

CC7/33/23

REPUBLIC

VRS

JAMES CUDJOE

JUDGMENT

INTRODUCTION:

The accused person has been charged with the offence of Fraudulent Breach of Trust; contrary to Section 128 of the Criminal Offences Act, 1960 (Act 29). Fraudulent Breach of Trust is defined as follows in **Section 128 of the Criminal Offences Act, 1960 (Act 29)**:

128 - Fraudulent breach of trust

“Whoever commits fraudulent breach of trust shall be guilty of a second-degree felony.”

The accused person was arraigned before the court on the 15th February, 2023. He pleaded not guilty to the charge. The accused person raised a defence of Alibi during proceedings which same following investigations by prosecution failed. The case therefore took its normal course with a full Hearing and subsequently adjourned for judgement.

FACTS OF THE CASE:

The complainant; Mikordorme Fosu is the chief executive officer of Adonai Marketing Link Limited. The accused person is a twenty-nine-year-old resident of Kasoa. He is a marketer by profession and an employee in the above-named company. The complainant stated that in March 2022 he employed the accused person as his manager at his warehouse located at Shikpontele near Amasaman. He stated that he provided accommodation to the accused person and other workers too. Accused as manager held the keys to the warehouse.

On 18th December 2022, the complainant caused the supervisor of his warehouse; Exodus Ahugah Bio to take stock of the products in the warehouse in the presence of the accused person

and realized that products worth Ten Thousand Seven Hundred and Seventy-One Cedis (GHC10,771.00) only could not be accounted for by the accused person. The complainant subsequently took stock two days later and again products worth Forty Thousand and Fifty Cedis (GHC 40,050.00) only had gone missing with no sales record. The accused person upon being exposed bolted and went into hiding.

The complainant lodged a complaint to the police, the accused person was arrested. During investigations, he admitted the offence, was charged and arraigned before the court.

EVIDENCE ADDUCED BY PROSECUTION:

The burden was on the prosecution to prove the guilt of the accused beyond reasonable doubt. They had the burden of persuasion and the burden of producing evidence. The prosecution in support of their case called three (3) witnesses; Mikordorme Fosu (PW1), Exodus Ahugah (PW2) and D/Sgt Shelter Dake (PW3).

The complainant; Mikordorme Fosu (PW1) in his witness statement stated that he is the CEO of Adonai Marketing Link and the accused person is his warehouse manager. He stated that he employed the accused person six years ago. He further stated that the company's warehouse together with apartments were handed over to the accused. He claimed that on 18th December 2022, the annual stock was taken and the accused could not account for products worth GHC10,771.00. When questioned by the accused person he attributed it to spirituality. The complainant narrated that he was compelled to close down that branch of his warehouse due to the loss incurred.

On 22nd December 2022, another stock-taking exercise was undertaken in the presence of the accused person. Once again, products worth GHC40,055.00 were missing without any record of sale for same goods. He narrated that the accused person was notified of the total loss of goods and its worth in cash. He consequently bolted and went into hiding.

The complainant therefore reported the matter to the police on 24th January, 2023 and the accused person was later arrested at his hideout in Kasoa City Hotel. In support of his testimony, he called Exodus Ahugah (PW2) who is the Human Resource Manager of the above-

mentioned company who corroborated the testimony of PW1. They tendered Exhibits C Series and D (which are audit reports conducted at the accused person's warehouse in his presence) without objection during trial.

The Investigator of this case; D/Sgt Shelter Dake (PW3) corroborated the testimony of PW1 and PW2. He added that on 10th February 2023, the accused person was arrested. In his investigation caution statement, he admitted committing the offence. PW3 also stated that in the course of his investigation, he visited the warehouse and observed that although there was no sign of a break-in the goods under the care of the accused person were not at the warehouse as complained by PW 1. He also inspected the home of the accused person at Kasoa but no products were found there. He tendered without objection all disclosures during trial.

DEFENCE OF ACCUSED:

In his investigation caution statement on 10th February, 2023, the accused person stated that he had been in the employment of the complainant for six years. He stated that he held the keys to the warehouse and worked with other colleagues. He narrated that he encountered shortages of goods on a monthly basis, for this reason he had to take loans to pay for same. He admitted having knowledge of the shortage of goods worth Ten Thousand Seven Hundred and Seventy=One Cedis (GHc 10,771.00) only.

He however stated that although he was informed of the shortage of goods on the first date of stock-taking, on the second stock-taking date, the total value of shortage was not disclosed to him and subsequently all staff went on Christmas break. He sated that he was recalled to duty by the complainant during this period but failed to heed to the call as he was caring for his sick child. During trial he admitted committing the offence with the connivance of another colleague. In conclusion he stated that he was aware of the shortage of goods under his care but had no valid explanation for this state of affairs.

On 14th February, 2023 he further stated that whenever he experiences shortages in his stock, he deferred to a colleague by name Samuel at their Kasoa Branch office and vice-versa thus it could be possible that the shortage occurred during such transactions they held together.

ISSUE FOR DETERMINATION:

From a careful examination of the charges and the facts presented the court had to determine whether or not the accused persons did breach the trust reposed in him by PW 1 in a fraudulent manner.

BURDEN OF PROOF;

It is apt before I proceed to evaluate the evidence led during trial that I set out the burden that prosecution bears in a criminal case of this nature. **Section 11(2) of the Evidence Act, 1975 (NRCD 323)** states that;

“In a criminal action the burden on the prosecution of facts essential to guilt requires the prosecution to produce sufficient evidence so that the court can find the guilt of the accused proved beyond reasonable doubt.”

Section 13(1) of the Evidence Act, 1975 (NRCD 323) states as follows:

‘In any civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt’.

And there seems to be a further emphasis under **Section 22 of the Evidence Act 1975 (NRCD 323)** which states that:

“In a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond reasonable doubt...”

In the wise words of His Lordship, Eric Kyei Baffour, JA. sitting as an Additional Justice of the High Court in the case of **The Republic v Eugene Baffoe Bonnie Suit & 4 Others Suit No. CR/904/2017:**

“As far as the standard of reasonable doubt is concerned there is no room for an accused to be convicted on the basis that the charges or the allegations against him might be true. If there is such a possibility then what it means is that prosecution has not made out a case or has not proved its case beyond reasonable doubt. There could be a doubt only that the doubt should not affect a reasonable person’s belief regarding the guilt of an accused. It is on that score that Lord Denning notes in Miller v Minister of Pensions [1947] ALL ER 372 @ 373 that it is needless for prosecution

to attempt to prove the guilt of the accused beyond a shadow of doubt since that standard will be impossible to attain and were the law to allow that there will be the admission of fanciful possibilities to deflect the course of justice. In effect and in simple language the standard expected of prosecution by reasonable doubt means that by the end of the trial prosecution must prove all the elements of the offences charged and the explanations offered by the accused must be one that is not reasonable probably. See Justice Brobbey in his work Essentials of Ghana Law of Evidence at pages 48-55. Lord Chief Justice of the King's Bench from 1822 - 1841, Charles Kendal Bushe put what is reasonable doubt in a much more elegant language as follows: "... the doubt must not be light or capricious, such as timidity or passion prompts, and weakness or corruption readily adopts. It must be such a doubt as upon a calm view of the whole evidence a rational understanding will suggest to an honest heart the conscientious hesitation of minds that are not influenced by party, preoccupied by prejudice or subdued by fear".

Accused however is not under any obligation to prove his innocence as the burden of proof is on the prosecution throughout the trial. All that an accused is required to do when invited to open his defence is to raise reasonable doubt regarding his guilt. It is only when the defence raised is not reasonably probable that an accused would be convicted. The Supreme Court aptly put it in the case of **Mallam Ali Yusif v The Republic [2003-2004] SCGLR 174** that:

"the burden of producing evidence and the burden of persuasion are the components of 'the burden of proof.' Thus, although an accused person is not required to prove his innocence, during the course of his trial, he may run a risk of non-production of evidence and/or non-persuasion to the required degree of belief, particularly when he is called upon to mount a defence"

The court having found that a prima-facie case had been established by the prosecution against the accused person ordered him to open his defence.

ANALYSIS:

With the burden of proof satisfied only when it has been proved to the standard required by law by the prosecution in mind, I proceed to an examination of the evidence led in respect of the charge against the accused person.

The charge against the accused person is fraudulent breach of trust; contrary to Section 128 of the Criminal Offences Act, 1960 (Act 29). This offence is defined as follows:

“A person commits a fraudulent breach of trust if that person dishonestly appropriates a thing the ownership of which is vested in that person as a trustee for and on behalf of any other person.”

This is a second-degree felony. The purpose of this offence is to discourage trustees from dishonestly exploiting their position of trust as regards the trust property and the beneficiaries of the trust property. From the tenor of this provision, Prosecution had a duty to prove three essential ingredients to succeed on a charge of fraudulent breach of trust namely:

- i. That the ownership of the thing is vested in the Accused as trustee for and on behalf of another person.
- ii. That the Accused as a trustee appropriated the thing while it was so vested in him; and
- iii. That the appropriation was dishonest.

If any of these elements are not met, the charge of fraudulent breach of trust is not the appropriate charge. Proof of ownership is not essential, what is essential is proof that the property was vested in the accused for and on behalf of some other person. Evidence establishing fiduciary relationship between Accused and the other person is essential in a charge of fraudulent breach of trust. A person in whom ownership of a property is vested as a trustee must have full control over the property. In the case of **Green v Russel [1959] 2Q.B 226, 241**, Romer J. defined a trust as follows:

“A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property) for the benefit of persons (who are called beneficiaries or the cestuis que trust) of whom he may himself be one, and any one of whom may enforce the obligation.”

Similarly in the case of **Gateway Worship Centre v David Soon Boon Seo [2009] 24 MLRG 1@pages 12 – 17** The Supreme Court of Ghana stated that:

“trust is a concept in equity whereby one person (called “the trustee”) holds the nominal or legal title in property which has been made available to him by another person (called “the settlor”) for the benefit of some other person (called the “beneficiary”)..:”

I have carefully considered the nature of the relationship between Accused and Complainant herein. It is clear that Accused and Complainant had employment relations and a valid contract between them. It is not in doubt that the accused person worked as a manager at one of the numerous outlets belonging to PW 1. As a branch manager he was a trustee of PW 1 of which he was not confused about. With the position held as Manager, clearly, he had fiduciary duties to his employer. The relationship between Accused and Complainant is a trustee relationship. The essence of the relationship is that the accused being an employee and caretaker of the entire outlet and goods therein together with apartments would manage same and likewise account for same. By his appointment and job description, he became a trustee in respect of the goods under his care. The goods, keys to the warehouse, apartments and subordinates placed under him was trust property. Thus, the failure of the accused person to account for goods in his care would mount to a breach of trust. By the nature of the contract, the accused person did owe fiduciary duties to the Complainant. The records also reflect that the accused person on previous occasions when he had experienced shortages covered up same with loans and connived with another colleague to throw dust into the eyes of PW1 thus depriving him of the knowledge of the true state of affairs of this business, clearly this smacks of malice.

A trustee, in law, owes a fiduciary duty to the person for whose benefit the trust property is held and managed by the trustee. This view is shared by the learned **P.K Twumasi who has stated in his book Criminal Law in Ghana, 1985 (Ghana Publishing Corporation) at page 331** that:

“To succeed on a charge of fraudulent breach of trust, the evidence must establish that the Accused knew at the time ownership of the property was vested in him that he was a trustee but that he formed the dishonest intent to appropriate the thing after the property had been vested in him as a trustee for and on behalf of another person... the fact that ownership of a thing has been vested in a person does not suffice to make him a trustee. The person becomes a trustee only when ownership of the thing is vested in him for and on behalf of another person. Evidence establishing a fiduciary relationship between Accused and another person is essential in a charge of fraudulent breach of trust. The court must find as a fact whether ownership of the thing was vested in the accused, not for his own benefit but for the benefit of another person”.

FINDINGS:

To establish a charge of fraudulent breach of trust, the evidence must establish that the accused person knew at the time of ownership of the property was vested in him as a trustee and further that he formed the intent to appropriate the property after it had been for and on behalf of another person. I hold that Prosecution has led credible and cogent evidence to support all the necessary ingredients of the offence as charged beyond all reasonable doubt.

Accused opened his defence prose. He did not produce any witness to corroborate his account. It is the pith of the defence of Accused that he admits the loss of goods from the warehouse under his care and further added that in order to cover his ineptitude and dishonest character of keeping the real state of affairs of the institution from his employer, he took loans and connived with a colleague to do so by exchanging goods; This smack of dishonesty and incompetence. If Accused has succeeded in doing anything he has demonstrated profusely that he did commit the offence which amounts to an admission. His defence did not in any way create a doubt in my mind of his commission of the offence above-mentioned.

CONVICTION:

I consequently reject his defence to the charge of Fraudulent Breach of Trust; contrary to Section 128 of the Criminal Offences Act,1960 (Act 29). I convict him accordingly on this charge.

SENTENCE:

In sentencing the accused person, I have taken into consideration the fact that:

1. The accused person is in his youth.
2. The plea of mitigation of Accused.
3. The period he has spent in lawful custody.

I have also taken into consideration the fact that every sentence is supposed to serve a five-fold purpose, namely to be punitive, calculated to deter others, to reform the offender, to appease the society and to be a safeguard to this country.

The offence of that Accused committed was premeditated and deliberately calculated. Accordingly Accused is sentenced to a term of one hundred (100) days imprisonment.

FURTHER ORDERS:

Complainant is to come by civil action to recover the amount of Fifty Thousand Eight Hundred and Twenty-One Cedis (GHC 50,821) only from Accused being the monetary value of his losses incurred.

H/W ANNETTE SOPHIA ESSEL (MRS.)

MAGISTRATE