

RWANDA / JUDGMENT

PROSECUTION v. SIBOMANA

RPA 0470/14/HC/KIG

COURT

High Court

DECIDED

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Text

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PROSECUTION v. SIBOMANA [Rwanda HIGH COURT – RPA 0470/14/HC/KIG (Mugabo, P.J) March 26, 2015] Evidence law – Audit report – Those competent to draft audit report – The report drafted by those monitoring the activities of the cooperative along with an independent expert is valid. Criminal law – Embezzlement of public fund – The persons responsible for embezzled public fund – The signatories of the account and those in charge of monitoring cooperative's activities must be held accountable. Facts:: Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine were all indicted beofore Intermediate Court of Gasabo for forgery and using a forged document and embezzlement of the public fund. The Couirt found that evidence submitted by the Prosecution creates doubt and sowing confusion and they were released. The Prosecution appealed to the High Court deploring that Court disregarded the audit report on the base that it was drafted by unqualified people, the contradiction which characterized the court, its holding that the report did not demonstrates all the amount of the money that were supposed to be managed so as to figure out the embezzled portion, the fact that the court held that the forged documents are truth telling while they are included in the case file and supported by various evidence. In their initial defence Musabyemariya Francine requested a time for present

the defence in connection with the audit report since it was drafted in her absence. After her requested was granted, he appeared together with Mukeshimana Venantie. They stated that appeal of the Prosecution has no merit. Sibomana Ananie had not appeared. Held: The judge had not to invalidate the audit report since it was conducted by those who were in charge of inspecting the activities the accused had in their attributions in addition to the expert auditor who was assigned with the task by th Rwanda Development Board who figured out the amount money which was at their disposal for management and that embezzled. It is the signatories and those in charge of monitoring the activities of Cooperative who must be held accountable of the embezzled money using forged document. Appeal has merit; Appealed judgment overturned Accused are guilty of forgery and use of forged document; Sibomana Ananie, Mukeshamariya Venantie na Musabyemariya Francine are sentenced to one year of imprisonment and a fine of 500 000 Frw; They are ordered to restate Cooperative Turwane ku Buzima Ruhuha 10.147.305 Frw as embezzled; They are ordered to pay the court fees. Statutes and statutory instruments referred to:

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Organic Law No 01/2012/OL of 02/05/2012 Instituting the penal code, articles 46, 78, 84, 325, 609, 610 and 611 No cases was referred to

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] The Prosecution seized the Intermediate Court of Gasabo after Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine were indicted for forgery and the use of theforged document and embezzlement of the fund that they were in charge of managing. After the Court examined evidence submitted by the Prosecution and the defence of the accused, it decided that evidence submitted by the Prosecution was full of confusion and creating doubt which ust be interpreted in favor of the accused. It acquitted them in consequence. [2] Not satisfied of the ruling, the Prosecution appealed to the High Court and its appeal was registered in the registers of thge of the Court under RPA 0470/14/HC/KIG. The hearing was fixed on February 18, 2015. On that day only Musabyimana Francine appeared while both Mukeshimana Venantie and Sibomana Annanie did not appear while they have been summoned in accordance with the law. The Court ordered the hearing in absentia. The Prosecution was represented by Kayitare Jean Baptiste, the National Prosecutor. [3] The grounds of appeal of the Prosecution are down set forth : The fact that the Judge has left out the audit report that had assessed the accused motivating that it had been elaborated by incompetent persons while aware that all its signatories are auditors because the one called Nkizamugano Dieudonné is an auditor in SEDC, Madame Njeri being also an auditor in that institution while other people anumerated in that report are the employees of Minisante in charge of of those activities follow-up while another is an employee of SEDC and the employee of the District who was supposed to sign on the report since it is in that district in which ithad been elaborated. In its view, the Prosecution notes that the judge had no reason to invalidate the report holding that they were incompetent; On paragraph 10 of the judgment, the judge is characterized of self-

contradiction where he initially holds that the auditors were not competent while elsewhere he states, " indeed, it is obvious that they were rather among those in charge of monitoring the activities of the accused while he contradicts himself on the other hand stating that they were incompetent". The Prosecution deplored their acquittal while they are guilty; On paragraph 11 of the copy of the judgment, the judge decided that the audit does not demonstrate the mount that was supposed to be managed by the accused while he ignores that the audit revealed that the accused had embezzled 10.147.305 Frw which implies that that money was embezzled from that they were in charge of managing. TheProsecutor articulated that had the judge failed to understood the content of the report, he had to order the appearance of those who elaborated it for further explanations as he is not an

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expert or else make recourse to other experts instead of acquitting the accused while evidence proving beyond reasonable doubt has been submitted by the Prosecution; On paragagraph 13, the judge motivated that there is no list of Health Counselors and acquitted the accused of both the crime of embezzlement and of forgery and the use of the forged document while that list was annexed on the audit report in such manner that the matter was to assess whether embezzlement was committed instead of stessing on that list while it was to help the Court with nothing, though it was also included in the case file that was handed over to the Court; On paragraph 13, the judge proved the contrary the alleged forged documents ignoring that the audit contains with supporting evidence the forged documents. Hence, in its view, there is no doubt that must invoked in producing evidence which amount in the acquittal of the accused. Instead, it is obvious that the judge had disregarded evidence submitted by the Prosecution and that there had been confusion of the content of audit while it is clear and understandable. Therefore, as to the Prosecution, the judge would not have interpreted the report of audit, but he would have make recourse to experts for explanations, if it had not been comprehensible enough, instead of call it a confusion. [4] The Prosecution disputed that the disregarded evidence is the following : The document forged by the accused justifying the purchase of the food for poultry with Mubandakazi Spéciose while it has never bben done while it is clear that the signatures on document have been put by the same signatory, evidence that the document was drafter with the porpose of enabling them to embezzle that money equivalent to 328 000Frw especially that when interrogated, Mubandakazi replied that she knew nothing about that document and that the signature on its is not hers. The document forged by the accused justifying the purchase of food for the poultry with Rutegesha Boniface while this parcahse has never been done since it is clear that the signature on those documents have been different while they have been put by the same person. It is evidence that the document had been drafted to aneble them to embezzle that money equivalent to 243 900 Frw especially that when interrogated, Rutegesha Boniface did not recognize that documents and so the signatures thereon; The document that they forged justifying the purchase of the food for the poultry with Itangishaka Abdou while that transaction had never been done as it is clear that the signatures on that document are different while put by the same person, evidence that it has been drafted to anable them to embezzle that money

equivalent to 426 250 Frw especially that in the course of his interrogation, Itangishaka stated that he sold the food for the poultry to the Cooperative but he could not recognise those documents. He denied further that his names are Itangishaka Abdou and that the signature on those documents is his. He testified further that, based on the documents which bear the payment of 300 000, even when bringing together all traders whom he work together with, they cannot afford to provide such quantity of fry powder amounting to that sum of money. Different documents demonstrating the payment done for Ndayisenga Stanislas having sold rabbits to the Cooperative equivalent to 251.000 Frw while in his interrogation Ndayisenga had denied to be the authors of signatures on that documents.

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He admitted however that there is a part of the money he was paid but that all the amount in those document had been fraudulently and exceedingly increased; The Prosecutor concluded that all that evidence as submitted prove beyond reasonable doubt the intention of the accused to commit the crime. [5] In her initial defence, Musabyimana Francine pleaded that she does not accept the audit report since it was done in her absence. He requested the Court to give that report to her so that she could have enough time to prepare the defence thereon. The Court agree on that and she later presented her defence being together with Mukeshamariya Venantie in the following manner : The judge had never disregarded the audit report as alleged by the Prosecution; instead the audit report was not considered as it had been elaborated by incompetent auditors. They states that there are model that audit must follow, the qualified professionals, and the manner in which it is done. They lamented that these formalities have not been respected, which is the reason why it was not considered and this has been sufficiently motivated by the judge; There is no contradiction in the holdings of the judge on paragraph 10 of the judgment because monitoring and audit are two different duties and apart from making oneself ignorant by the Prosecution, even the Prosecution knows that those attributions differs one from another. It cannot be therefore qualified as contradiction of the judge, instead, the judge has rightly applied the law appropriately; The holdings of the judge on paragraph 11 is the legal manner in which audit must be carried out whereby all the money which must be managed must be figured out so as to have the starting point to compute the embezzled money. This is the lawful procedure in case audit complies with regulations : therefore, the fact that it did not follow the right procedure, which is the one which jibes with law, the judge could not act as if he had not noted it; As provided for by article 70 of Organic Law No 01/2012/OL of 02/05/2012 instituting the penal code, the Court shall pass judgment in accordance with the provisions of law and must state the reasons for its decision. In deciding the case, the case acted in line with this article; he could not base his decision on the audit that was carried out unlawfully. The legal bases of the judge is the provisions of article 86 paragraph 2 of Law No 30/2013 of 24/5/2013 relating to the code of criminal procedure which provides that The court shall decide at its sole discretion on the veracity and admissibility of incriminating or exculpatory evidence, hence, the decision of the judge in the judgment RP 0068/14/TGI/GSBO is in accordance with the law. They finds that the judge has not disregarded any ground, rather he acted in accordance with the law and nothing

was challenged by the Prosecution as having been in contradiction with the law. They concluded that appeal filed by the Prosecution has no merit. [6] Sibomana Ananie did not respond to the submissions of the Prosecution as he had not appeared before the Court though he had been summoned in accordance with the law. The issue of the case is an assessment of the validity of the audit report and its content

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II. ANALYSIS OF THE LEGAL ISSUES With regard to audit [7] The Court finds that the audit had been carried out by three persons who are Mr. Nkunda Denis, the employee of the Ministry of Health, Mr. Mburamatore Daniel, auditor in SEDC, Mr. Habinshuti Olivier, the employee of SEDC who work in Bugesera District. It is obvious that two of those persons are the employees of the Ministry of Health who were in Charge of Monitoring the activities of Community Health Workers and the Monitoring of the mobilization of the fund that is brought to their disposal. The third auditor Mr. Mburamatore Daniel is a consultant auditor recognized by the Rwanda Development Board as indicated by the paper provided by the Prosecution submitted to the Court by the Prosecution which was issued on July 20, 2012. It means therefore that there was no reason as to why the judge at the first instance could have invalidated that audit report since it was elaborated by competent persons. [8] The Court further notes that the fact that the Judge of the first instance held that the totality of the alleged money was not figured out so as to find out the embezzled money is not true because since the auditor found out that the totality of the fund is equivalent to 39,753,239 Frw and that this has happened after the money was deposited to account of Community Health Workers from which 10,147,305 Frw has been embezzled and that the manner in which it has been embezzled has been demonstrated. Therefore, the explanations of the judge are not correct. [9] The Court finds that another evidence that the report should not have been invalidated is that conclusive evidence demonstrates that the money has been embezzled but this was taken seriously. This evidence is included in the audit report where it is clear that there is food for the poultry that Ndayisenga Stanislas, Itangishaka Muhamed, Rutegesha Boniface and Mubandakazi Spéciose that sold to the cooperative and even recognize the payment by their signatures but they denied it during their interrogation and that they are not the authors of invoice in the audit report and that the signatures thereon are not theirs; With regard to the content of the report [10] The Court further notes that another evidence that that report must be considered is that though the accused have not actually notified about that, and since it was brought to their disposal since the Court had ordered so, they did not comment on it at all apart from stating that they do not recognize it. This defence therefore cannot be considered by the Court since, at any case it was brought to their disposal, they had to show that its content was not true and rebut it; [11] The Court finds that since the Cooperative has started running in 2009, its account no 424300981311 was opened in Banque Populaire de Ruhuha and that account has been managed in the following manner: Since February 26, 2010 – August 1, 2012 it has been managed by Uwimana Annonciata, the President of the Cooperative, Mukeshamariya Venantie, the secretary and the treasurer and Hakizimana Celestin, the Vice President; Since August 2, 2012 till December 31, 2013 the Cooperative was managed by

Mukeshamariya Venantie, the President, Nyirafashaho Jeanine, the Secretary and treasurer and Musabyemariya Francine, the Vice President;

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[12] The Court finds that during all those periods Sibomana Ananie is the sole person who was in charge of monitoring the the activities of the Community Health Workers and their Cooperative and the management of the money that the Ministry of Health brought to their disposal as fund. He was in charge of assisting the cooperative in compliance with the regulations about the fund of donated by the Ministry of Health whereby 30% was distrubuted to the Community Health Workers while other 70 % was supposed to remain in the assets of the cooperative so as to be used in the income generating activities; [13] The Court therefore notes that as demonstrated by the audit report, the totality of the embezzled money is equivalent to 10.147.305 Frw using the forged document and it is detailed as follow : 5.137.500 Frw that must be imputed to Mukeshamariya Venantie, Musabyemariya Francine, Nyirafashaho Jeannine and Uwimana Annonciata since they are the ones who were the signatories of the account also being in charge of following up of the manner of the spenditure of the money as provided for by the Law relating to the cooperatives, 5.009.805 Frw which must be imouted to Mukeshamariya Venantie, Musabyemariya Francine, Nyirafashaho Jeannine an Uwimana Annonciata together with Sibomana Ananie in embezzling the money of PBF (Performance Based Finance); [14] The Court finds that in this case the guilty are Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine and in case the Prosecution would deem it necessary indict others who Nyirafashaho Jeannine and Uwimana Annonciata; [15] The Court finds that the crime of forgery and the use of the forged document and embezzlement of the state resources must be imputed to Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine based on article 325, 609, 610 and 611 of Oganic Law instituting the penal code; [16] The Court finds that article 325 of Organic Law No 01/2012/OL of 02/05/2012 instituting the penal code provides that any employee who embezzles public or private property, funds, negotiable instruments, documents, or movable property which are entrusted to him/her, by virtue of his/her office; fraudulently destroys or embezzles negotiable instruments under his/her care or which have been communicated to him/her by virtue of his/her office; shall be liable to a term of imprisonment of seven (7) years to ten (10) years and a fine of two (2) to five (5) times the value of the embezzled or destroyed property. [17] The Court finds that article 609 of Organic Law No 01/2012/OL of 02/05/2012 Instituting the penal code provides that any person who forges or alters documents by forged signature or fingerprint, falsifying documents or signatures or impersonation, forging agreements, its provisions, obligations, discharged obligations shall be liable to a term of imprisonment of more than five (5) years to seven (7) years and a fine of three hundred thousand (300,000) to three million (3,000,000) Rwandan francs; [18] The Court finds that article 610 of Organic Law No 01/2012/OL of 02/05/2012 the penal code provides that any person who knowingly, uses a counterfeit document shall be liable to the same penalty as the person counterfeiting a document and

article 611 which provides that if forgery has been committed by the civil servant or any other person in charge of public service counterfeits a document in the exercise of his/her duties the term of imprisonment ranks from

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seven (7) years to ten (10) years and a fine of five hundred thousand (500,000) and five million (5,000,000) Rwandan francs. [19] The Court observes further that article 84 of Organic Law No 01/2012/OL of 02/05/2012 the penal code provides that if an offender would receive several penalties of imprisonment or fine as a result of one or several acts, the judge shall apply the most severe penalty and increase its duration or the amount depending on the circumstances of the offences, but not exceeding half (1/2) in addition to the maximum of the most severe penalty. [20] The Court notes that based on the provisions of the Law, the most severe penalty is the one provided for by article 611 of the penal code. The Court notes that in compliance with that article Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine must be sentenced to 7 years of imprisonment (7). [21] The Court notes however that as long as they are first offenders and that they have sacrificed themselves for public general work by assisting Community Health Workers, they must benefit the reduction of the penalty based on article 78 paragraph 3 of the penal code which provides that a penalty of imprisonment of more than five (5) years, but less than ten (10) years may be reduced up to a term of imprisonment of one (1) year; hence they are sentenced to the term of one year and a fine of 500 000 Frw each one. [22] The Court notes that article 46 of the aforementioned law provides that In any criminal case in which a sentence of imprisonment or a fine is pronounced, the judge shall order the restitution of embezzled, stolen, fraudulently obtained property or undue payment under a contract. Hence, in compliance with this article, the Court finds that Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine must jointly to pay back the money of the Cooperative that has been Embezzled as it is equivalent to 10.147.305 Frw as figured out in the audit report; III. THE DECISION OF THE COURT [23] Admit the appeal launched by the Prosecution and after its assessment finds that it has merit; [24] Confirms the change in the ruling of judgment RP0068/14/TGI/GSBO decided by the Intermediate Court of Gasabo; [25] Finds Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine guilty of forgery and the use of the forged document and embezzlement; [26] Sentences Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine to one year of imprisonment and a fine of 500 000 Frw; [27] Orders Sibomana Ananie, Mukeshamariya Venantie and Musabyemariya Francine to restitute 10.147.305 Frw to Cooperative Turwane ku Buzima Ruhuha as embezzled;

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[28] Orders them to jointly pay the Court fees of the case equivalent to 75.000 Frw and pay it in the time limit imposed by the Law failure of which Government coercion will be exercised.

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