

UGANDA / JUDGMENT

Rajiv Kumar v Uganda (Criminal Appeal No. 281 of 2021) [2022]

UGCA 255 (14 October 2022)

[2022] UGCA 255

COURT

Court of Appeal of Uganda

BEFORE

Madrama, JA, Bamugemereire, JA, Luswata, JA

CASE / FILE NUMBER

Criminal Appeal No. 281 of 2021

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THE REPUBLIC OF UGANDA IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 281 OF 2021 CORAM: (Bamugemereire, Madrama, Luswata, JJA)

RAJIV KUMAR SABHARWAL VERSUS

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UGANDA. [Appeal from the Decision of Jane Okuo Kajuga J, dated 25th November 2021 at the High Court of Uganda sitting at Kololo)

JUDGMENT OF THE COURT

The appellant was indicted and convicted on one count of Embezzlement contrary to **Section 19 (b) (iii) of the Anti-Corruption Act, 2009**, Forgery contrary to Sections 342 and 347 of the Penal Code Act CAP 120, and 15 Uttering a False Document contrary to **Section 351 of the Penal Code Act CAP 120**.

Background

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The brief facts as ascertained from the lower court record were that the Appellant and a one Rajendra Kumar (the Complainant) formed a 20 company, Global Wire Industries, with the aim of engaging in manufacture of binding wire which has multiple uses in the construction industry. It was agreed that Rajendra's main role was to send machinery and raw materials from India since he was based in India. On the other

hand, the Appellant's sole role was to manage the daily operations of the 25 company in Uganda. When Rajendra happened to return to Uganda, he discovered that the Appellant had on several occasions forged his

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signature and withdrawn large sums of money from the company account. It was also discovered that several company resolutions were made bearing forged signatures of Rajendra. The matter was reported to police and the cheques were submitted to a handwriting for analysis. It was established that the only authentic signature on the cheques belonged to the appellant. On the other hand,, Rajendra's signature appearing on the cheques was forged. It was on that basis that the appellant was charged with offences of Embezzlement, Forgery and Uttering False Documents. At the beginning of the trial, the appellant pleaded not guilty to a total of 66 counts. However, in the course of the trial and after three prosecution witnesses had testified against the appellant, he changed his plea to guilty. Having pleaded guilty to all the 66 counts, he was convicted and sentenced to a term of 4 years' imprisonment for Embezzlement, 1 year imprisonment each for the counts of forgery and uttering a false document to run concurrently with a compensation order of UGX 556,000,000/= Five hundred and Fifty Six million shillings) to be paid to the Co-director. Dissatisfied, the Appellant appealed against both conviction and sentence.

Grounds of Appeal

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²⁰ ¹ The learned Trial Judge erred in law by failing to follow the proper procedure for recording a plea of guilty (to convict and sentence the appellant) thereby occasioning a miscarriage of justice.

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2. The learned Trial judge erred in law and fact when she sentenced the Appellant to 4 years' imprisonment, which is excessive in the circumstances and imposed an unjustified compensation order in disregard of extenuating factors thereby occasioning ^a miscarriage of justice.

Representation

At the hearing of the appeal the Appellant was represented by Mr. Henry Kunya while the Respondent was represented by Ms. Josephine Namatovu, Assistant DPP from the Office of the Director of Public Prosecutions. 10

The Appellant's case

'15 In respect of Ground No. 1, Counsel for the Appellant submitted that the procedure adopted by the Trial Judge whilst recording the change of plea from one of not guilty to one of guilty was erroneous and occasioned ^a miscarriage of justice. Counsel noted that when the matter came up for trial on 8th February 2027, the appellant pleaded not Guilty to the indictment but on 23rd November 2021, when prosecution had led evidence of 3 witnesses, Mr. Mackay, counsel for the appellant addressed the court informing the Trial Judge that his client intended to change plea. Counsel submitted that after reading each count on the indictment, the appellant was asked as to whether he understood the charge read out to it)

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him and after confirming it to be the case, a plea of guilty was subsequently entered against him for each and every count and the trial judge went further to enter a blanket plea of guilty on all counts'

Counsel further submitted that the State Attorney then stated the facts pertaining to the alleged offences and upon the appellant confirming that he understood the facts and that they were true, he was ultimately convicted on his own plea of guilty on all the 66 counts in the indictment.

Counsel referred to *Adan v R* (1973) EA 445 on the procedure for recording a plea of guilty. He averred that there was a failure by the trial judge to explain the salient elements of the offences for which the appellant was indicted' He added that this procedural step was critical and that omitting it was not only prejudicial to the appellant but also rendered the whole process an illegality. Counsel invited this court to allow this ground on the basis that the plea of guilty was not properly entered leading to a wrong conviction. 15

Regarding ground No.2, counsel for the appellant argued that the sentence meted out by the trial judge especially the 4 years' imprisonment in respect to count no.1 and the attendant compensation order were manifestly harsh and excessive.

Counsel submitted that had the trial judge given due consideration to the mitigating factors and other compelling revelations from the evidence of the prosecution witnesses on the record, she would not have passed such severe sentences let alone the order for compensation as she did' 20

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Consequently, he prayed that the appellant's conviction be quashed and the impugned sentences and compensation order be set aside'

The Respondent's Case

5 In reply to Ground No. 1, counsel for the respondent argued that the plea of guilty was properly taken by the trial court after satisfying itself that the appellant had understood the charges he was pleading to. Counsel submitted that the Purpose of the procedural step in *Adan v R* (supra) which requires the trial court to explain the elements of the offence to the accused is for the court to intentionally ensure and satisfy itself that the accused person has understood the charges and the consequences of the charges to which he or she pleads guilty. 1()

It was counsel's submission that there was a sufficient evidence at trial to prove that the appellant had indeed understood the charges he was pleading to and that his decision to change plea was informed by this understanding.

Counsel further asserted that the events that preceded the appellant's change of plea were based on the information counsel for the appellant relayed to the court when he stated that the appellant intended to change plea. Counsel further argued that the change of plea having followed three critical prosecution witnesses gave the impression that the appellant needed to mitigate his losses, and attract more sympathy from the trial court. Counsel added that the appellant had not only reached the decision to plead guilty after seeking legal advice but personally made a conscious

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well-informed decision to plead guilty well aware of the consequences of his action. Counsel submitted that before she proceeded to read out prior to soliciting a specific response to each of them, the Trial Judge found that the appellant had sufficiently consulted his counsel and had understood the meaning of a plea of guilty and undertaken it willingly.

In further reply counsel for the respondent submitted that the brief facts of the case were read out to the appellant and he confirmed that they were true and correct. It was counsel's argument that the Purpose of ensuring that the accused's plea of guilty was unequivocal was specifically achieved through the trial judge fully reading the charge's once again and the elaborate facts which the appellant confirmed to have understood before eventually confirming them as being correct. Counsel added that the facts together with the particulars of the offences in the indictment that was read out to the appellant clearly embedded the elements for each of the offences, which the appellant confirmed to have committed.

Counsel contended that contrary to what counsel for the appellant submitted about the trial court entering a blanket plea of guilty on all the 66 counts, the record shows that the charges were individually read out to the appellant and he separately pleaded to each one of them and court separately convicted the appellant on each count and specified the offences and counts in respect of which the appellant was convicted.

Counsel concluded that this honourable court be pleased to uphold the appellant's conviction as valid under S.53 of the Trial on Indictments Act.

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In response to Ground No.2, counsel for the respondent submitted that the sentences were arrived at by the trial court after a detailed and cautious consideration of the mitigating and aggravating factors. It was counsel's submission that the appellant pleaded guilty to embezzlement of UGX 1,113,955,859/= . Having done so it is strange for him to expect prosecution to adduce further evidence to prove facts he had already admitted.

The first count of embezzlement carries a maximum sentence of 14 years and the other counts carry a maximum sentence of 3 years' imprisonment.

On the issue of compensation, counsel submitted that S. 125 (1) of the Trial on Indictments Act, which empowers the High Court to award compensation is not limited to the complainants as the beneficiaries of compensation in criminal matters but is all encompassing and covers any person who has suffered loss as the result of the offence with which an accused person has been convicted. 10 15

Counsel contended that the trial Judge was justified in ordering compensation to the appellant's co-director (PW3) who had lost his equity in the company as a result of the criminal activities of the appellant which resulted into a conviction and sentence. Counsel submitted that the compensation order was both lawful and justified. It was counsel's submission that the sentence was commensurate to the circumstances of this case. In conclusion, counsel prayed that this court upholds the conviction, sentence and compensation order.

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Dut of Court

This court as an Appellate Court has discretionary duty to reappraise the evidence contained in the record of proceedings and all other material that was placed before the trial court. It is the duty of this court to subject

.5 such evidence to a fresh and exhaustive scrutiny and draw its own inferences on matters of fact bearing in mind that it has neither heard nor seen the witnesses testify unlike the Trial Judge. (See *Pandya v R* [1957]

EA 335, and *Kifamunte Henry v Uganda SCCA No. 10 of 19921*.

Consideration of the Court

10 In *Ground No.1*, the appellant faults the learned Trial Judge for failing to follow a proper procedure in recording a plea of guilty.

The procedure for recording a plea of guilty was settled by Spry J in *Adan v Republic* (supra) in the following terms;

"When a person is charged with an offence, the charge and the particulars thereof should be read out to him, so far as possible in his own language, but if that is not possible in the language which he can speak and understand. Thereafter the Court should explain to him the essential ingredients of the charge and he should be asked if he admits them. If he does admit his answer should be recorded as nearly as possible in his own words and then plea of guilty formally entered. The prosecutor should then be asked to state the facts of the case and the accused be given an opportunity to dispute or explain the facts or to add any relevant

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facts he may wish the court to know. If the accused does not agree with the facts as stated by the prosecutor or introduces new facts, which if true might raise a question as to his guilt, a change of plea to one of not guilty should be recorded and the trial should proceed. If the accused does not dispute the alleged facts in any material respect, a conviction should be recorded and further facts relating to the question of sentence should be given before sentence is passed."

10 For a conviction to be based on a plea of guilty, the plea must be unequivocal. Where the plea taken does not appear to be unequivocal the conviction must be quashed see: *R v Tambukiza s/o Unyonga* [1958] EA 21.2). We have borne the above principles in mind while resolving this appeal.

15 We observed from the court record that during trial, the appellant pleaded not guilty to 66 counts but after three prosecution witnesses had given evidence, he decided to change his plea to that of guilty. For ease of reference we wish to refer to the record;

> Rajiv Kumar: I have met and consulted with my new lawyer Robert Mackay. I understand and I want to plead guilty. That pleading guilty means that I accept all the charges against me and that the court will enter an appropriate sentence. I know its court that will enter the sentence. This isn't a plea bargain. I have willingly, freely and voluntarily taken the decision to accept the case and change my plea.

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Court: I'm satisfied that accused has understood the plea of guilty and undertaken it willingly. The charges will therefore be re-read to him, and he will take plea again. Charges read in English which accused understands.

Count 1: Embezzlement

Read out

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Accused: I have understood the charge, it is true.

Court: PG entered.

Count 2-Count 56...

We shall not reproduce the entire record but we observed that the 66 counts were read out to the appellant and he confirmed that he understood them. The trial court entered a plea of guilty on all counts distinctively. Thereafter, the brief facts were read out by the state. 10

Rajiv Kumar: I have understood the facts. The facts read out are correct.

Court: the accused, Rajiv Kumar Sabharwal is accordingly convicted on his own plea of guilty on all the 66 counts in the indictment, for the offences of Embezzlement contrary to S. 19 (b) iii of the Anti-Corruption Act in count 1. The counts of Forgery contrary to Sections 343 & 347 of the Penal Code Act on counts 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64 and the offence of uttering false documents contrary to section 35 of the Penal Code Act in the

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remaining counts 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35, 37, 39, 41, 43, 45, 47, 49, 51, 53, 55, 57, 59, 61, 63, 65, 66.

Basing on the above record there is evidence that the procedure for recording of a plea of guilty as laid down in *Adan v R* (supra) was followed. The record clearly shows that the appellant understood all the charges against him in all the 66 counts, which were exclusively read out to him and he pleaded guilty.

We wish to refer to *Sebuliba Siraji v Uganda CACA No. 319 of 2009* where this court held that;

"The record clearly indicates that the indictment and facts were not only put but fully explained to the appellant. His answers to all the stages of the proceedings indicate that he understood what was said to him, its consequences, and what the proceedings were all about. Moreover, there is no protest on record from his counsel to indicate that the appellant did not understand or misunderstood anything, In the premises/ we conclude that the conviction was valid under section 63 of the Trial on Indichnents Act and uphold it for being unequivocal." IO 1.5

In the case before us, the appellant indicated that he had understood all the charges against him. The appellant was represented by a lawyer who did not protest, on the contrary he encouraged his client to change plea and informed the court as much. This is an indication that the appellant pleaded guilty from an informed perspective. In the circumstances, we are satisfied that the plea of guilty was clearly unequivocal. 20

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As a result, we find that the conviction was valid under Section 63 of the Trial on Indictments Act. Ground No. 1 of the appeal lacks merit and therefore fails.

5 In considering Ground No.2, we have carefully taken into account the arguments of counsel on whether the sentences of 4 years' imprisonment for Embeczzlement, 1 year imprisonment each for the counts of forgery and uttering false documents and the attendant compensation order were not unduly harsh and excessive.

Section 2 of the Trial on Indictment Act provides for the sentencing power of the High Court in the following terms:

2. Sentencing powers of the High Court

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- 1) The High Court may pass any lawful sentence combining any of the sentences, which it is authorized by law to pass.
- 2) When a person is convicted at one trial of two or more distinct offences, the High Court may sentence him or her to the several punishments prescribed for them which the Court is competent enough to impose, those punishments, when consisting of imprisonment, to commence one after the expiration of the other in such order as the Court may direct, unless the Court directs the punishments to run concurrently.
- 3) For purposes of appeal, the aggregate of consecutive sentences imposed under this section, in the case of convictions for several offences at one trial, shall be deemed to be a single sentence.

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In dealing with this ground, we have been mindful of the often-quoted dicta below:

"An appropriate sentence is a matter for the discretion of the sentencing Judge. Each case presents its own facts in which a Judge exercises his discretion. It is the practice that as an Appellate court, this court will not normally interfere with the discretion of the sentencing Judge unless the sentence is illegal or unless the court is satisfied that the sentence imposed by the trial judge was manifestly excessive as to amount to an injustice: See Ogalo s/o Owoura v R (1954) 1 EACA. 270 and, R v Mohamedali Jamal [1948] 1 EACA 125. The sentences imposed by the trial court in the instant matter were within the sentencing range prescribed by law. Section 19 of the Anti-Corruption Act provides for a maximum sentence of 14 years for the offence of Embezzlement, Forgery provides for a maximum of 3 years'

imprisonment and the offence of uttering false documents attracts ^a maximum sentence of 3 years imprisonment. 15

The Trial Judge reasoned that the fine payable under Count 1 as against the embezzled money which amounted to Uganda Shillings One billion one hundred thirteen million nine hundred fifty-five thousand eight hundred fifty-nine (UGX 1,113,955,859/=) was not sufficiently punitive and found that indeed a fine would not meet the ends of justice. The Trial Judge considered the fact that the appellant had been convicted of other offences other than embezzlement; was aged 56 years at sentencing; and did not seem to suffer from any grave illness. The Trial Judge further

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considered the sentencing guidelines in Part IV of the third schedule, which provide the sentencing range for Embezzlement between 2-14 years. The mitigating factors were equally considered. The trial Judge took note of the fact that the appellant had been granted bail on the first day of plea till conviction thus there was no period spent on remand. She imposed a sentence of 4 years' imprisonment on count 1 (Embezzlement) and 1 year imprisonment in respect of each of the counts of forgery and uttering false documents to run concurrently. We find that the sentences imposed were within the sentencing range thus were appropriate in the 10 circumstances.

On the issue of compensation, the trial judge rejected the compensation order to the company reasoning that the convict was the managing director of the company and therefore an order of compensation to the company would unjustly enrich him and thus would not meet the ends of justice. She instead ordered that the compensation of Uganda Shillings

Five Hundred Fifty-Six Million (UGX 555,000,000) be paid to the 2nd director; Rajendra Kumar Jayantilal Thakkar who she believed directly suffered financial loss as a result of the appellant's fraud.

We have carefully studied the court record and noted that PW3 the codirector clearly stated that his contribution to the company was machinery and raw materials, which he would send to the appellant and in return, the appellant was to sell the materials and save the in the company and later repatriate some of profits to him. He also stated that he received approximately USD \ \$110,000 from the Appellant. In his 20

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testimony, he stated that his complaint was non-receipt of profit as ^a director and also money for received from selling the supplies. However, no rounded figure was given.

The Trial Judge ordered for half the amount of the embezzled funds that is; UGX 556,000,000/= to be paid to the Co-Director which we find in our view justifiable given the circumstances of this case.

In conclusion this appeal fails and stands dismissed with the following orders;

- 1) The Appellant's conviction is upheld.
- 10 2) The Appellant's sentence is upheld.
- 3) The compensation order of UGX 556,000,000/= is maintained.

We so order.

Dated at Kampala this. v+s Day of 2t)22.

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Hon. Lady Justice Catherine Bamugemereire Justice of Appeal 2l) on. r. Justice Christopher Madrama Justice :[" 2S Hon. Lady Justice ^E K Luswata Justice of Appeal

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