

UGANDA / JUDGMENT

Uganda v Etyang (Crim. Case No. 0006 of 2014) [2015] UGHCCRD 444 (28 October 2015)

[2015] UGHCCRD 444

COURT

HC: Criminal Division (Uganda)

BEFORE

Tibulya, J

CASE / FILE NUMBER

Crim. Case No. 0006 of 2014

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO

Crim. Case No. 0006 of 2014

UGANDA PROSECUTION

VERSUS

ETYANG MARTIN..... ACCUSED

BEFORE: HON. LADY JUSTICE MARGARET TIBULYA

J U D G M E N T

The accused was charged with two counts. In the first count he was charged with Embezzlement and it was alleged that between the 10th of February 2011 and the 5th of May 2011 while employed by the office of the prime minister as Assistant Commissioner Programs stole 41,919,000/= the property of his employer, or which he had access to by virtue of his office.

In the second count he was charged with false accounting and it was said that on the 5th of May 2011 while employed by the office of the prime minister as Assistant Commissioner Programs, being charged with the receipt, custody and management of 49,569,000/= which was public fund, knowingly furnished a false statement of it.

At the beginning of the hearing the following facts were agreed;

1. that the accused was employed as an Assistant Commissioner Programs in the Office of the Prime Minister.

2. that he was deployed to the department of pacifications and development under the Karamoja program.
3. His appointment letter (dated 22/12/2010), deployment letter (dated 6th /01/2011) and schedule of duties were allowed in evidence as exhibits P.1 and 2 respectively.

BACK GROUND

This case arose out of the general inquiries that took place at the Office of the Prime Minister (O. P. M) after the then Principal Accountant **Mr. Godfrey Kazinda** was found to have been involved in financial impropriety.

The evidence for the prosecution was that Pw1 (**Irene Birungi**) received and entered in the computer system a requisition by the accused for 49,569,000/= which was meant for travel to Karamoja for a District meeting as per I. F. M. S report (exhibit P.3). The particulars of travel were on a loose minute the accused originated.

Pw3 Benjamin Kumumanya, then Under-secretary in the Office of the Prime Minister (O. P. M) later received an accountability for 34,730,000/= (exhibit P.4) from the accused. He sent the accountability to the principal accountant to “verify and retire”.

Pw13 D/AIP Orone David recovered the accountability (exhibit p.4) and **Pw16 D/AIP Eper Darius** verified it by interviewing the alleged workshop participants. He obtained their specimen signatures for expert analysis. **Pw 7 Ebajja Andrew**, RDC Nakapiripirit (2008-2010) and Kotido (2010-2014), **Pw 8 Florence Naduk Norah**, a research assistant in O. P. M based in Karamoja, **PW 9 Kisembo Moses Bahemuka**, Acting C. A. O Nakapiripirit 2011 and **Pw10 Ochieng Jimmy** the Coordinator of Karamoja livelihood program all denied having got the money reflected against their names and disowned the signatures attributed to them in the documents.

Pw6, Ezati Samuel a forensic examiner of questioned documents compared the specimen signatures of;

1. Napaja Andrew RDC Kotido District,
2. Eko Edward, CAO
3. Opio Paula
4. Lobwangor J
5. Kisembo Moses Bahemuka
6. Iriama Charles, Amudat District Planner,
7. Chuna Kapolon
8. Ochen Jimmy
9. Ojwe Nahaman, RDC Moroto

10. Naduk Florence

L. Bewayo Steven, and

O. Ewaru David, with signatures attributed to them in a typed payment schedule bearing 59 names of district staff who allegedly attended the meeting, the O. P. M payment voucher dated 7th April 2011 paying those who cleaned and organized the conference Hall, and the O. P. M payment voucher dated 7th April 2011 for night and subsistence allowances for staff of O. P. M, to establish whether the authors of the specimens signature listed above signed against their names in those documents (**exhibit P.4, the accountability**), or not. He found that all the persons whose specimens were given did not sign against their names. His report is P.8.

Pw16 D/AIP Eper Darius retrieved the accused's bank statement of account which showed that 49,569,000/= was deposited in his account on 10th February 2011 for a workshop but two months before the date of the activity, the accused had started drawing the money. Some of the money went to settling his loan. By the time of the meeting he had about 15m/= in the account.

An audit was done by **Pw11 (Mwesigwa Ronald)**, a senior Auditor with the Auditor Generals Department. He reviewed the receipts and payment acknowledgements in the accountabilities and looked at the witness statements (**Exhibit p.5**). He established that;

1. The accountability was not for all the money; 14,839,000/= was not accounted for.
2. 3,630,000/= was used for fuel and stationery but there were no receipts or supporting documents for the expenditure.
3. 7,390,000/= had been paid to drivers and escorts as allowances and the drivers had acknowledged receipt by way of signature but their Principals had made statements that they had not attended the workshop.
4. Twelve people who had been listed as participants denied having attended the workshop.

He concluded that 15,500,000/= was not genuinely paid to participants, 560,000/= was not genuinely paid to O. P. M staff and that there is a likelihood that a total of 41,919,000/= was lost.

It is common cause that the accused refunded 10m/=, and that on the 3rd December 2014 the accused made attempted to transfer 31,919,000/= but cancelled the transaction (**after 5 to 10 minutes per the prosecution evidence**), and proceeded to withdraw the money. See the evidence of **Pw15 Lillian Nyangoma** and **exhibits P.15 and 17**.

The accused wrote to the DPP on 2nd December 2014 (**exhibit P.22**) asking that the charges be dropped on the basis of the alleged refund but the investigator found that there was no such refund.

THE DEFENCE CASE

The defense contended that the money was meant to fund four activities;

1. A workshop,
2. Third quarter monitoring,
3. Imprest for the quarter,
4. Purchase of equipment.

The police took only the accountability for the workshop. The accused could not implement the activities according to the schedule due to intervening events. He used part of the money for field monitoring which took eight days. On the 8th April 2011 the workshop was conducted. It was a one day workshop but it ran till 5:30 p.m. The participants had to stay for the night since there was insecurity in the area at the time.

Musinguzi (Pw15), Ssebide and Evelyn Nankanja made the payments to the Chief Administrative Officer's, District Officials and O. P. M staff and Naduk (PW8) was paid as is indicated in the accountability documents. Musinguzi (Pw15) forwarded the accountabilities to the accused in May, assuring him that they were okay. He then sent them to the head of department and they were subsequently retired. He gave 14m/= to Raphael Lubega for monitoring and 2.8m/= to Ssebide for imprest. Lubega received 960,000/= in allowances.

The Audit report (**exhibit P.11**) only covers the workshop leaving out imprest, purchase of small equipment and monitoring. It only focuses on per diem, leaving out stationery, food, and fuel.

Exhibit P.14 could have been tampered with since it was not recovered from the accused but from the Accounts section. The accused did not witness the search. He is not mentioned in exhibit P.8, (**the hand writing experts report**) and there is no reference to his writing or signature. He was not involved in paying the people who disputed their signatures/payment.

He had refunded the money only to secure a with-draw of the case, not because he had stolen the money. When the prosecutor insisted on pursuing the case, he cancelled the transfer an hour after processing it.

Lubega Ssebide submitted the accountability for the imprest and Musinguzi submitted the one for monitoring but the accountabilitys could be in the custody of the accounts section.

Dw2 Lubega Raphael, Senior Assistant Secretary O. P. M. said that he got some money from the accused to buy office items like cutlery and kettles for the Karamoja office. He did not sign for the money. He only signed for 960,000/= meant for a monitoring trip to Karamoja. He acknowledged receipt of **2.8m/=** for buying items for the Karamoja office, (Exhibits D.2 and 3). He was given money for fuel refund by Musinguzi who paid the staff who attended. Nankanja Evelyn also paid some money. The accused did not make any payments.

He further said that Naaduk Florence (Pw.8) was paid. He saw her getting the money. When they came back to Kampala he sent the document on which people signed for fuel refund to Musinguzi who sent it to the accused. He does not remember the amount he was given to pay out for fuel. He does not know how much the accused requisitioned for the work-shop. The 2.8m/= he got for fuel refund and the 960,000/= were not part of the money for the workshop.

Embezzlement

The state has to prove:

1. That the accused was an employee of the Government or a public body.
2. That he stole the money in issue.
3. That the money was the property of his employer.
4. That it was received or taken into possession by him for or on account of his employer, or that he had access to it by virtue of his office.

That the accused was an employee of the Government was not contested and therefore taken as proved by virtue of section 66 (3) of the **Trial on Indictments Act**.

The third and fourth issues were sufficiently proved by the evidence of;

1. Pw1 (**Irene Birungi**) that she received and entered a requisition that had been originated by **Etiang Martin** for 49.569.000/= for travel to Karamoja for a District meeting, in the integrated Financial Management System (IFMS),
2. Pw2 **Kasulo Yahaya** that the Bank of Uganda statement of account for the OPM account No. 000030058000001 bears a transaction dated 11/2/11 in which the payee for 49.569.000/= was **Etiang Martin**.
3. Pw3 **Benjamin Kumumanya**, then Under-secretary in the Office of the Prime Minister (O. P. M) that the accused sent him an accountability for 34,730,000/= (**exhibit P.4**).

Their evidence is lent credence by that of the accused that he requisitioned for, and received the 49.569.000/= from the Permanent Secretary.

There is therefore sufficient evidence to prove;

- * 1. that the money was received or taken into possession by the accused for or on account of his employer, or that he had access to it by virtue of his office, and,
2. that it was the property of his employer.

Whether the accused stole the money.

Pw11 (**Mwesigwa Ronald**), a senior Auditor with the Auditor Generals Department verified the accountability records including receipts and acknowledgements of payment. He established that the accused only accounted for part of the money leaving 14,839,000/= unaccounted for. He also found that 3,630,000/= was used for fuel and stationery but there were no receipts or support

documents for the expenditure. Further that 7,390,000/= had been paid to drivers and escorts as allowances and the drivers had acknowledged receipt by way of signature but their Principals had made statements that they had not attended the workshop. Finally that twelve people who had been listed as participants denied having attended the workshop. He concluded that 15,500,000/= was not genuinely paid to participants since they did not participate, 560,000/= was not genuinely paid to O. P. M staff and finally that there is a likelihood that a total of 41,919,000/= was lost.

Pw3 (**Benjamin Kumumanya**) then Under-secretary in the Office of the Prime Minister (O. P. M) also said that the accused sent him an accountability for 34,730,000/= (exhibit P.4). This evidence goes to lend support to the Auditors evidence that part of the money was not accounted for. The evidence of Pw6 (**Ezati Samuel**) a forensic examiner of questioned documents is also vital to the issue at hand. He examined and compared the specimen signatures of;

1. Napaja Andrew RDC Kotido District,
2. Eko Edward, CAO
3. Opio Paula
4. Lobwangor J
5. Kisembo Moses Bahemuka
6. Iriama Charles, Amudat District Planner,
7. Chuna Kapolon
8. Ochen Jimmy
9. Ojwe Nahaman, RDC Moroto
10. Naduk Florence

L. Bewayo Steven, and

O. Ewaru David, with questioned signatures on a payment schedule bearing 59 names of district staff who allegedly attended the meeting, the O. P. M payment voucher dated 7th April 2011 and the O. P. M payment voucher dated 7th April 2011 for night and subsistence allowances for staff of O. P. M. He established that all the persons whose specimens were given did not sign against their names and he made a report, (Exhibit P.8) to that effect.

Pw6 (**Ezati Samuel**)'s evidence supports that of Pw7 (**Ebajja Andrew**), Pw8 (**Florence Naduk Norah**), Pw9 (**Kisembo Moses Bahemuka**), and Pw10 (**Ochieng Jimmy**)'s, disowning signatures attributed to them in the accountability documents rendered by the accused, and denying receipt of monies indicated against their names. Dw2's (**Ssebide**) evidence that he saw Naduk sign for the money is against the weight of evidence and cannot be believed.

The Investigating office, Pw16's (**D/AIP Eper Darius**) evidence that the accused's bank statement showed that two months before the date of the activity the accused had started drawing the money and that some money went to settle his loan and that by the time of the meeting he had about 15m/= in the account also goes to support the assertion that the money in issue was not used for the stated purpose. The bank statement, (**exhibit P...**) bears out the above facts. Moreover there was no explanation for the scenario testified to by Pw16. The irresistible conclusion is that the accused diverted the money to his own use under circumstances amounting to theft.

The accused argued that the money in issue was meant for four activities; a workshop, third quarter monitoring, imprest for the quarter, and purchase of equipment, but that the police recovered only the accountability for the workshop.

The Audit report (exhibit p.11), he argues, only covers the workshop, and focuses on per diem, leaving out stationery, food, and fuel. He maintained that he accounted for all the funds.

The following evidence however shows that the 49,509,000/= was only meant for travelling to Karamoja for a district meeting.

1. Pw1's (**Irene Birungi**) evidence that the requisition as supported by the accused's loose minute was for 49,569,000/= for "**travel to Karamoja for a District meeting**". This evidence was not challenged by the defence and I had no reason to doubt it.
2. The only accountability the accused attempted to render was for only the meeting. Other accountabilities were not got by the investigators, and were not brought to court by the accused who claims that they exist. This could not have been a coincidence. Pw11 (**Mwesigwa Ronald**), a senior Auditor with the Auditor Generals Department, found that 14,839,000/= was not accounted for and that there were no receipts or support documents for the 3,630,000/= allegedly used for fuel and stationery.

In view of that above evidence I did not believe the argument that the funds were meant for three activities. Moreover I don't believe the contention that the investigators only recovered part of the accountability. The rest of the accountability was not recovered simply because it did not exist. Had it been there it would have been recovered.

Lubega Sebidde (**Dw2.**) was shaky, hesitant and seemed to be unsure of what he was testifying about. He came across as a liar. Moreover what he told court contradicted his statement to the police (exhibit p...). It was obvious that he only came court to help a friend out of a problem.

Had Exhibits D.2 and 3 which he tendered in evidence existed at the time of the investigations they would have been recovered with the rest of the accountabilities.

Moreover he was clear that he does not know how much money the accused got for the workshop and that the 960,000/= and the 2.8m/= he allegedly got for fuel refund were not part of the money for the workshop. This means that he was a completely irrelevant witness as far as the use/misuse of the 49,569,000/= meant for a workshop which is the matter under consideration here, is concerned.

The accused's claim that Dw2 made accountabilities for the imprest money he gave him cannot be believed. No such accountabilities were found by the investigators. Moreover if they exist in the O. P. M, Dw2 should have come with them to them court since he still works with the O. P. M. I found Dw2 (Ssebidde) an unreliable witness and rejected his evidence as false.

The assertion that the internal auditors did not raise any query is of no consequence since there is sufficient proof of the anomalies. The investigations revealed that money was lost. The internal auditors should in fact be made to answer for their failure to unravel the scam in good time.

Other arguments the defense raised are;

1. That Exhibit P.14 could have been tampered with since it was not recovered from the accused but from Accounts section. There is however no evidence to support that assertion.
2. That the accused did not witness the search is of no consequence since there is no evidence that anything went wrong during the search.
3. That he is not mentioned in exhibit P.8, (the hand writing experts report) and that there is no reference to his writing or signature is again of no relevance since the state contention is not that he wrote or signed any document.
4. Similarly not important is whether or not he was involved in paying the people who disputed their signatures/payment. This is because the complaint that he stole the money and rendered false accountabilities can stand even if it were true that he did not make any writing on the documents in issue, and was not involved in paying the participants.

Pw's 7 to 9 were clear that the meeting was a one day event. This is a fact the accused himself mentioned in his evidence, though he explained that the participants had to spend a night in Moroto due to insecurity. That explanation does not clear the lie in the accountabilities that the meeting ran for two days. There is a difference between a workshop taking two days and participants sleeping over for an extra night. It is not impossible to account for the latter scenario in those clear terms. He cannot therefore feign ignorance of the falsity of the accountability.

Pw14 (**Steven Musinguzi**)'s evidence that he was paid two nights allowance totaling to 240,000/= may be/may not be correct. His evidence in this regard does not however change the general effect of the evidence that the meeting was for one day. That he may/may not have given the payment schedule to the accused for forwarding to the Under Secretary is of no consequence as I have already said.

His evidence that he paid Naduk (Pw 8) is an outright lie though. Naduk said that the meeting was held in her compound, and this was not denied or challenged. She could not therefore have been paid money for night allowances when she was in her home. The hand writing expert (PW6)'s opinion evidence that the signature attributed to her in the accountability documents does not belong to her went to galvanize her position.

The other prominent issue in the matter is the fact that the accused refunded part of the money and attempted to refund the whole amount. He said that he had refunded the money only to secure a with-draw of the case but that when the prosecutor insisted on his prosecution he cancelled the transfer an hour after processing it.

The reason behind the accused's actions can only be a matter of speculation. I note however that it is unusual for an innocent person to offer to refund such a big sum of money when they are in court where they have an opportunity to prove their innocence. Pw15 (**Lillian Nyangoma**)'s evidence that the accused cancelled the funds transfer order after 5 to 10 minutes of its making and then proceeded to withdraw the money, coupled with that of the investigating officers that the accused wrote to the DPP on 2nd December 2014 (**exhibit P.22**) asking that the charges be dropped on the basis of the alleged refund, seems to suggest that the accused sought to irregularly secure a withdraw of the case. As I have noted all this speculative.

What is important however (**and it is my conclusion**), is that there is sufficient evidence to prove that the accused stole the funds in issue.

The evidence of Pw1 (**Irene Birungi**) that the accused requisitioned for and got 41,919,000/= of which 10,000,000/= was refunded, Pw3 (**Benjamin Kumumanya's**) that the accused rendered an accountability for 34,730,000/= (**exhibit P.4**), and that of Pw 7 (**Ebajja Andrew**), Pw 8 (**Florence Naduk Norah**), PW 9 (**Kisembo Moses Bahemuka**), and Pw10 (**Ochieng Jimmy**) who said that the meeting ran for one and not two days and denied having got the money reflected against their names, disowning the signatures attributed to them in the accountability documents. Their evidence was supported by that of Pw6 (**Ezati Samuel**) a forensic examiner of questioned documents who found that those whose signatures he examined did not write the signatures in issue.

Other vital evidence was that of Pw16 (**D/AIP Eper Darius**) who said that two months before the date of the activity, the accused had started drawing the money and that some of the money went to settling his loan and by the time of the meeting he had about 15m/= in the account. That evidence was not challenged.

I believed Pw11 (**Mwesigwa Ronald**)'s evidence, that the accountability that the accused rendered was not for all the money and that 14,839,000/= was not accounted for, that for the 3,630,000/= allegedly used for fuel and stationery there were no receipts or supporting documents for that expenditure, further that the 7,390,000/= allegedly paid to drivers and escorts as allowances was a false payment since their Principals had made statements that they had not attended the workshop. I also believed his evidence that twelve people who had been listed as participants denied having attended the workshop and his conclusion that 15,500,000/= was not genuinely

paid to participants, 560,000/= was not genuinely paid to O. P. M staff.

The evidence proves that the accused stole the money in issue under circumstances amounting to embezzlement. I accordingly find him guilty of embezzlement as charged in the first count.

FALSE ACCOUNTING

The ingredients;

1. The accused must be proved to be a public officer charged with receipt, custody or management of the money.
2. That he knowingly furnished a false statement or return of the money.

The accused did not contest the fact that he was an employee of the Government.

Pw1 (**Irene Birungi**), Pw2 (**Kasulo Yahaya**) and Pw3 (**Benjamin Kumumanya**) testified that he requisitioned for and got the 49.569.000/=, a fact the accused does not deny. The first ingredient was sufficiently proved.

On whether he knowingly furnished a false statement or return of the money, the Investigating office's Pw16 (**D/AIP Eper Darius**) evidence that the accused's bank statement (**exhibit P.)** showed that two months before the date of the activity the accused had started drawing the money and that some money went to settle his loan and by the time of the meeting he had about 15m/= in the account shows that the money in issue was not used for the stated purpose. There is no indication that the accused got money from other sources to fund the workshop. It is therefore fair to conclude that the workshop was conducted within the budget of the available 15m/=. Pw3 (**Benjamin Kumumanya**) however said that the accused rendered an accountability for 34,730,000/= (**exhibit P.4**). This can only mean that the accountability for the extra money was, to the accused's knowledge, only made up.

The evidence of Pw 7 (**Ebajja Andrew**), Pw 8 (**Florence Naduk Norah**), Pw 9 (**Kisembo Moses Bahemuka**), and Pw10 (**Ochieng Jimmy**) that the meeting ran for one and not two days, and that they did not sign for and receive the monies reflected against their names also goes to prove that the accountability was, to the accused's knowledge false. The defence sought to distance the accused from the accountabilities but this is not possible considering that;

1. he was the one who requisitioned for and got the money,
2. he was the one who rendered the accountabilities to the Head of Department,
3. there were obvious falsehoods that he cannot feign ignorance of. It is not possible for example that he did not know that the workshop ran for only one day. He knew for sure that the accountability reflecting two days workshop were false.

Even if we believed Musinguzi's evidence that he compiled the accountability and gave it to the accused, it would be a shameful and an illogical proposition that the accused, (**who was Assistant Commissioner Programs**) did not read through them before forwarding them to the head of department. It is significant that the accused did raise that as a defence. The conclusion that he read through the accountabilities and was therefore aware of the falsehoods is inevitable.

I find him guilty of knowingly furnishing a false statement of the money as charged in count two.

Margaret Tibulya

Judge.

28th October 2015.

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