *Criminal Law in Ghana* @ page 333 discussing Section 120(1) of Act 29, read with section 122(1) of Act 29 in relation to fraudulent breach of trust stated as follows; “if the accused person without the consent of the beneficiary deals with the property in any way with intent to defraud, no defence will be open to the accused person. In other words, proof that the appropriation of the thing by the trustee, was without the consent of the person for whom he is trustee, or that the appropriation would, if known to him, be without his consent and the appropriation was made with intent to defraud, it would be sufficient to support conviction.” In my considered opinion, once there is prima facie evidence of appropriation of the money by the accused person, any such appropriation without the consent of the owner can be for no other purpose than with intent to gain money at the expense of the complainant, which means that the appropriation is dishonest. In the case of *Abbey v. The Republic* [1964] GLR 546, the High Court per Hayfron Benjamin J, (she then was) held in its holding two that: “the evidence against the accused being entirely circumstantial the law required a particularly high standard of proof. The trial magistrate did not fully consider the credibility and veracity of the prosecution’s evidence compared to that of the accused. Disbelieving the accused’s evidence the magistrate further failed to consider whether the accused’s evidence was reasonably probable.” In my considered opinion, the high standard of proof required of prosecution in criminal cases cannot be at the close of the case for prosecution but at the end of the entire trial when the veracity of the evidence of the prosecution witnesses has been tested against the evidence offered by the accused person in his defence. I am however mindful that the burden on the accused person when called upon to open his defence is on a balance of probability only, which is lighter than the burden on the prosecution. On the totality of the evidence led by the prosecution, I hold that a prima facie case of fraudulent breach of trust is made out against the accused person requiring him to open his defence. The submission of no case is accordingly dismissed. The accused person shall prepare to open his defence to raise a reasonable doubt in the case of the prosecution. H/L JUSTICE AGNES OPOKU-BARNIEH (ADDITIONAL CIRCUIT COURT JUDGE) SGD. 13

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