THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

Coram: Kakuru, Mutangula Kibeedi & Mulyagonja, JJA

CRIMINAL APPEAL NO. 037 OF 2017

PATRICK SENTONGO :: APPELLANT

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of Hon. Mr. Justice Lawrence Gidudu, J, dated 14th February 2017, in High Court Anti-Corruption Division Criminal Case No. 123 of 2012)

JUDGMENT OF THE COURT

Introduction

This is an appeal against the decision of the High Court (Anti-Corruption Division) sitting at Kampala dated 14th February 2017 in which the trial judge convicted the appellant on 4 counts of embezzlement contrary to sections 19 (b) (i) of the Anti-Corruption Act, electronic fraud contrary to section 19 of the Computer Misuse Act and conspiracy to defraud contrary to section 309 of the Penal Code Act. He imposed a total sentence of 10 years' imprisonment upon him and ordered him to pay compensation of **UGX 5,000,000,000** (Five billion Uganda Shillings) to his former employer, MTN Uganda Limited.

Background

The facts that were accepted by the trial judge are briefly that the appellant and others, who are not party to this appeal, were employees of MTN Uganda Ltd, a telecommunications company that provides communication and electronic money transfer services to the public.

It was the prosecution case that between May and December 2011, the appellant while employed with MTN conspired with other persons to steal money from the MTN mobile money computer system called FUNDAMO. They did so by creating fictitious journals and exiting the money through the MTN Public Access Shop which was operated by one

Joan Nabugwawo, A2 at the trial. It was also the prosecution case that the appellant created pseudo persons on the system who transacted as *"ghosts"* and drained money from the Adjustment Account for Discrepancy through the Dispute Account to 17 subscribers and accomplices such as Joan Nabugwawo (A2) and the appellant's wife, Saudah Nakimbugwe, one of the proprietors of a company that was an agent of MTN, Always (U) Ltd.

Further, that before he was discovered, the appellant resigned from MTN. Following an audit carried out by the company, it was established that the appellant colluded with others and stole money from the company in the sum of **UGX 10,200,000,000**. The appellant and others were arrested, charged and prosecuted.

The appellant denied the offences but the trial judge found that there was sufficient evidence to convict him and Joan Nabugwawo and sentenced the appellant to 10 years' imprisonment and ordered him to pay a fine of UGX 5,000,000,000. He now appeals against the conviction and sentence on 7 grounds stated in his Amended Memorandum of Appeal as follows:

1. The learned trial judge erred in law and fact when he convicted the appellant of the offence of embezzlement contrary to section 19 (b) (i) of the Anti-Corruption Act in Counts 1, 2, 3 and 4, electronic fraud contrary to section 19 of the Computer Misuse Act 2011 (Count 5), conspiracy to defraud contrary to section 309 of the Penal Code Act (Count 8) without proof of the ingredients, hence occasioning a miscarriage of justice.

2. The learned trial judge erred in law and fact when he convicted the appellant on the assumption that the username **sentop121** which made the fraudulent postings was created by/belonged to the appellant whereas not.

3. The learned trial judge erred in law and fact when he convicted the appellant basing on the prosecution's weak evidence in isolation of the defence case hence occasioning a miscarriage of justice.

4. The learned trial judge erred in law and fact while evaluating the evidence of electronic records and data by disregarding the

provisions of the Electronic Transactions Act thus arriving at a wrong conclusion.

5. The learned trial judge erred in law and fact when he relied on extraneous facts not canvased in evidence and on speculations hence arrived at a wrong conclusion to convict the appellant thus occasioning a miscarriage of justice.

6. The learned trial judge erred in law when he gave the appellant a manifestly harsh and excessive sentence in Counts 3, 4 and 5 given the circumstances of the case and the sentences he imposed on other similar Counts.

7. The learned trial judge erred in law and fact when he ordered the appellant to pay compensation of 5 billion Uganda shillings which amount was not proved as a loss, was manifestly exorbitant and excessive.

Representation

At the hearing of the appeal, the appellant was represented by learned counsel, Mr Ochieng Evans, on private brief. The appellant was present in court. Ms Abigail Agaba Kabayo, Chief State Attorney and Mr Amerit Timothy, State Attorney, represented the respondent. The parties filed written submissions as directed by court. This appeal has been disposed of on the basis of written arguments only.

The Memorandum of Appeal

From the onset, it is necessary that we comment about the appellant's memorandum of appeal with regard to manner in which the grounds of appeal were set out. Rule 66 (2) of the Rules of this Court provides as follows:

> **"(2) The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and**

in a third appeal the matters of law of great public or general importance wrongly decided."

The provision above explains that the grounds of appeal to this court should specify the points of law or mixed law and fact alleged to have been wrongly decided by the court below. In this appeal, we note that all the grounds stated do not comply with the requirements of rule 66 of the Rules of this court. However, we take particular issue with ground 1 which states as follows:

1. *The learned trial judge erred in law and fact when he convicted the appellant of the offence of **embezzlement** contrary to section 19 (b) (i) of the Anti-Corruption Act in Count 1, 2, 3 and 4, **electronic fraud** contrary to section 19 of the Computer Misuse Act 2011 (Count 5), **conspiracy to defraud** contrary to section 309 of the Penal Code Act (Count 9) without proof of the ingredients, hence occasioning a miscarriage of justice.*

{Emphasis supplied}

This ground definitely does not state the appellant's grievances concisely. It relates to 6 counts in respect of which the appellant was convicted. While the counts on embezzlement share the law it is not clear in this ground of appeal which of the ingredients was not proved, or the facts in respect of which the trial judge erred in his evaluation of the evidence.

The two other counts complained about in the same ground, *computer fraud* and *conspiracy to defraud*, each have their own legal provisions and therefore each its specific ingredients which must relate to specific facts. In short, this omnibus ground does not state the points of law or mixed law or fact, the particular ingredients that were not proved for each offence, said to have resulted in the errors of the trial judge

In his submissions, the appellant's counsel sets out what he meant when he framed ground one. He itemises each of the counts and states the appellant's complaints in the submissions, instead of doing so in the memorandum of appeal. For example, in respect of Count 1, embezzlement of **UGX 8,000,000**, he sets out the 3 ingredients relating to that offence and then states that the ingredient of *"theft"* was not proved by the prosecution against the appellant. He repeats this for

each of the other counts, so creating the grounds of appeal within his submissions.

In compliance with rule 66 of the Rules of this court, the appellant's counsel ought to have set out the complaint in respect of each of the counts in a separate ground of appeal, specifying why he thought the decision of the trial judge was wrong. For example, with regard to Count 1, he ought to have stated that:

> *"The learned trial judge erred in law and fact when he convicted the appellant for embezzlement contrary to section 19 (b) (i) of the Anti-Corruption Act without sufficient evidence to prove that using the username* ***sentop121****, the appellant stole the sum of UGX 8,000,000/= from the MTN mobile money computer system, by transferring it to Joan Nabugwawo, the 2nd accused in the trial court."*

The specification of the complaints in the manner above would have enabled this court to see at a glance and understand the appellant's grievances in the appeal. It would have also limited the repetition of the same grievances against the impugned judgment in separate grounds of appeal.

Advocates for parties who file appeals in this court must comply with rule 66 of the Rules of this Court. It is a mandatory requirement. Had the respondent objected to the grounds, we would have struck them out. In this case we could not do so because the appeal proceeded by way of written submissions.

Consideration of the Appeal

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules. It is to reappraise the whole of the evidence from the trial court and draw from it inferences of fact. The court then comes to its own decision on the facts and the law but must be cautious of the fact that it did not observe the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**)

In resolving this appeal, we have considered the submissions of both counsel and the authorities cited and those not cited that are relevant.

to this case. We reviewed the submissions on each of the contested counts and grounds of appeal, immediately before we re-appraised the evidence relating to each of them.

We observed that the appellant's main grievance about the convictions, on almost all of the counts, was that the trial judge erred when he found that he that created and used the username **sentop121** on the MTN Mobile Money Computer system. The appellant contends that this was an error on the part of the trial judge that resulted in the erroneous conclusion that he committed the fraud.

This grievance was specifically stated in Ground 2 of the Amended Memorandum of Appeal. But in spite of that the appellant's counsel offered submissions on the same grievance to challenge conviction on all counts complained about in Ground 1.

We also observed that the grievances in Grounds 3 and 5 are complaints about the evaluation of evidence in respect of the counts upon which the appellant was convicted. We will therefore address Ground 2 of the appeal first. Grounds 1, 3 and 5 will be addressed together since they relate to evaluation of evidence. Grounds 4, 6 and 7 will each be addressed separately.

Ground 2

Ground 2 was solely, that the trial judge erred when he found that the appellant created and used the username **sentop121** through which the fraud was orchestrated. It is the appellant's case that this led to erroneous findings about all the other counts in the indictment.

Submissions of Counsel

Counsel for the appellant submitted that the arguments about the erroneous finding that the appellant created and used username **sentop121** were covered under Ground 1. Under that ground he contended that though the trial judge found that the appellant created the username **sentop121**, there was no evidence anywhere on the record that he did so.

He further submitted that the evidence in **PEX14**, the list of usernames for FUNDAMO did not contain the username **sentop121** since the appellant's username was shown to be **senpat231**. That in his

testimony the appellant denied using **sentop121** and stated that his username was **senpat231**.

Counsel further submitted that in resolving this issue, the trial judge misquoted the testimony of A2 when he found that she stated that the *"8 million shilling was created from the system by A1."* This contention was one of the complaints in Ground 5. Counsel asserted that the quotation was erroneous because A2 never made this statement in her testimony in defence against the offence in Count 1.

The appellant's counsel also faulted the findings of the trial judge when he relied on the testimony of PW4 and **PEX17**. He contended that there was no evidence or explanation by PW4 throughout her testimony to justify the conclusion that the appellant created the username **sentop121.**

In his main submissions on this ground, the appellant's counsel stated that reference to the username **sentop121** only appeared in **PEX17**, an investigation report on the fraud. That there were no accompanying documents extracted from the FUNDAMO system to show that the username existed, was fraudulently created by the appellant and used to make fraudulent transfers on the system. That in spite of this the trial judge believed it was created by the appellant and he used it in the fraudulent transactions.

Counsel again referred us to the investigation report on the fraud (**PEX17**) and faulted it for not naming the staff in MTN that were interviewed by the investigators. He further attacked it for not listing any documents examined, and/or attaching any on the basis of which conclusions were made. Counsel also submitted that in her testimony in chief and cross examination, PW4 who produced the report did not tender in any documents to support it. That the report of the investigators therefore remained a skeleton without any flesh and could not be relied upon to convict the appellant.

He concluded that the erroneous conclusion by the trial judge that the appellant created and used username **sentop121** affected the resolution of the rest of the counts the appellant was indicted with, because he evaluated the evidence on that assumption. That as a result, he occasioned a miscarriage of justice.

In reply, the respondent's counsel submitted that the evidence about creation of the username **sentop121** was in the testimony of PW3 and PW4. That PW4 also testified about the creation of one Sebugenyi as a user on the system by the appellant, who in addition allocated the said Sebugenyi the role of an administrator. She repeated the testimony of PW3 about the process that the appellant went through to create Sebugenyi on the system. She charged that the appellant did not challenge this evidence.

Counsel then set out the principles established by the courts over time about relying on circumstantial evidence to convict and supported the trial judge's finding that the appellant indeed created and used the username **sentop121**.

As to whether **PEX17** relied on by the trial judge was supported by documentation and interviews of witnesses, counsel for the respondent submitted that it was. She explained that PW4 stated that during investigation, they interviewed staff of MTN and reviewed reports and manuals of the company and documents from suppliers of the system, among other things.

Counsel further submitted that the contested report (**PEX17**) had annexure and appendices which formed the basis of its findings. That in addition the prosecution tendered various reports and documents in evidence printed off the MTN computer system which were identified by PW3 as such. That the appellant's counsel did not object to tendering in **PEX17**, except on the point of the signature appended to it.

Resolution of Ground 2

We observed that there is nowhere in the judgement that the trial judge specifically pointed to the appellant as having created the username **sentop121**. However, at page 21 of his judgment, the trial judge stated thus:

> *"A1 was very deceptive. He created ghosts gave them pseudo names and obscene rights to do anything without authorisation. He benefited from this scheme because he was shown to have estates which are far beyond his lawful means."*

At page 22 he stated that:

"I have found that on the evidence of PW3, A1 manipulated the system to create pseudo users with similar user names to A3, A4 and A5 to steal money. A3, A4 and A5 did not share passwords with A1 but he linked them to user names like ***sentop121****,* ***brianokuru01*** *and* ***ayo2104*** *to process fraudulent transactions. The charges against A3, A4 and A5 have not been proved."*

At page 24 the trial judge concludes that the appellant conspired to defraud his employer, and states as follows:

"Without much ado, my findings on counts three, four, five and six show that there was no conspiracy involving all the accused. This charge was preferred basing on the belief that all the accused participated in stealing this money. I have established that A1 was the manipulator. He was the schemer, he was the owner of the system by virtue of his super user rights. He abused his credentials and stole by exiting through A2, the 17 bogus subscribers, his wife's agency called Always Uganda and other accomplice agents."

It is therefore clear from the record that though the trial judge did not state that the appellant created the username **sentop121**, he *did* find that the appellant linked A3, A4 and A5 to usernames like **sentop121**, **brianokuru01** and **ayo2104** in order for him to process fraudulent transactions.

What needs to be established now is whether the trial judge correctly found so and whether it was the appellant who created the username **sentop121** to which the mastermind of the fraud was linked. This is because if there is no evidence that the appellant created fictitious user accounts, including **sentop121,** that syphoned money out of MTN Mobile Money Accounts, he could have been wrongly convicted.

The appellant's arguments about the creation and use of the username **sentop121** were mainly three. First that PW4 did not prove that he created it; secondly, that the Dispute Resolution Account Report which showed all the transactions on the FUNDAMO system did not show that username **sentop121** ever transacted on the system; thirdly, that there was no audit report or any document of whatever nature presented by PW4 that contained the username **sentop121.**

We will now consider the appellant's contentions in view of the evidence adduced by the prosecution and the appellant's own testimony on oath.

PW4, Jasmine Shah, was a Certified Public Accountant practicing with Grant Thornton. She stated that she was employed by this firm which was hired by MTN Uganda to carry out an investigation on the alleged fraud in mobile money at the company.

PW4 testified that she received information from interviewees in the investigation that the Finance Administrator was considered to be the *'owner of the system'* and so he had unrestricted rights of access to the system and its applications. Further that there were breakdowns and slowdowns in the system which the trust violators exploited to *"wreak havoc"*. With regard to the appellant's role in the fraud she testified that:

> *"A1 originated fictitious transactions and also authorised fictitious transactions of his associates. Details of the transactions are in Annexure 1 to Appendix B which starts 17/5/11 to 12/12/11 – this is an extract of the adjustment account for discrepancies."*

In cross-examination, PW4 stated that in their investigation, they found various usernames that they attributed to the appellant. Further that the appendices attached to the report (**PEX17**) in that regard were system generated.

The role of the username **sentop121** in the fraud was set out in the report on investigations produced by PW4 (**PEX17**). **Appendix B of PEX17**, at page **1** shows a list of employees that were identified as having participated in the fraud. The appellant was the first person on that list and his username was stated as **sentop121**. The investigation established that the appellant *"Passed fraudulent journal entries and authorised journal entries passed by other involved employees."* Contrary to the contention of the appellant's counsel, we find that it was established that PW4 presented evidence in court that related to the username **sentop121**.

In her testimony, PW4 explained that details of the transactions were listed in **Annexure 1** to **Appendix B**. This was a listing of entries in one of the accounts that was used in the fraud, the Adjustment Account for Discrepancies, which started on 17th May 2011 and ended on 12th December 2011. PW4 testified that the appellant was involved in

creating money artificially from this account though it was not a transactional account.

Annexure 1 to **Appendix B** of the Grant Thornton Report (**PEX17**) showed that Patrick Sentongo carried out transactions on the Adjustment Account for Discrepancies. Transactions attributed to the him by PW4 occurred between 17th May and 13th December 2011. PW4 explained that the appellant transferred money from the Discrepancies Account to the Dispute Account, and from the Dispute Account to the Discrepancies Account. She stated that the money that he transacted was created artificially by the appellant, and Angella Ayo up to 12th December 2011.

We found the testimony of PW3 most instructive about the creation of fictitious users on the FUNDAMO system. PW3, Phrase Donald Lubega was the Systems Analyst at MTN (U) when the fraud occurred. He testified about his experience working with MTN, a company he joined in 1998. He rose through the ranks up to 2011, when he became the General Manager for Service Delivery and Enterprise Applications.

PW3's testimony was similar to that of PW4. He stated that the Finance Administrator, a person in the position the appellant occupied at the time the fraud occurred, had a token which enabled the creation of users on the system. He emphasised that in 2011, there was only one person that had that token, a set of secret characters, for the security of the system. Although the appellant denied that he was the owner of the system with rights to create users on the system, the evidence of PW3 and PW4 remained challenged in cross-examination.

PW3 further testified that the system used by MTN kept records of whoever logged in, the time, date and the computer used to log in. Further, that the source and destination of the funds were captured on the system in the journals. That whatever one did on the system was automatically captured and the users had no control over it, as far as this function was concerned.

By implication, the system was able to keep all the information of the transactions, usernames, the creator of each of them, the date and time and the computer used to create them, just as would have happened in a written journal of accounts. PW3 further testified that each journal created on the system was allocated a transaction number which could

not be used again. That the transactions in the Adjustment for Discrepancies Account, at page 1 and 2 of **PEX27** showed that they were carried out by the appellant and one Sebugenyi Ronald.

PW3 identified the appellant's computer or workstation on the system. He stated that it was identified with the IP address **10.156.1.128**.

An *IP address* is defined as a unique address that identifies a device on the internet or a local network. IP stands for *"Internet Protocol,"* which is a set of rules governing the format of data sent via the internet or local network. In essence, IP addresses are the identifier that allows information to be sent between devices on a network. They can contain location information and make devices accessible for communication. This is because the internet needs a way to differentiate between different computers, routers and websites. IP addresses are provided by the Internet Service Provider to do so. (Retrieved from https://*www.kaspersky.com*)

PW3 testified about how the appellant created fictitious users and user accounts on the system. He stated that the appellant also created a user who he named ***Sebugenyi Ronald*** and gave him the rights of a Financial Administrator. That at the request of the police, he searched the system and found out that the fictitious user Ronald Sebugenyi was created by the user account **senpat231** on 4th February 2010 at 6:45 am. In his testimony, the appellant denied the username **sentop121** but he admitted that his username on FUNDAMO was **senpat231**.

PW3 explained that Ronald Sebugenyi was not an employee and was unknown to anyone at MTN. However, on FUNDAMO, Ronald Sebugenyi had rights to suspend and unsuspended customer and agent accounts. He could update transitional authorisations, upload ESR files from the escrow account in Stanbic Bank to bank control in MTN. Ronald Sebugenyi also had the rights to broadcast SMS, link new pins and deal with pending payments. Further that the same computer used to create Sebugenyi, IP Address **10.156.1.128,** the appellant's workstation, was the computer that this fictitious person used to log onto the system.

PW3 went on to explain that Ronald Sebugenyi was linked to Ayo Angela, A4 at the trial. That the username that was given to Ronald Sebugenyi was actually **Ayo2104**. And that if Ayo Angella logged in it would appear as though Ronald Sebugenyi logged in. The log trail of

Sebugenyi was put in evidence as **PEX10**. PW3 went on to state that the same IP address, **10.156.1.128,** was also used to create and disable **Ayo2104**. Further that the fictitious Sebugenyi was disabled by the appellant on 2nd November 2011.

PEX10 was an interesting document. It showed the appellant logging in as **senpat231**. A short while after **senpat231** logs on, Sebugenyi would log in with username **ayo2104**. In some instances it was the username **senpat231** affected while in others it was the username **ayo2104** affected by the log in. PW3 explained that this meant that *"Ayo was being Ronald Sebugenyi and any journals were captured in the reports as those of Ronald Sebugenyi."*

PW3 also testified about how the appellant used a different computer than the one assigned to him, identified with IP address **10.156.1.128** to log in as Brian Okurut. He said that this occurred between 2/12/11 and 13/1/12. That during this period, **brianokuru01** used the IP address of Sentongo **10.156.1.128** to log in at 7.11 am on 2/12/11 but was unsuccessful. That the log in was repeated the same day on IP address **10.156.1.32** and was successful. He referred court to the document containing audit logs of traffic hitting FUNDAMO between 2/11/11 and 13/1/2012 which was tendered in evidence as **PEX12**.

PEX12 was an audit log trail which was generated from FUNDAMO for the period 2/12/11 to 13/1/12. It showed that on 2/12/11, username **sentonp121** logged in to the system at 7.11.59am on IP address **10.156.1.128,** the appellant's workstation. Immediately thereafter on the same date at 7.12.44am, **brianokuru01** successfully logged into the system at the same IP address **10.156.1.128.** Username **brianokuru01** further logged onto the system at the appellant's IP address 6 times at different times of the day on 2/12/11.

Brian Okurut who was A3 at the trial denied the username **brianokuru01**. He said he did not know how the username was created and it was not his username and password. His correct username on the MINISAT, a billing system, not FUNDAMO, was **okurut.B**. Brian Okurut also testified that he did not have access to FUNDAMO because he was not one of the team in MTN Mobile Money; he therefore had no password to the system.

According to **PEX14**, the list of users on FUNDAMO, the username **brianokuru01** who was listed as administrator on the system was indicated to be **"FALSE."** This leads to the conclusion that the appellant who was the user of IP address **10.156.1.128,** the only person at MTN at the time who had the rights to create users on the system must have created the fictitious username **brianokuru01** and used the same to successfully login at his workstation, among others.

Counsel for the appellant submitted that the username **sentop121** was not on the list of FUNDAMO users. We find that this submission was correct because the username **sentop121** was not included in the list of users tendered in evidence as **PEX14**. This is also true of the fictitious Ronald Sebugenyi.

However, PW3 explained the absence of Ronald Sebugenyi on the list of users of FUNDAMO. He said Sebugenyi was just a reference and could not appear on the list of users, **PEX14**. The user **sentop121** also did not appear on that list, possibly because it was never used at all at MTN. We found no direct evidence on the record relating to the creation of **sentop121**. However, there was evidence that related to **SENTONP** in the testimony of PW3, as a username that was used to log on at the appellant's workstation.

PW3 produced the user login trail, **PEX12,** which showed a series of logins with the username ***sentonp121***. This report showed that **sentonp121** was used to log in successfully at the appellant's known IP address **10.156.1.128** and other IP addresses as is shown below:

Date	IP address	No. of successful logins
2/12/11	10.156.1.128	7
	10.156.1.32	5
4/12/11	10.156.1.32	1
5/12/11	10.156.1.128	2
	10.156.1.32	5
	10.156.1.133	1
6/12/11	10.156.1.128	3
	10.156.1.32	4
7/12/11	10.156.1.128	5
	10.156.1.32	8
8/12/11	10.156.1.128	3
	10.156.1.32	3
9/12/11	10.156.1.128	3

	10.156.1.32	4
	10.156.21.21	1
10/12/11	10.156.1.32	2
12/12/11	10.156.1.128	4
	10.156.1.133	4
13/12/11	10.156.1.128	5
	10.156.1.32	2
	10.156.1.133	1
14/12/11	10.156.1.32	2
	10.156.1.133	1
	10.151.44.130	1
15/12/11	10.156.58.26	3
16/12/11	10.156.58.26	15
17/12/11	10.156.58.26	1
19/12/11	10.156.58.26	9
20/1 2/11	10.156.58.26	3
21/12/11	10.156.58.26	10
22/12/11	10.156.58.26	3
23/12/11	10.156.58.26	1

It will also be recalled that PW3, the MTN Computer Analyst, testified that the machine **10.156.1.128** where the username **sentonp121** first came onto the system was the appellant's workstation. The username **sentonp121** started logging in on 2nd December 2011 at the appellant's workstation and terminated on 23rd December 2011, around the time that the appellant resigned from MTN. According to the report of the auditors, **PEX17**, the appellant's resignation from MTN took effect on 23rd December 2011. There is therefore no doubt that the appellant disabled **sentonp121** in preparation for his departure from MTN.

We therefore find that the trial judge erred when he referred to the username ***sentop121*** instead of ***sentonp121.*** But the error originated from the report of the forensic investigators, M/s Grant Thornton, **PEX17.** The trial judge lifted the error from that report and referred to the usernames responsible for the fraud, as ***sentop121***, **brianokuru01** and **ayo2104,** all created by the appellant.

We accept the submission of the appellant's counsel that the appellant did not create the contested username **sentop121**; neither did he use it. However, we find that there is ample evidence to prove that the appellant created and also used the username ***sentonp121*** to log in into the MTN Mobile Money Computer 122 times, as is shown in the

table above. He did this at his workstation, identified as **10.156.1.128,** and other workstations in the Mobile Money Department at the MTN Offices.

Ground 2 of the appeal therefore substantially fails and it is dismissed.

Grounds 1, 3 and 5

Counsel for the appellant itemised his submissions in Ground 1 according to the convictions on the counts that were challenged in the appeal. We shall review them and the response of the respondent before we resolve the grievances against the conviction in each count. Since the complaints in Grounds 3 and 5 relate to the complaints in Ground 1, we have found it useful to review the submissions offered together with the submissions on the counts that they relate to before we proceed to resolve the appellant's grievances.

Count 1

The main contention against the conviction in Count 1 was that the prosecution did not prove that the appellant stole the amount of **UGX 8,000,000** referred to in the indictment.

Submissions of Counsel

In this regard, the first argument presented for the appellant was that the prosecution did not produce any evidence to prove that it was he that created or owned the username **sentop121**. Counsel for the appellant asserted that the erroneous conclusion that the appellant was the user of **sentop121** resulted in the resolution of Count 1 and the rest of the counts challenged in Ground 1 against the appellant. The issue about username **sentop121** was substantially resolved in Ground 2 above.

In reply, the respondent's counsel referred us to section 254 (6) and (7) of the Penal Code Act and submitted that a person shall be deemed to have moved money if that person moves or causes it to be moved from one account to another, or otherwise outside the original account. She relied on **Sula Kavira v Uganda, Supreme Court Criminal Appeal No 20 of 1993** for her submission. She then concluded that by transferring money from the Money Transfer Account to the Public Access Shop

Account, the theft was complete, irrespective of whether the person that moved the money had the intention of paying it back or not.

In reply to the submission that there was no evidence to show that the appellant created username **sentop121**, and used it to transact, counsel for the respondent submitted that there was. She referred us to the testimony of PW3, the System Analyst, who explained how FUNDAMO operated and the role of the appellant on the system. She pointed out that PW3 testified that the system indicated that on 15th May 2011, **UGX 8,000,000** was transferred from the Money Transfer Account to the Public Access Account that was operated by A2. That this money was liquidated as indicated in **Annexure 1, Appendix A,** of **PEX17**.

The respondent's counsel also referred us to the decision of the Supreme Court in **Akbar Hussein Godi v Uganda, Criminal Appeal No 003 of 2013** where the court quoted from the decision in **Simoni Musoke v R [1958] EA 715** and re-stated the principles for the reliance on circumstantial evidence to convict.

As to whether the trial judge misquoted the testimony of A2 about the author of the transaction of **UGX 8,000,000,** the respondent's counsel submitted that A2 stated that it was the appellant who effected the transaction on the 18th May 2011 at 10.45am. Counsel then submitted that it was this evidence that informed the trial judge's conclusion that **sentop121** was created by the appellant. And that therefore, the judge did not misquote the testimony of A2.

Resolution of Court on Count 1

The appellant's contention is basically that he did not participate in the theft of **UGX 8,000,000** from MTN. In this regard at page 10 of his judgment the trial judge found that the appellant's denial that he sent **UGX 8,000,000** to Joan Nabugwawo was against the weight of evidence as captured on the system, which was contained in the evidence of PW4. That the transaction of 2nd May 2011 on the Dispute Account contained in **PEX20** showed that the appellant moved **UGX 8,000,000** through the Dispute Account. That the appellant's denial that he did so was false. The trial judge then found that,

"In conclusion, on count one it is my finding in agreement with the two lady assessors that A1 stole the money from the system. A2 liquidated the same through normal trading as an accomplice. By trading in the stolen money, A2 aided A1 to get the proceeds. A2 to the extent is a principal offender within the meaning of section 19 (c) of the Penal Code Act, Cap 120."

Phrase Donald Lubega, PW3, testified about the various accounts on FUNDAMO from which the money was stolen. He said that the Dispute Account was a transitional account on which money was placed before its final destination. That for example payments to subscribers and agents were placed on it.

PW4, Jasmine Shah, testified about the movement of **8,000,000** on the mobile money platform. She stated that the transaction was initiated by the appellant who had super user rights as the Finance Administrator and owner of the system. She referred to **Annexure 1, Appendix A, PEX17.**

PEX17 had a table on page 1 that had details of transfers that were carried out on 11th May 2011. PW4 stated that when these transfers were made by the appellant, he was testing the system to see whether he could successfully transfer money from the Dispute Account to other accounts. The transfer of **UGX 8,000,000** with a description *"Float Transfer APLAB,"* Ledger Account **No. 500252000000167** was to Account **No. 5002520000000507**.

It was stated in **PEX17** that the transfer was reflected in the daily mobile money reconciliation account prepared by the Public Access Cashier. The transfer was shown as though it was purchase of virtual money from subscribers using cash. However, the fact was that virtual money was created using a fictitious journal entry by the appellant, Sentongo Patrick.

The appellant denied passing the journal for **UGX 8,000,000** because it was not passed by username **senpat231**. However, the Dispute Account Report, **PEX20,** showed that the transaction of **UGX 8,000,000,** Ledger Account **No. 500252000000167** to Account **No. 5002520000000507** on 2nd May 2011 at 8.08am and described as "*clock tower float*" was performed by Patrick Sentongo. No reference was

made to the usernames **sentop121**, **sentonp121** or the appellant's acknowledged username **senpat231.**

When she was cross-examined about the contents of the report about the **UGX 8,000,000**, said to have been sent to APLAB, PW4 stated that the money did not go to APLAB but went to the cashier in the Public Access Shop. She referred to page 1 of **Appendix A**, **PEX17** and explained that the transaction was a movement of money from the Dispute Account to Public Access. That APLAB was only given as a reason on the system but was not its destination. Further that APLAB which had a project in MTN could not get money from Mobile Money. It would requisition for payment from management.

When PW4 was cross-examined for A2, she stated that the latter did not create fictitious journals but she benefited from them. That the **UGX 8,000,000** she received was liquidated normally yet she could not justify its receipt. She benefited from selling e-float to genuine customers less the commission; she got e-float which she had not worked for by paying physical cash. That this money was from the Dispute Account, sent by the appellant, and the appellant approved its liquidation for A2 to be paid through the Bank. A2 transferred the money to customers.

A2 claimed she received this money as a refund from the APLAB project which had an account operated by Sarah Kiyemba, the Administrator of APLAB. She also claimed the money did not go through the Dispute Account. However, PW4 debunked this when she stated that in their investigation of the fraud, they did not find any money moving between mobile money shops because Sarah Kiyimba operated a Mobile Money Shop. She asserted that there was no genuine transaction between A2 and APLAB.

We therefore find that the trial judge correctly found that when the appellant moved **UGX 8,000,000** from the Dispute Account by stealthily transferring it to A2 who was not entitled to it, he stole that money. That at this point the asportation was complete because A2 was not entitled to this money from the Dispute Account. The appellant further authorised its liquidation into cash to enable its physical theft from the MTN mobile money system with the help of A2.

We therefore find that the theft of **UGX 8,000,000** in Count 1 was proved against the appellant by direct evidence adduced by the prosecution, beyond reasonable doubt. The trial judge made no error in convicting the appellant of embezzlement in Count 1 and the conviction is sustained.

Count 2 and Ground 3

Submissions of Counsel

With regard to the embezzlement of **UGX 67,000,000** counsel for the appellant again contended that the ingredient of theft was not proved against the appellant. That the trial judge relied on **Appendix A** to **PEX17** without supporting documents or entries tendered to show that these transactions went through the appellant's known user account **senpat231** on the system, or any other accounts belonging to or created by the appellant. That **Appendix A to PEX17** which the trial judge relied upon did not show that it was the appellant who made the fraudulent entries that moved **UGX 67,000,000** on the system.

Counsel for the appellant further submitted that the trial judge relied upon **PEX20** which showed all the transactions in the Dispute Resolution Account, whether genuine or fraudulent. But there was no transaction on 7th and 8th June 2011 of **UGX 27,130,000** and **39,899,085** that went through the Dispute Resolution Account. That as a result the testimony of A2 that the appellant made deposits and withdrawals on her account at the Public Access Shop was false.

The appellant's counsel went on to submit that the conclusion of the trial judge on Count 2 was based on the weakness of the appellant's defence instead of the strength of the evidence adduced by the prosecution. This contention was also the subject of Ground 3.

With regard to Ground 3, the appellant's counsel submitted that Ground 3 was resolved within the other grounds of appeal which showed that the trial judge relied on the weaknesses in the appellant's case and not the strength of the prosecution case.

He further submitted that the trial judge dismissed the appellant's evidence that the money had been paid as sales tax, yet the prosecution evidence through PW2 clearly described the entry made on 15th June

2011, with a bank statement. That this document, **PEX21,** showed that this amount was Sales Tax Clearance paid to URA. He contended that in **PEX21** all entries only showed names but did not reflect user IDs, whether the appellant's genuine one or any other fraudulent account. That as a result it was not possible to calculate and add up funds or to determine what was posted from a fraudulent or genuine account.

In reply, the respondent's counsel addressed the complaint that the trial judge disregarded the evidence in **ExhP20** that the transaction was sales tax paid to Uganda Revenue Authority. Counsel referred us to the testimony of PW5 who explained the movement of the money on the system by the appellant, and the absence of a requirement for MTN to pay Sales Tax at the time.

The respondent's counsel further referred us to the Charge and Caution Statement of A2 in which she admitted that she received this money in a transaction carried out by the appellant. She further submitted that A2 confessed that in appreciation of her role in taking the money out of the system, the appellant rewarded her with a gift of **UGX 500,000**.

Counsel for the respondent pointed out that A2 was not cross examined on this evidence and it remained intact. That in addition, in her testimony A2 stated that when she liquidated the sum of **UGX 67,029,085**, the appellant took away cash of **UGX 12,500,000**. Counsel then submitted that at the time the appellant moved the money in issue from the Money Transfer Account to the Public Access Account, the theft of it was complete, and it was proved beyond reasonable doubt.

In reply to the submissions on Ground 3, counsel for the respondent submitted that it was too general and did not specify how the trial judge failed to evaluate the evidence. She referred us to the decision in **Opolot Justin v Uganda, Court of Appeal Criminal Appeal No. 1551 of 2009**, where this court struck out a similar ground of appeal pursuant to rule 86 (1) of the Rules of this Court. She submitted that the court in that case held that the rule on framing of grounds of appeal is mandatory and not regulatory as courts should adjudicate on specific issues complained of on appeal. She prayed that ground 3 of the appeal be struck out.

Resolution of court on Count 2 & Ground 3

Once again the main contention is that it was not proved that the appellant stole **UGX 67,000,000** so as to constitute embezzlement. It was contended that **PEX17**, the Grant Thornton Report, did not prove that he participated in the theft. That **PEX20** contained both fraudulent and genuine money and so could not be used to show that the appellant moved the money.

With regard to Count 2, the trial judge found and held that:

> *"Appendix "A" to exhibit P17 and D7 shows that on 7th June 2011 journals created from the money transfer account through the dispute account by A1 to transaction line **0783 501900** which was operated by A2 at the Public Access Shop were a total of **67,029,085** was deposited. (sic) The deposit was described as **Sales tax clearance** on the deposit account. See exhibit P20. MTN at the time was not liable to pay sales tax and even then such tax would not be paid to A2 but to URA. This is a fraudulent payment for which both A1 and A2 are liable. A2's charge and caution statement of 23rd December, 2011 admits that A1 sent this money to her account and immediately took off some without her participation. She claims to have reported this phenomenon to her colleagues or bosses and nothing was done. Her bossed such as PW5 were in court but were not challenged on this aspect. Her defence is false.*
>
> *I find as a fact that A1 stole **67,029,000=** from the system disguised as sales tax clearance and liquidated it through A2 and other subscribers. The two are guilty are (sic) principle offenders under section 19 (c) of the PCA, Cap 120. The prosecution proved count two beyond reasonable doubt."*

PEX20, the Dispute Account Report was produced in evidence by PW5, Peter Ochen, the Senior Manger Treasury at MTN at the time the fraud occurred. He was also the person who printed it off the mobile money computer system and certified it. We observed that it did not show the transaction of **UGX 67,029,000** to have taken place on the 7th June 2011.

However, **PEX26**, the Public Access Statement which was also produced by PW5 showed two transactions of **UGX 27,130,000** and **39,899,085** deposited on 7th June 2011 and 10th June 2011, respectively. These two amounts made up the total of **UGX 67,029,085**. Both were indicated to be journals created by Patrick Sentongo, the appellant. **PW5** explained the source and destination of the money in these journals created by the appellant as follows:

> *"The mobile money system had the capability to compute taxes on transactions. For about 9 months there was no regime for paying taxes. This money accumulated on this sales tax account and was available. ...*
>
> *About 67m was available on sales tax and all of it was transferred to Public Access Account in June 2011. It moved from Sales Tax Account to dispute Account, then to mobile money transfer account and then split into two on different dates and transferred to dispute account and then to public access account.*
>
> *... transfers require authorisations. These authorisations are done by persons with rights on the system. I did not authorise these irregular transfers. The origin of this money is known. It is system generated on transactions.*
>
> *The 67m was split into two. 39,899,085/= and 27,130,000/=. They were described as deposit on 27/6/11 by A1. The other was on 10/6/11 at 13:04hrs – deposit by A1."*

The statements for Public Access for the 27th June 2011 and 10th June 2011 which were **Annexure 1 to Appendix A, PEX17,** showed the receipt of these deposits on the Public Access Account.

The appellant denied that he transferred this money to the Public Access Account. He said he did not even know through which account this money was exited. However, A2 stated in her testimony that she received **UGX 27,130,000** on 7/6/2011 from the appellant. That immediately after the money hit her account, **UGX 4,500,000** was taken away by the appellant. And immediately after that another **UGX 8,000,000** was taken away by the appellant.

These transactions where the appellant took some of the money back are shown in **PEX26**, the statement for Public Access shop as reversals by the appellant. A2 retained the **UGX 17,000,000**. She further stated

that she did not raise an alarm about the balance of **UGX 17,000,000** but she admitted that she traded with it normally. A2 also admitted that she traded with the **UGX 39,899,085** which was deposited on the Public Access Shop account by the appellant.

PW4 testified, on the basis of the findings in **PEX17** that the money that was sent to A2 by the appellant was shown as purchase of virtual money by subscribers by use of physical cash. However, the virtual money had been created using fictitious journal entries by the appellant.

PW3 and PW4 testified that the FUNDAMO system had features that enabled the recording of all transactions carried out on it automatically. PW3 testified that the system was proved to be working well, and was capable of generating necessary trading reports. He and PW5 extracted the reports from the system in the investigation carried out by Grant Thornton.

We find that the movement of money from the Sales Tax Account by the appellant was unauthorised. It was also moved for the wrong reasons and to the wrong account. By so moving it, the asportation of the money on the system was complete. The theft of **UGX 67,000,000** was proved by the prosecution against the appellant beyond reasonable doubt. The trial judge therefore cannot be faulted for convicting him of embezzlement in Count 2.

The contention in Ground 3 that the trial judge convicted the appellant on the basis of the weak evidence of the prosecution while ignoring the evidence of the appellant also falls by the wayside. The trial judge considered the strong and uncontroverted testimony of PW5 which clearly countered the defence that the money was removed from the system to pay sales tax. Ground 3 of the appeal therefore also fails.

Count 3

Submissions of counsel

Regarding the conviction for the embezzlement of **UGX 3,759,319,389**, the appellant's counsel submitted that it was not proved at all by the prosecution. Counsel advanced four arguments in this regard.

The first was that the monies for whose theft the appellant was convicted in Count 3 included the amount he was convicted for in

Counts 1 and 2. That it was therefore erroneous for the prosecution to break these amounts up to create different counts and totals in another count of an offence stated to have arisen from the same transaction. That as a result it was erroneous of the trial judge to convict the appellant on Counts 1, 2 and 3, simultaneously.

The second limb of counsel's contention was that in respect of the same count, in his judgement the trial judge created a figure of **UGX 3,684,290,304** which he claimed represented the money drained in Count 3. Counsel submitted that this resulted into an amendment of the Indictment in Count 3. That the resultant amendment contravened section 50 (2), (3) and section 51 of the TIA.

Counsel went on to submit that the appellant was not called upon to plead to this new count or to adduce evidence to rebut the same. That this compromised the principle of a fair hearing to which the appellant was entitled. Counsel further submitted that though the prosecution sought to amend Count 3 by adjusting the figures, the trial judge rejected the application. He referred us to the decision in **Nsubuga Guster & Another v Uganda, Court of Appeal Criminal Appeal No. 0014 of 2013**, in which this court relied on **Makula International v Cardinal Nsubuga, [1982] HCB 11** to quash the conviction of the appellant in that case for the same reasons and rendered the whole trial a nullity.

The third limb of his argument was a repetition of the complaint that the trial judge relied on the assumption that it was the appellant who created the username **sentop121,** and that it was not proved against the appellant.

In the fourth limb, the appellant's counsel complained about the trial judge's reliance on A2's charge and caution statement, **PEX29**, when he held that the appellant used to go to A2 to collect bags of money. He stated that the charge and caution statement related to allegations against A2 for the embezzlement of UGX 16,000,000,000, yet there was no charge against the appellant and A2 for theft of that amount in the present indictment. He charged that the only plausible explanation for the existence of **PEX29** was that it related to another case. That as a result it was an error on the part of the trial judge to convict the appellant who was co-accused to A2. That in addition, there was no

audit report or audited books of MTN Uganda to show that they incurred the loss of **UGX 3,684,290,304**.

In reply, counsel for the respondent addressed the contention that the prosecution separated Counts 1, 2 and 3 contrary to provisions of the TIA. She submitted that each of the amounts in Counts 1 and 2 arose from different transactions and the amounts in each of the 3 counts were different. That the accused persons indicted in Count 1 and 2 were different from those in Count 3, save for the appellant and A2 who appeared in both. She concluded that it was for that reason the counts had to be separate in the Indictment.

Regarding the contention that the adjustment in figures to make up **UGX 3,759,000,000** amounted to an amendment of the Indictment by the court, counsel for the respondent explained that after subtracting the amounts in Count 1 and 2, the trial judge stated that the figure in Count 3 would be **UGX 3,684,290,304**. She asserted that this did not amount to an amendment within the meaning of sections 50 and 51 of the TIA.

In answer to the grievance that the appellant did not create the username **sentop121**, the respondent's counsel offered further submissions that he did. But this was the subject of Ground 2 which we have already resolved earlier on in this judgment.

Counsel then reiterated the principles for the reliance on circumstantial evidence to convict, as they were re-stated by the Supreme Court in **Akbar Hussein Godi** (supra).

Turning to the grievance that the trial judge erred when he relied on the charge and caution statement of A2 (**PEX29**) to convict the appellant, counsel for the respondent submitted that A2 made her plain statement and charge and caution statement on 23rd December 2011, soon after her arrest and the commencement of the investigations. PW4 on the other hand stated that the forensic audit about the losses complained of carried out by M/s Grant Thornton began in January 2012. That the criminal investigations began in 2011 before an expert opinion established the total amounts stolen as **UGX 10,220,178,132**. That by the time the forensic investigations commenced A2's charge and caution statement had already been recorded, in which she was required to respond to loss of **UGX 16,000,000,000**.

Regarding the contention that there was no audit carried out by MTN, the respondent's counsel submitted that according to PW4, there *was* an investigative audit carried out by Grant Thornton CPA, who were engaged by MTN. That it was this audit that quantified the amount of money that was lost by MTN through the fraud.

Resolution of Court on Count 3

The indictment in Count 3, embezzlement of **UGX 3,759,319,389,** was brought against the appellant, Joan Nabugwawo (A2), Angella Ayo (A4) and Richard Mwami (A6). The trial judge found evidence to convict the appellant and A2 and held that:

> *"It is clear that A1 and A2 are culpable for draining 3,759,319,389= from the mobile money system fraudulently. A1 created the fictitious journals which credited A2's Account with money she had not earned through trading. Instead of reporting the anomaly she chose to cooperate and hand over money to A1. A2 got some kick-backs for the favour. I am mindful that the figure of 3,759,319,389= included money already charged in count one and two. This does not in my view diminish the crime. The money in counts one and two totals 75,029,085=. If this figure is subtracted from 3,759,319,839= the result is 3,654,290,304= which represents the money drained in count three."*

As to whether the trial judge convicted the appellant for the offence in Count 3 simultaneously because the amounts in Counts 1 and 2 were included in the amount for which he was charged in Count 3, the respondent's counsel explained that the persons charged in Count 3 and the transactions in it were different from those in Count 1, and we find that it was so.

PW4 explained the various transactions that constituted the fraud which were set out chronologically in **PEX17**. The fraud involving the sum of **UGX 3,759,319,389** was described as *"The consolidation phase."* It was explained at page 2 of **Appendix A, PEX17** as follows:

> *"Thereafter, Patrick Sentongo (F. Administrator) and Angella Ayo (Administrator) regularly started passing fictitious journal entries by debiting general ledger account called 'Adjustment Account for Discrepancy' and created fictitious e-float in Public Access (Joan*

Nabugwawo). The fictitious mobile money so created was withdrawn in part through the process of e-float liquidated by Joan Nabugwawo and partially by transfer to a network of three employees and 28 other subscribers. Some of the e-float was also sold in exchange of cash to subscribers. This channel was exploited from May 2011 to Dec 2011 and an amount of 3,759 million was diverted through this channel."

Section 23(2) of the TIA provides that:

> **"(2) Where more than one offence is charged in an indictment, a description of each offence so charged shall be set out in a separate paragraph of the indictment called a count."**

In the description of the phases of the fraud in **PEX17**, the offences in Counts 1 and 2 was referred to as *"The beginning of the testing phase."* This phase consisted of 2 transactions: the transfers of **UGX 8,000,000** and **67,029,085** by the appellant to A2. The offences committed in the two transactions were separated into Counts 1 and 2 in order to comply with section 22 of the TIA. This requires the prosecution to set out the details of the offence; the two transactions could not be included in one count.

The amount that was alleged to have been lost in the *"Consolidation phase"* seems to have included the amounts in Count 1 and 2 because it specified the period in which the transactions occurred as May 2011 to December 2011. The transfer of the amount in Counts 1 and 2 occurred in June 2011. With regard to Count 3 therefore, it had to be separated in terms of section 23 (2) of the TIA.

Regarding the contention that the reduction of the amount in Count 3 by subtracting the amounts in Counts 1 and 2 amounted to an amendment of the indictment by court, section 50 (2) of the TIA provides as follows:

> **"(2) Where before a trial upon indictment or at any stage of the trial it is made to appear to the High Court that the indictment is defective or otherwise requires amendment, the court may make such an order for the alteration of the indictment (by way of its amendment or by substitution or addition of a new count) as the court thinks necessary to meet**

the circumstances of the case, unless having regard to the merits of the case, the required alterations cannot be made without injustice; except that no alteration to an indictment shall be permitted by the court to charge the accused person with an offence which, in the opinion of the court, is not disclosed by the evidence set out in the summary of evidence prepared under section 168 of the Magistrates Courts Act."

On 18th April 2016, after A2 testified, the prosecution applied to amend the indictment under section 50(2) of the TIA in respect of Counts 2, 3, 5, 6, 7 and 8. With regard to Count 3, the prosecution sought to remove Richard Mwami (A6) who had been acquitted because he had no case to answer, and to reduce the amount therein to **3,682,971,000**.

Counsel for the appellant strongly objected to the amendment. He submitted that such alteration should only be made if there would be no injustice. That the result should comply with the facts in the summary of evidence. He charged that the prosecution case was based on the Grant Thornton Report (**PEX17**). That the amendments proposed would result in new offences. That they were at that point in the trial focused on the defence. He complained that the prosecution had closed its case and sought to amend the indictment and so disorganise the defence. In his view this amounted to an injustice. He submitted that the prosecution should not be allowed to adjust its case based on the prosecution case contained in the evidence of A2 on oath.

The trial judge ruled in favour of the appellant. He found that the adjustment in figures in Counts 3, 5 and 8 would amount to changing the summary of the case. Further that the prosecution would require to re-open its case so leading to delay and the accused persons who had already testified, basically the appellant, might also wish to re-open their cases. The trial judge ruled that if the adjustments were born out of evidence, the prosecution should submit on them at the end of the case.

In his submissions on Count 3 prosecuting counsel did not submit about the discrepancy in the amount of **UGX 3,759,319,389;** neither did he draw courts attention to the amounts contained in Counts 1 and 2. But he referred to the testimony of PW4 and **PEX17,** the source of the sums involved in the fraud.

PEX17 had two versions. One was the main report without detailed Appendices and Annexure (the Original Report) and the other had detailed Annexure in the form of print outs from the mobile money computer system and various other forms that were used in the fraud. At page 12 of the main report, there was a table which contained the movement of the fraudulent funds over the months by the various constituents.

This table showed that the amount that was exited from the MTN Public Access Shop (Joan Nabugwawo, A2) from May 2011 to December 2011 amounted to **3,759,319,389**. This figure included the amounts in Counts 1 and 2, also credited to Joan Nabugwawo at the Public Access Shop by the appellant.

The trial judge altered the amount for which the appellant was indicted in Count 3 by reducing it by the amounts for which he had already been convicted in Counts 1 and 2. It means the appellant pleaded not guilty to a higher amount than should have been included in the Charge Sheet and the Indictment after it, in Count 3.

However, the offence in the indictment did not change. It was still embezzlement, but of a lesser amount than had been stated in the Indictment. The particulars were exactly the same as those that had been disclosed in the particulars presented when the appellant was indicted for trial. Given the general trend in the case, the appellant could not have changed his plea had the amount alleged to have been embezzled been stated as **3,654,290,304** instead of **3,759,319,389**.

We therefore find that no prejudice was occasioned to him by the alteration of figures by the trial judge in his judgment. If at all, the alteration was to his advantage because he was not convicted simultaneously for embezzlement of the amounts in Counts 1 and 2, when he was convicted for embezzlement of the reduced amount in Count 3.

In addition, we note that the appellant did not complain about the proof of the sum of **3,759,319,389** said to have been embezzled in Count 3. His complaint was that he was convicted of the amount in Count 3 simultaneously with the amounts in Counts 1 and 2. Re-appraisal of the evidence of PW4 established that this was not true. He was convicted for embezzlement of the amounts in Counts 1 and 2, and

because of a technical glitch that occurred because the trial judge refused an application to amend the indictment, he had to adjust the figures on conviction, on the basis of the evidence that was before him.

As to whether the appellant was denied a fair hearing when the alteration was made on conviction, the appellant's counsel objected to the application to amend the indictment to alter the figures. He submitted that it would have occasioned an injustice to the appellant at that stage of the trial. However, as the trial judge pointed out in his ruling, it was by this route, amendment, that the appellant would have been enabled to plead to the amended count and produced evidence on it.

It has been established that it was his advocate that objected to the amendment. It is now too late in the day for the appellant to claim he was denied a fair hearing when it was efforts to defend him that led to the alteration of the amount on conviction, and not before.

The contention that the conviction of the appellant in Count 3 resulted from the erroneous decision of the trial judge that it was he that transacted on the system as **sentop121** has already been disposed of earlier in this judgment. We found that though the appellant did not transact as ***sentop121***, he *did* transact as ***sentonp121***. He also transacted as Ronald Sebugenyi, a fictitious user he created at his workstation, IP address **10.1.156.128,** on the 4th February 2010.

We also found that the fictitious money that was created and stolen in Count 3 was not attributed to username **sentop121**. Instead, **ExhbitP26**, the statement of account of Joan Nabugwawo at Public Access showed that the money was deposited in her account by Ronald Sebugenyi and Patrick Sentongo, who were one and the same person, the appellant.

Regarding the contention that the trial judge erred when he relied on the Charge and Caution Statement of Joan Nabugwawo to convict the appellant, we find that the statement was only one of the pieces of evidence in which A2 stated that the appellant was involved in the theft that led to the loss of **UGX 3,759,319,38/=.** In her testimony on 31st March 2016, in relation to the indictment in Count 3, Joan Nabugwawo testified as follows:

"It is not true that between May-December 2011, I embezzled 3,759,319,389/= with others. In 2011 when float hits (sic) my account I would not know until I have transacted then I would realize I have more float than I had. I would not tell who has sent the float. I would not be informed by anybody that float has been sent to my account.

I informed Doreen Gasinzi – now Assistant Revenue Analyst that I have received more money on my transaction account in July 2011. I also informed Doreen Lukandwa an Administrator Mobile money. Lukandwa asked me to put it in writing to her and copy to Richard Mwami and Patrick Sentongo.

Patrick Sentongo replied the same day that they were preparing for a super agency so I should just trade in the money. This meant they would be depositing float to my line and then transfer some to other centres when required. But I was also transacting.

The money used to increase and decrease without my input. I would not know who was doing it. Sometimes it would reduce before close (of) day. Every day I would communicate to head Treasury the cash and e-balances."

A2 gave examples of suspicious float that hit her account. She stated that in July 2011, **206,000,000** was journalised by Ronald Sebugenyi. That she did not know Sebugenyi but this money hit her account and it was scooped off in lesser figures, about three times a day, as it was shown in **PEX26**. This document was the account statement of the Public Access Shop operated by A2 for the period 2/5/11 to 9/12/11.

She also testified that Sebugenyi deposited **45,000,000** on 17/8/11 at 13:19 but three seconds later at 13:22 **UGX 43,500,000** was taken off her account by the same Sebugenyi. She also testified about another amount of **UGX 5,000,000** deposited and scooped off by the same Sebugenyi. **PEX26** had all the impugned journals from Sebugenyi and Sentongo to Public Access which PW4 found to amount to **UGX 3,759,319,389**, for the period May 2011 to December 2011.

Regarding receipt of money by the appellant from A2, there was further evidence to prove that the appellant benefited from these fraudulent transactions at the Public Access Shop involving the fictitious Ronald Sebugenyi.

In his submissions in respect of Ground 5, the appellant's counsel complained about the trial judge's finding that the appellant admitted that he received a total of **UGX 241,000,000**. He charged that it was not backed by any evidence on the record and so it must have been a fanciful theory in the mind of the trial judge.

However, we found that in his cross-examination, the appellant admitted that A2 sent him money on 15th August 2011 at 2.34pm. The Statement of Account for the Public Access Shop (**PEX26**) showed that on the same date, Sebugenyi Ronald created a journal at 18:01:05 of **UGX 45,000,000** to transfer money to the account of Joan Nabugwawo. Immediately following was a transaction where **UGX 30,000,000** was taken off Nabugwawo's account on 16/08/11 by Patrick Sentongo, the appellant

The appellant also stated in cross-examination that on 24/8/11, **UGX 55,000,000** was sent to him by Sebugenyi Ronald. It was journalised as purchase of mobile money by the appellant. He also admitted that he got **UGX 10,000,000** on 18/8/11; **5,000,000** on 18/8/11; **10,000,000** on 20/8/11; **10,000,000** on 24/8/11; **6,500,000** on 25/8/11 and **5,000,000** on 26/8/11.

The appellant admitted that he got further amounts from the same Sebugenyi in September 2011. He stated that during that period he received a total of **UGX 241,000,000** from the Public Access Shop. The finding by the trial judge that during the trial the appellant admitted that he received this amount from the system was therefore not a fanciful theory; it was borne out by the evidence on the record. This partially disposes of the appellant's grievances in Ground 5 of the appeal.

The final contention for the appellant about the embezzlement in Count 3 was that there was no audit report or audited books of account of MTN to prove that it incurred the loss of **UGX 3,759,319,389**.

PW3 testified about the process after the fraud was discovered. He stated that the MTN CEO decided to get an audit firm to carry out a forensic audit to ascertain how the fraud was effected. That Grant Thornton, was engaged to carry out the Audit. Further that Grant Thornton brought in the system experts from Fundamo and Risk

Secure, the provider of the anti-money laundering system and Information Management System (IMS), to participate in the exercise.

PW4 confirmed this. She explained that after Grant Thornton was hired, they were given terms of reference. They included studying and understanding the operating system of mobile money, documenting the *modus operandi* of the fraud, identifying the fraudsters and quantifying the loss. PW4 presented two copies of the Audit Report entitled *"Report on Investigation – MM Operations, January 2012."*

In conclusion, we find that the loss of **UGX 3,654,290,304** by MTN was proved. That the participation of the appellant who orchestrated the movement of the money to the Public Access Shop operated by A2 was also proved beyond reasonable doubt. The trial judge therefore could not be faulted for convicting the appellant of the offence in Count 3.

Count 4 and Ground 5

Submissions of counsel

With regard to Count 4, embezzlement of **UGX 5,846,000,000**, counsel for the appellant submitted that it was not proved beyond reasonable doubt because there was no evidence about how this amount was arrived at. He contended that **PEX17** merely gave a block figure without showing court how the auditors arrived at it. That PW4 confirmed this in her testimony when she stated that they "dealt with a block figure" and did not apportion money to each of the accused persons.

Counsel further submitted that there was no classification of the entries contained in **PEX20** to show which entry was computed in order to get the total of **5,846,000,000**. That the trial judge evaluated the evidence based on the assumption that the appellant created **sentop121**. He therefore erroneously acquitted A3 and A5, who were charged under the same count.

Counsel for the appellant complained about the trial judge's attribution of the use of A3 and A5's names to abuse of the system by the appellant. He submitted that this assumption by the trial judge was not backed by any evidence. He pointed out that **sentop121** through which the fraudulent transactions were carried out only featured in **PEX17**. He emphasised that there was no evidence to prove that **sentop121** was

created and used by the appellant and that he also created and used Ronald Seebugenyi on the system.

Counsel went on to submit that there was no evidence from MTN that that monies were deposited on the account of Always Uganda Ltd fraudulently, or from **sentop121**, the fraudulent user account.

Counsel further charged that the trial judge's conclusion that the act of the appellant hiding was that of a guilty mind because he knew that he stole money was another fanciful theory. He stated that it was not backed by any evidence on the record. That the evidence of PW10, the investigating officer, was to the effect that the appellant was not in hiding. He relied on the decision in **Mulindwa James v Uganda, Supreme Court Criminal Appeal No. 23 of 2014,** where the court relied on **R v Isiraili Epuku s/o Achietu (1934)1 EACA 166**, and held that suspicion may be strong but the law is clear; suspicion however strong it may be is not sufficient to fix a person with criminal responsibility.

The complaints in Ground 5 were partly related to the findings of the trial judge in Count 4. The appellant's complaint in Ground 5 was that the trial judge made statements in his judgment that were not based on the evidence on the record that: *"... the appellant further admitted being an approver in the money liquidation process;"* and that *"A1 admits having had supper user rights to create other users on the system."* He contended that these statements not borne out in evidence were highly prejudicial to the appellant as they connoted that he admitted creating the fraudulent accounts, which was not true.

In reply to the submissions challenging the conviction in Count 4, the respondent's counsel submitted that it was proved that the appellant participated in the theft of **UGX 5,846,000,000**. That the slightest asportation was enough to prove the offence. She emphasised that it was already established that it was only the appellant who had the rights to create users on the system. She referred to the testimony of PW4 where she referred to **Annexure 3, Appendix A, PEX17** which showed the list of subscribers whose accounts were credited with this money and indicated who was responsible for posting it. She submitted that PW4 pointed out that the amount of money posted was indicated as **UGX 5,846,000,000**. The posting was mostly by the appellant, and the user of **brianokuru01** on the system.

Counsel further submitted that in the testimony of PW3, he stated that the username **brianokuru01** was also the user of the appellant's workstation, IP address **10.156.1.128.** Counsel pointed out that PW3 also testified regarding **PEX11** that on the 3rd October 2011 at 9.57am, Ronald Sebugenyi's account authorised journals or transfers and at 1.20pm selected customers to high value subscriber profiles from the customer account profile to enable them to receive higher values. She pointed us to the log trail marked **PEX10**.

Counsel for the respondent further referred us to the testimony of PW3 where he stated that the user Sebugenyi Ronald was created by the appellant using his acknowledged user ID **senpat231** on 4th October 2010. Further that it was PW3's testimony that it was the appellant who disabled Sebugenyi who had been tagged to user ID **ayo2104**.

As to whether the trial judge erred when he referred to the disappearance of the appellant during the investigations as an inculpatory fact, counsel for the respondent referred to the testimony of PW10 and PW11. She concluded that in view of the evidence of the two witnesses the trial judge was correct when he concluded that the conduct of the appellant was that of a guilty mind, and a statement of fact.

Counsel for the appellant did not respond to the submissions of the appellant's counsel in respect of Ground 5 that some of the statements that were made by the trial judge were not borne out with evidence.

Resolution of Court on Count 4 & Ground 5

In Count 4 the appellant was indicted with Brian Okurut and Baryamwijuka Eriya. In the summary of his findings against the appellant for the embezzlement of **UGX 5,846,000,000**, the trial judge relied on the statement made to the police by PW3 about the manner in which the appellant manipulated the system to assign the rights of a Finance Administrator to the fictitious Ronald Sebugenyi. The judge then stated thus:

> *"The above excerpt shows the manipulative nature of A1. According to PW4's testimony, A1 was the "owner" of the system. He had super user rights and used them to unleash havoc. It is therefore no wonder that A4 was linked to a ghost called Sebugenyi who was*

not even an employee of MTN to make transactions that were not subject to authorization in the names of A4 since they shared user ID ayo2104.

...

The dispute account transaction report which is exhibit P20 clearly captures Sebugenyi, a creature of A1 and A1 himself as the fraudsters that stole 5.8 billion from the system between November and December 2011 alone. I was asked to consider that A1's IP address was not tendered in court and therefore he was not proved to have stolen.

With respect, exhibit P20 which is the dispute transaction account takes care of that. Both A1 and Sebugenyi (and they are one and the same person) did steal money from the adjustment for discrepancies account through the dispute account to bogus subscribers who drained the money. One of the exit points was an agent trading as always Uganda belonging to A1's wife called Nakimbugwe. She has disappeared since early 2012 to date."

With regard to the contention that there was no evidence about how the amount of **5,846,000,000** was arrived at, we found that PW4 testified about the process and the total amount that was stolen. The summary contained in the Grant Thornton Report was entitled *"Opening of a new channel"* and *"The acceleration phase"* in respect of which the auditors stated as follows:

"In addition to diverting money through (the) Public Access Cashier channel, a new route of diversion of funds was opened in August, 2011. For this purpose, using the same general ledger account of 'Adjustment for Discrepancies' fictitious e-floats (credits) were given to 'Always Uganda Limited,' MM Agent company which is reportedly owned by wife of Mr Patrick Sentongo. During the period of Aug-2011 to Dec-2011, an amount of Ushs 291 million was liquidated using Always Uganda Limited as a conduit.

...

The Trust Violators realised that the capacity constrains were being addressed by IT and the deadline for restoration of the IT system was fixed for 15th December 2011. Therefore the time at their disposal was limited and hence to accelerate the pace of the fraud, they used different agents to register 17 fraudulent subscribers.

Using the same methodology of debit to 'Adjustment for Discrepancies' (through dispute account), an amount of Ushs 5,846,000,000 was transferred to these subscribers."

PW4 testified about the transactions that led to the exit of this amount. She stated that money was taken off the Adjustment for Discrepancies Account, which was not a trading account but a suspense account that had to be balanced off at the end of each day to zero. It was then exited through the Dispute Account. That 17 subscribers were fraudulently registered and a total of **UGX 5,846,000,000/=** was liquidated through withdrawals that were made by the 17 persons listed in the report as: Aron Bukenya; Dan Kiiza; Godfrey Mutungi; Herbert Katamba; Isaac Katongole; James Masinga; Kabuye Phillip; Kiyimba Bob; Michael Konde; Moses Kitaka; Mutungi Godfrey; Okello George; Paul S. Kaluswa; Peter Kawuma; Peter Kiserere; Sauda Nakimbugwe and Tom Kiyingi.

The full details of their accounts were contained in **Annexure 3 Appendix A, PEX17**. It contained the names, telephone numbers, created for the subscribers, transactions carried out and amounts transferred to them, as well as the grand total of **5,846,705,004/=.** The document showed that the telephone accounts were activated by one Mariam Kamulung, also a fictitious person. Attached were printouts of the transactions on the system indicating the codes described by PW4 such as **"x, v, b, f, g, h, g, k, d, w,"** and so on, and the users who performed them as Patrick Sentongo, Brian Okurut, George Odyeny, Eriya Baryamwijuka and Angella Ayo.

It was also the testimony of PW4 that out of the 17 subscribers used in this fraud, only 9 had *"Know Your Customer"* (KYC) files. The files contained mismatching signatures and photos. They had drivers' licenses and local identity card, but the signatures on the IDs and licences were different from those on the KYC forms. PW4 stated that the 17 subscribers looked like *"poor people"* but their accounts were transacting huge amounts of money. This information was reflected in **Annexure 2, Appendix A, PEX17.**

PW4 further testified that the 17 fraudulent subscribers were proved to have exited the money through mobile money agents who colluded with the appellant. The mode of exiting the money was described by PW4 as follows:

Even some particular agents colluded with the trust violators. This is because liquidation was commonly done at their POS. Observation is in Annexure 3 of Appendix A, the money is created by A3 and immediately withdrawn in a matter of hours. It is not shown to have been received from a transaction ... is received directly from a journal.

The description or reference is the use of letters like "X", "V", "b", "f" etc. these are fictitious transactions. It should have indicated who sent the money or what is the nature of the transaction." (sic)

PW4 further stated that investigations established the involvement of the appellant, the Financial Administrator in Mobile Money, Brian Okuru (A3), Angella Ayo (A4) and Eriya Baryamwijuka, as well as Joan Nabugwawo (A2). **Appendix B** to **PEX17** had a list of the trust violators and their codes. PW4 went on to state that the appellant originated fictitious transactions of his associates as was indicated in **Appendix B** referred to above. Further that this money was created artificially by the appellant and the associates named above. They started on 17/5/11 and ended on 12/12/11.

PW4 further testified that when some of the accounts were automatically suspended by the system for exceeding the amount allowed for each subscriber, the appellant re-activated them to enable them to accommodate higher amounts. In paragraph 5.4 of **Appendix A**, **PEX17** it was stated that:

"It is evident from the above that the daily transactions limit was also reset by Patrick Sentongo and Brian Okurut, Fin Admin and Administrator, on 28/11/2-11 to ensure that high value transactions are carried out on a single day. It is also curious from the analysis that the activity on this account that in the initial stages, it appears the daily transaction limit was Ushs 10 million for deposits and withdrawals and hence when on 28/11/2011 at 12.39 a deposit of Ushs 10 million was pushed through a journal by Patrick Sentongo and the account balance exceed 10 million the account got suspended as can be seen from the screen shot above. However, Brian Okurut, Administrator, reactivated the account on 28-11-2011 at 15:57:02. Immediately thereafter, at 16.37 the withdrawals started from Always Uganda, and within a period of

one and a half hours (up to 10:53) an amount of Ushs 10 million were withdrawn by different agents.

More curiously on the next day, 29-11-2011 an amount of Ushs 30 million were credited to this account through the fraudulent journal by Patrick Sentongo. This time however the account was not automatically suspended by the system. The only possible explanation of this appears to be that the account profile must have been changed to allow higher deposits and withdrawals. ..."

The journals referred to above appeared on the dates and times stated in **PEX20**, the statement of the Dispute Account, and they showed that journals were created by the appellant and Brian Okurut (A3). However, there was also evidence adduced by A3 that he was not an employee in Mobile Money and so he had no access to the Fundamo System. We dealt with the aspect of the fraud in Ground 2 where we established that username **brianokuru01** attributed to A3 was false. It was a fictitious account created by the appellant.

The appellant admitted that he re-set the maximum limit for subscribers and agents on the system. That he did so because the nature of the business changed and agents required larger amounts of cash. He explained that the CEO and others were aware of this and did not take any issue with him. Instead they cleared liquidations that were above the limit that had been set for the business.

However, PW5, the Senior Manager Treasury earlier on testified about the MTN mobile money tariffs and commissions that were set in December 2009. He said that the maximum for Public Access requisitions was **27,800,000** but all the liquidations that the appellant fraudulently authorised were above the limit. Further that the maximum that subscribers could withdraw, according to the MTN guide on tariffs and commissions was **10,000,000**, but the system was set for **1,000,000** as the limit. That the amount of 10m that was stated in the tariffs was just a proposal that had not been operationalised. And that because of that, the amounts above **1,000,000** that were taken off the system had to move by manual transfers through journals directly to the 17 fraudulent subscribers.

The transactions which led to the accumulation of the total of **5,846,000,000/=** syphoned from the mobile money system were

detailed by PW4 in her testimony where she referred to the 17 fraudulent subscribers through whom the appellant worked to exit the money. The table in the record of appeal clearly shows how much was exited through the accounts of the appellant and the fictitious **brianokuru01**, in the table referred to as Brian Okurut. The total was **UGX 5,846,000,000.**

Regarding the contention that there were no specific amounts apportioned to each of the accused persons under Count 4, the amounts relating to each of the alleged trust violators were stated by PW4 and she gave evidence from the system to prove it, **Annexure 3 Appendix A, PEX17.** The list was replicated by the trial judge in the record of proceedings with the amounts apportioned to each of them.

However, Brian Okurut was acquitted for the reasons stated above. Angella Ayo was also acquitted because her account **ayo2104** had the fictitious Sebugenyi Ronald created by the appellant tagged onto it. She was not found to have been culpable for the transactions of Sebugenyi created by the appellant, because some of them occurred after she had already left MTN. Baryamwijuka Eriya (A5) was also acquitted because he was proved to have logged onto the system after the transaction of **UGX 40,000,000** for which he was indicted had already been carried out.

We also observed that the printout from the system that was attached to **PEX17** as **Annexure 3 to Appendix A** showed the names of the person who originated the fictitious journals that did not disclose the purpose for which journals were created, and which were code named **"x, v, b, f, g, h, g, k, d, w,"** and so on. They showed that they were created by the appellant and Brian Okurut, except for one on 2nd December 2011, at 7:14:54 for **UGX 40,000,000**, codenamed **"g"** which indicated that it was created by **"Eriya bary."** This was short for Eriya Baryamumwijuka, but he was acquitted for reasons stated above.

That left the appellant, Patrick Sentongo, as the person responsible for creating fictitious journals for sums of money amounting to **5,846,705,004/=.** The journals then facilitated 17 fraudulent subscribers, including Always (U) Limited, to take money off the MTN mobile money system.

Regarding the contention that there was no evidence adduced by MTN to show that monies were deposited on the account of Always (U) Ltd by **sentop121**, or the appellant, the testimony of PW4 explained how Always (U) Ltd was used to steal from MTN and the role that the appellant played in the fraud.

In cross-examination, the appellant admitted that one of the proprietors of Always (U) Ltd was his wife, Saudah Nakimbugwe. PW4 testified that this Always was used to receive fictitious float from August to December 2011 amounting to **UGX 291,000,000**. She referred court to **PEX17**, at page 12, which detailed the transactions of the Public Access Shop and Always (U) Ltd.

PW4 also testified that Always (U) Ltd had 8 lines through which money was received and liquidated. These were shown at page 3 of **Appendix B, PEX17**. The different points, mobile money agents that were used to liquidate money by the company, were shown in **Annexure 3, Appendix A, PEX17**.

PEX19 related specifically to the fictitious transactions of Always (U) Ltd in which the appellant participated. Float would be created for Always on the system after which Sauda Nakimbugwe would request for its liquidation into cash. The float requisition forms in **PEX19** all showed that the appellant authorised the replenishment of float to Always (U) Ltd. He did so in spite of the fact that he knew about the MTN rule against trading with relatives.

Annexure 3 to **Appendix A (PEX17)** showed that the journals for Saudah Nakimbugwe (Always) were created by Angella Ayo, Patrick Sentongo and Brian Okurut to the tune of **UGX 203,500,000**. It has been established earlier in this judgment that these were one and the same person, the appellant since he used the usernames **ayo2104** as the factious Ronald Sebugenyi, **brainokuru01** and **sentonp121** in his fraudulent dealings on the mobile money system.

In Ground 5, that appellant complained that the trial judge made an erroneous finding that he participated in approving liquidation of the monies that constituted the sum of **UGX 5,846,000,000**. However, it was established that during cross-examination, the appellant stated that he played a crucial role in liquidations. That he had to confirm that the money existed and the correct procedure was used to liquidate it.

Regarding **PEX19** which related to requisitions for Always (U) Ltd, his wife's business, the appellant said that he approved the liquidations because he did not go by the signature of the person requesting liquidation but by verifying whether the agent had money on account or not. The statement of the trial judge that the appellant admitted approving liquidations was therefore borne out by the evidence on the record. We therefore find that there was no prejudice thereby occasioned to the appellant.

The statement that the appellant admitted that he owned the system may not be correct. In his examination in chief, the appellant denied that he was the owner of the system. However, evidence adduced through PW3 and PW4 based on information from the providers of the system (FUNDAMO), the Finance Administrator was the person with the token for creating users and so was the owner of the system. PW3 testified that the appellant was the only person with the secret set of figures to open the system and create users on it in 2011. The appellant was therefore not prejudiced by the statement of the trial judge in any way.

Ground 5 of the appeal therefore had not merit and it fails.

As to whether the trial judge's statement that the appellant was in hiding and so displayed his guilt by his conduct was backed by evidence on the record, we considered the testimonies of PW10 and 11, police officers who were engaged in the investigation of the fraud.

PW10, in particular, testified that he looked for the appellant but could not locate him because he had already left MTN. That he went to his home in Kungu, Makindye but he was not at home. That he therefore searched his home in his absence and recovered two laptops which he thought could have information. Further that having found nothing of use on the laptops, they were returned to the appellant *"when he surfaced from his hideout."* However, during cross-examination he stated that the appellant was not in hiding. Further, that it was Mr Mbiire who finally called him to receive the appellant.

PW11 said nothing about the matter. But in his plain statement, **PEX34**, the appellant admitted to investigators that he was in hiding. That he went into hiding when he received a telephone call from one Ibrahim Luyombya, a driver at MTN, who advised him not to go to the

MTN Offices. That Luyombya warned him that if he did so he would be arrested as a suspect in the mobile money fraud. He explained that he remained in hiding until he reported to Mr Charles Mbiire who handed him over to the Police.

It was therefore not correct for the appellant's counsel to state that the finding that the appellant was in hiding was an extraneous statement not borne out by evidence. The appellant clearly had a guilty mind, otherwise he would not have stayed away from home and his work place, as he did, before the 30th December 2011 when his resignation was to take effect.

In conclusion, we find that the trial judge had sufficient evidence to convict the appellant for the embezzlement of UGX **5,846,705,004/=** in Count 4 of the Indictment. The offence was proved against him beyond reasonable doubt.

Count 5

Submissions of Counsel

With regard to Count 5 for in which the appellant was convicted for the offence of electronic fraud by making false transactions through which UGX **10,220,178,132** was transferred, the appellant's counsel contended that the particulars disclosed were insufficient. That as a result the appellant did not have sufficient information to defend himself and was prejudiced throughout the trial.

Counsel further contended that transfer connotes movement from one place to another. That it was incumbent upon the prosecution to disclose the destination of the monies moved from the mobile money accounts. And that though it was stated in the indictment that the appellant and his co-accused made false transactions and unlawfully moved **UGX 10,220,178,132** from the MTN mobile money accounts, it did not disclose which accounts. Further that the indictment violated the provisions of section 22 of the Trial on Indictments Act (TIA) and ought to have been struck out.

Counsel further contended that there was no credible evidence for the trial judge to rely upon to sustain this charge. That the trial judge relied on his decisions in Counts 3 and 4 and came to the conclusion that the

offence in Count 5 had been proved and so convicted the appellant. Further that he relied on **PEX32** and concluded that the appellant benefited from the fraud because he owned property.

Counsel for the appellant further submitted that the evidence in **PEX32** suggesting that the appellant was rich beyond his means was not evidence of transfer and electronic fraud. He asserted that the appellant sufficiently explained how he obtained the money to acquire the property; through bank loans and his businesses. He complained that the trial judge ignored this evidence and did not evaluate it. That had he evaluated it properly, he would have come to a different result. He pointed out that the evidence in **DEX24** and **DEX25,** about the appellant's loans, was not challenged by the prosecution. He prayed that this court finds that Count 5 was not proved against the appellant.

In reply, counsel for the respondent submitted that the Indictment at committal was accompanied by a summary of the case. That the summary contained a detailed description of the offences and thus better particulars thereof. Further that this was disclosed to the appellant before he took his plea, meaning that the appellant was well aware of the particular counts referred to in the Indictment and the facts relating to them. She explained that the total amount fraudulently taken was related to and included the monies in Counts 1, 2, 3 and 4 of the Indictment. That as a result, the prosecution did not contravene sections 22 and 25 of the TIA.

With regard to argument that there was insufficient evidence for the trial judge to convict the appellant for electronic fraud, counsel listed the 4 ingredients of the offence: deception; intention to secure unfair or unlawful advantage; a computer system and participation.

Counsel went on to submit that PW2, PW3, PW4 and PW5 testified that MTN had a computer system of which the appellant was the Finance Administrator. Further that PW4 testified that the appellant had the sole, unrestricted and unchecked access to the system. That he combined administrative rights and rights to operate the system as the provider of user access and alteration of user rights. She emphasised that the appellant was a super user and the only person at MTN with the token to create users on the system. She pointed us to the evidence that the usernames **sentop121**, **ayo2104** and **brianokuru01** were used to move money from the system amounting to **UGX 10,220,178,132**.

In response to the contention that there was no evidence adduced to show that the MTN accounts were affected by the activities attributed to the appellant, the respondent's counsel submitted that PW4 highlighted the loss suffered by the company. That it was she that stated that a total of **UGX 10,220,178,132** was lost. Further that PW5, the Senior Manager Treasury, highlighted the different fraudulent transactions in **PEX18**, the liquidation forms.

As to whether the appellant benefited, counsel for the respondent referred us to the evidence of A2, that whenever she liquidated the sums posted by the appellant, he went to her and took away cash in a bag. Counsel further submitted that there was evidence adduced to show that the appellant obtained properties in **ExhP32** worth **UGX 460,000,000** during the period close to the investigation. Further, that evidence was led through PW4 to show that **UGX 291,000,000** was fraudulently received by Always (U) Ltd, in which the appellant's wife had 40% shareholding. Counsel also pointed us to the list of 17 subscribers in **PEX13** which included the appellant's wife, Sauda Nakimbugwe.

Resolution of Court on Count 5

The indictment for electronic fraud contrary to sections 19 of the Computer Misuse Act was brought against the appellant, Brian Okurut (A3), Angella Ayo (A4) and Eriya Baryamwijuka (A5). It was alleged that the three wilfully transferred **UGX 10,220,178,132** by making false transactions on the MTN mobile money system.

The trial judge found evidence to convict the appellant but he acquitted his three co-accused. In his conclusion the trial judge ruled thus:

> *"A1 was very deceptive. He created ghosts gave them pseudo names and obscene rights to do anything without authorization. He benefitted from this scheme because he was shown to have estates which are far beyond his lawful means. His defence that he was a trader is not credible. He was a fulltime employee at MTN. He could have had side businesses but not property of the magnitude found in exhibit P32.*
>
> *Besides, some of the stolen money in counts three and four were exited through an agency called Always Uganda belonging to his*

wife who has since run away from justice. It was for his gain otherwise why does his wife disappear?

The charges in count 5 have been proved against A1 beyond reasonable doubt. The charges against A3, A4 and A5 have not been proved beyond reasonable doubt in count five."

The decision of the trial judge clearly shows that he relied on his decisions in Counts 3 and 4 to convict the appellant of electronic fraud. To that extent therefore, the observation of counsel for the appellant was correct. What needs to be determined now is whether there was sufficient evidence disclosed to prove the offence of electronic fraud against the appellant, beyond reasonable doubt.

But before we determine that question, we will consider whether the grievance that the particulars of the offence in the indictment were insufficient for the appellant to prepare his defence. In that regard, counsel for the respondent referred us to the summary of the case filed on committal of the appellant for trial in the High Court, which she asserted had sufficient information about the offence.

Section 168 of the Magistrates Act provides for committal for trial in the High Court in the following terms:

"(1) When a person is charged in a magistrate's court with an offence to be tried by the High Court, the Director of Public Prosecutions shall file in the magistrate's court an indictment and a summary of the case signed by him or her or by an officer authorised by him or her in that behalf acting in accordance with his or her general or special instructions.

(2) The summary of the case referred to in subsection (1) shall contain such particulars as are necessary to give the accused person reasonable information as to the nature of the offence with which he or she is charged."

We examined the contents of the summary of the case filed on committal of the appellant for trial. We observed that it contained further particulars about the offence of electronic fraud in paragraph 3 which specified that the offences in the indictment were committed on the MTN mobile money computer system (FUNDAMO). Paragraph 10 stated that

the total that was lost as a result of the fraud between May and December 2011 was **10,220,178,132.**

It was also alleged that the appellant and others moved money from the Adjustment for Discrepancies Account to the Public Access Shop, and from the Adjustment for Discrepancies Account to the Dispute Account. That the appellant created fictitious users on the computer system, including one Ronald Sebugenyi, in order to transfer the money. Further that the monies moved on the system were liquidated and drawn from the system and Stanbic Bank by the fraudsters, including the appellant himself and his wife, Saudah Nakimbugwe, Always (U) Ltd.

We find that sufficient information was disclosed by the prosecution to the appellant about the offence in Count 5. The prosecution therefore did not contravene the provisions of sections 22 of the TIA in framing the Indictment.

But had it not been the case, it is also our opinion that it was rather late in the day for the appellant to raise this matter on appeal. This is because section 50 (1) of the TIA provides for orders for alteration of Indictments. It states that objections about formal defects shall be taken immediately after the indictment has been read over to the accused persons, and not later

Having omitted to complain about the indictment in the trial court, the appellant could not, without the leave of this court, successfully raise this issue because of the provisions of rule 102 of the Rules of this Court.

We shall next consider whether the prosecution proved all the ingredients of the offence of electronic fraud to the standard required. Counsel for the respondent correctly laid them out as: deception; intention to secure unfair or unlawful advantage; a computer system and participation.

Starting with deception, it has already been established under ground 2 that the appellant manipulated the MTN mobile money computer system and created users on it. This included one Sebugenyi Ronald, whose username was linked to his computer at IP Address **10.156.1.128** and his acknowledged username **senpat231**. It was also

proved from the reports produced from FUNDAMO that the appellant used the fictitious username **sentonp121**, which he denied but evidence on the record laid it at his door. We need not belabour this ingredient because it was conclusively dealt with in Ground 2.

We find that the resolution of Ground 2 against him meant that the appellant's deceit, presence of a computer system and his participation in the deceit were all proved beyond reasonable doubt. The remaining ingredient then becomes the intention to secure an unfair or unlawful advantage.

As to whether the trial judge erred when he referred to the property acquired by the appellant around the time that the fraud occurred, we think that it was pertinent to the question. However, we are also of the view that the benefit that he secured need not have been connected to the acquisition of property.

In cross-examination, the appellant admitted that he received **UGX 241,000,000** from the Public Access Shop run by Joan Rose Nabugwawo (A2). He also admitted that Ronald Sebugenyi, a creature on the mobile money platform that was birthed by the appellant, sent him money, though he claimed he did not know this creature which operated the accounts **brianokuru01** and **ayo2104**.

We find that there could be no other viable reason for the appellant's use of the fraudulent usernames attributed to A3 and A4, **sentonp121** and Sebugenyi, other than to fraudulently move money on the MTN mobile money system. The appellant could not have had any other reason for these acts than to benefit from them, and he admitted that he did so. The inculpatory facts were therefore incompatible with the innocence of the appellant. They were incapable of explanation upon any other reasonable hypothesis than that of the guilt of the appellant (**Simoni Musoke v R; [1958] EA 715**).

However, it was not proved that the appellant benefited to the tune of **UGX 10,220,178,132**, though the testimony of PW4 and **PEX17** showed that a total of **UGX 10,220,178,132** was lost through his fraudulent actions. Of this amount, only **UGX 9,897,024,395** was attributed to transfers from the Adjustment Account for Discrepancies through subscriber transfers and withdrawals, the Public Access Mobile Money Shop and diversion through Agents, like Always (U) Ltd.

The balance of **UGX 323,153,739** unlawfully moved from the Adjustment Account for Discrepancies was credited to other mobile money shops and unidentified transfers which had not been reconciled by the time the Grant Thornton Report was released to MTN. This balance required further investigations to determine exactly how it was liquidated.

We find that all the four ingredients of electronic fraud were proved against the appellant beyond reasonable doubt. The trial judge therefore made no error when he convicted the appellant of the offence on the basis of his findings in Counts 3 and 4 for they related to electronic fraud as a separate offence.

Count 8

Submissions of counsel

In Count 8, the appellant was convicted with A2 for a conspiracy to defraud MTN of **UGX 10,220,178,132**. The appellant's counsel submitted that the trial judge erred when he convicted the appellant of this offence, as well as electronic fraud in Count 5 in the same indictment. He submitted that where one is convicted of an unlawful act, the conspiracy to commit that same act is deemed to have been terminated. He referred us to the decision of this court in **Serunkuma Edirisa v Uganda & 5 Others, Criminal Appeal No. 147 of 2016**, to support his submission.

Counsel further pointed out that in his judgment, the trial judge found that the appellant and A2 conspired to steal **UGX 3,759,319,389** (the total amount in counts 1, 2 and 3) and not **UGX 10,220,178,132**. He submitted that the trial judge erred when he acquitted A3, A4 and A5 of the conspiracy because it was not proved against them, but went on to convict the appellant of the same offence.

The appellant's counsel further submitted that the trial judge erred when he amended the indictment by adjusting the figures to **3,759,319,389,** for which the appellant was not charged in Count 5. He contended that this amounted to an amendment contrary to sections 50 (2), (3) and 51 of the TIA.

The appellant's counsel concluded his submissions by challenging the judgment and stating that there was no tangible evidence for the trial judge to rely upon to convicted the appellant and A2 of a conspiracy to defraud MTN.

The respondent's counsel made no response to the submission that the trial judge ought not to have convicted the appellant for the conspiracy after he convicted him of the substantive offence of electronic fraud.

But in response to the contention that the trial judge amended the indictment when he adjusted the amount specified in the indictment, counsel for the respondent submitted that he did not. She asserted that the trial judge found that the prosecution proved less money than was stated in the particulars of the offence and so adjusted it to what had been proved.

Counsel added that this did not mean that the appellant and A2 did not steal the money from their employer. She pointed out that it would have been unjust to acquit them on the basis that less was proved in evidence. That however, evidence was led by PW2, PW3, PW4 PW5 and PW7 that the two were in concert with each other to defraud MTN. That the adjustment of the amount by the trial judge therefore did not amount to an amendment of the Indictment.

Resolution of Court on Count 8

The indictment in Count 8 specified that the appellant, A2, A3, A4 and A5 were indicted with conspiracy to defraud MTN Uganda of **UGX 10,220,178.179**, contrary to section 309 of the Penal Code Act. After concluding the evaluation of evidence in respect of this offence the trial judge summarised his findings and held thus:

> *"Without much ado, my findings on counts three, four, five and six show that there was no conspiracy involving* ***all*** *the accused. This charge was preferred basing on the belief that* ***all*** *the accused participated in stealing this money. I have established that A1 was the manipulator. He was the schemer. He was the owner of the system by virtue of his super user rights. He abused his credentials and stole by exiting it through A2, the 17 bogus subscribers, his wife's agency called* ***Always*** *Uganda and other accomplice agents.*
>
> ...

It would be too naïve to refer to A2 as a victim. She had ample time to report this to her superiors beyond A1 but chose to enjoy the benefits. I find that A1 and A2 were conspirators to steal what amounted to 3.759.319.389= and not 10.220.178.132= as charged. A3, A4 and A5 are not guilty of conspiracy. They are the victims of it. A1 and A2 are guilty of conspiracy in count 8."

In effect, the trial judge convicted the appellant and A2 of conspiracy to defraud after convicting them of jointly embezzling funds from MTN in Counts 1, 2, and 3, amounting to **UGX 3,759,319,389/=.** We therefore find that the amount of **UGX 10,220,178,132** referred to in Count 5, electronic fraud c/t section 19 of the Computer Misuse Act was not the subject of the conviction in Count 8. The argument that the trial judge erred when he convicted the appellant and A2 in Count 5 yet he acquitted A3, A4 and A5 therefore does not hold water in relation to Count 8. We say so because the reasons for acquittal of these three persons were clearly enunciated in his judgment, with which we agreed in that respect.

It must now be established whether the principle stated by this court in the case of **Serunkuma Edirisa v. U** (supra), which was commended to us by counsel for the appellant, applies to the facts upon which the appellant and A2 were convicted of the conspiracy to defraud MTN.

In **Serunkuma Edirisa's case** (supra) the appellants were convicted of the offence of theft. They were contemporaneously convicted with the conspiracy to commit a felony contrary to section 390 of the Penal Code Act. Finding for the appellants, this court (consisting of Musoke, Musota and Tuhaise, JJA) held that:

"It would be unnecessary to punish an accused person for an agreement to carry out an offence, as well the offence itself, especially as the agreement constitutes the mens rea for commission of the offence in question. We are further persuaded by the observations of the learned authors of (the) Halsbury's Laws of England (supra), that the conspirators' agreement, which is the basis for the offence of conspiracy is terminated by completion of its performance that is, when the offence itself is committed. Accordingly, we agree with the submissions of the appellants' counsel on this point, and find that the learned trial judge should not have convicted the appellants of the offence of conspiracy to

commit the felony of theft and yet he had already convicted them for the felony of theft itself. We therefore quash the convictions of the 1st, 2nd, 3rd, 4th and 6th appellants for conspiracy to commit the felony of theft."

It may be useful to charge an accused person with the substantive offence as well as the conspiracy to commit the same offence in some cases. This was observed by the Court of Appeal for Eastern Africa in **Stanley Musinga and 4 Others v Rex (1951)18 EACA 18 211** where the court held that:

"Counsel for the appellant have referred us to expressions of opinion by the Court and by the Courts in England deprecating the joinder of a charge of conspiracy with charges of specific offences based on the same evidence. It is admitted that there is no illegality in such a joinder, but we agree that it ought not to be done in cases where it is likely to prejudice the conduct of the defence. No objection was raised to the joinder of this charge at the trial and we do not think that it was improper in the circumstances of this case. Indeed, it would seem to have been the only course open to the Crown to bring home the guilt of some of the persons concerned in this series of illegal transactions."

We emphasise this opinion here lest the deprecation of the joinder of charges of substantive offences with conspiracy to commit the offence be misunderstood to totally preclude an indictment which includes a conspiracy to commit the substantive offence. The Kenya Court of Appeal laid down a guide as to when it is suitable to bring charges for conspiracy together with charges for related substantive offences in **John Mburu Kinyanjui v Republic [1988] eKLR,** as follows:

"It seems to us that the principles summarised in Archbold Criminal Pleading, Evidence and Practice, 40th Ed para 4073 as to the desirability of including a count of conspiracy in an indictment or charge, offers a useful approach. But the question cannot be determined by the application of any rigid rules.

Each case must be considered according to its facts. The following points should be considered: -

1. *As a general rule where there is an effective and sufficient charge of a substantive offence, the addition of a charge of*

conspiracy is undesirable. It is not desirable to include a charge of conspiracy which adds nothing to an effective charge of a substantive offence. The conspiracy indeed may merge with the offence.

2. *To this general rule there are exceptions, as for instance:-*
   a) *Where it is in the interest of justice to present an overall picture, which a series of relatively small substantive offences cannot do; sometimes a charge of conspiracy may be the simpler way of presenting the case;*
   b) *Where there is clear evidence of conspiracy but little evidence that the conspirators committed any of the overt acts; or where some of the conspirators but not all, committed a few but not all, of the overt acts, a count for conspiracy is justified;*
   c) *Where charges of substantive offences do not adequately represent the overall criminality disclosed by the evidence, it may be right and proper to include a charge of conspiracy.*
3. *But a count for conspiracy should not be included if the result will be unfair to the defence, and this has always to be weighed with other considerations.*
4. *It may be necessary to try a count for conspiracy separately from substantive counts which are only examples of carrying out the conspiracy.*
5. *Where the evidence discloses more than one conspiracy, it is undesirable to charge all the conspiracies in one count, but it may not be bad in law as Musinga's case shows.*
6. *Other factors concern the number and type of conspirators, for instance, the possibility of two being husband and wife, or of two conspirators the possibility that one may be acquitted, may need to be safeguarded as Mulama v Rep [1976] KLR, 24 indicates.*

The question which one must then ask is why or in what circumstances it is undesirable to join a count of conspiracy with counts for substantive offences. The main ground is unfairness to the accused, which is a general consideration. That may arise because the accused may not know with what he is charged precisely, or may be embarrassing (sic) to be obliged to defend in the alternative."

The court pointed out that it would be prudent to bring such objections at the earliest point in the proceedings. This would help to avoid the quandary that the trial court found itself in when it convicted and sentenced the appellant and A2 for two offences based exactly on the same facts. The court expressed that matter in the following terms:

> *"Having set out the guidelines, we must then ask in what manner these conflicting interests are to be resolved. In England a practice direction was set out in [1977] 2 All E.R 540. It was:*
>
> 1. *In any case where an indictment contains substantive counts and a related conspiracy count, the judge should require the prosecution to justify the joinder, or failing justification, to elect whether to proceed on the substantive or on the conspiracy counts.*
> 2. *A joinder is justified if the judge considers that the interests of justice demand it.*
>
> *We may add that election or severance follows from the Court's inherent powers to see that its process is not abused, in the sense that the accused is guarded against oppression or prejudice. It is for this purpose that the rule is that the objection must be taken at the earliest opportunity; and here we congratulate counsel for trying to safeguard their clients at the right time, a chance missed in Musinga's case, whether or not their clients are ultimately proved right.*
>
> *Now these guidelines of 1977 are not unknown in East Africa. Mrs Awori brought the decision of the Court of Appeal in Uganda v Milenja [1970] EA 269 to the attention of the learned judge. The magistrate in that case had called upon the prosecution to justify or elect. That is the order that should have been made in this case."*

The decision in **Kinyanjui's case** is consistent with section 50 of the TIA. But that cannot be achieved now. The appellant was already convicted of a conspiracy which had been brought to an end when he participated in the offences in Counts 1, 2 and 3 with the appellant.

We agree with the principle espoused by this court in **Serunkuma Edirisa & 5 Others** (supra). We find that the trial judge erred when he convicted the appellant of the offence of conspiracy to defraud in the face of convictions for embezzlement in counts 1, 2 and 3 which were based on the same facts and for which he had been convicted both for embezzlement and electronic fraud.

The subsequent conviction for the conspiracy to defraud resulted in three convictions on the same set of facts. The result was not only oppressive but also extremely unfair and embarrassing. We therefore set aside the conviction and the sentence of three years that was imposed upon him for the conspiracy.

In conclusion, Ground 1 of the appeal partially succeeds. Grounds 3 and 5 had no merit and they are dismissed.

Ground 4

The appellant's grievance in Ground 4 was basically that the trial judge failed to address his mind to the provisions of sections 7 and 8 of the Electronic Transactions Act and the Computer Misuse Act while evaluating the evidence. And that as a result, he arrived at wrong conclusions which occasioned a miscarriage of justice.

Submissions of Counsel

The appellant's counsel contended that adducing the evidence contained in electronic data (users of the mobile money system, FUNDAMO, listed in **PEX14)** required the prosecution to comply with sections 7 and 8 of the Electronic Transactions Act. That the prosecution ought to have established the authenticity of the evidence before it was admitted. Finally, that it was erroneous for the trial judge to convict the appellant based on such evidence because it was unreliable and not authentic. He invited court to find so.

In reply, counsel for the appellant submitted that section 7 of the Electronic Transactions Act relates to authenticity of data messages; it emphasises that information shall be complete and unaltered. Further that section 8 relates to the admissibility and evidential weight of the data message or electronic record. That the burden to prove this lies on the prosecution.

The respondent's counsel went on to submit that in cases such as this one, it must be proved that at all material times the computer system in issue was operating properly and that the integrity of the information was not affected. Further, that the information was recorded in the ordinary course of business. Counsel went on to submit that the provisions of sections 7 and 8 of the Electronic Transactions Act are

similar to section 29 of the Computer Misuse Act of 2011, which the learned trial judge relied upon as PW2 and PW3 testified.

She explained that PW2 who was a Revenue Analyst at MTN Public Access testified about her interaction with the Mobile Money Platform, FUNDAMO, and how the MTN Information Technology Section assisted her to generate reports from it. She then presented the reports in evidence, such as the Mobile Money Statements, Dispute Resolution Account Statement and Ledger Account Balances.

She further pointed us to the ruling of the trial judge on the same question in which he found that the system capacity to receive, record and store messages or data was automatic. Further, that human effort to manipulate the receiving, recording and storage of data was ruled out. She concluded that as a result, the authenticity of the records that the prosecution relied upon was proved beyond reasonable doubt. She prayed that court dismisses this ground of appeal.

Resolution of Ground 4

We observed that the trial judge ruled on objections about the admissibility of reports extracted from the mobile money computer system twice during the course of the proceedings. The first was on the 10th of February 2015, during the testimony of PW2. On that occasion he ruled that:

> *"The burden of proving the authenticity of an electronic record is discharged when evidence is presented by the prosecution to explain how the electronic records it wishes to tender are recorded or stored in regard to the nature of the Business. It is only then that such electronic records can be admitted in evidence.*
>
> *In this case, the electronic records though generated by the witness cannot be admitted in evidence unless the prosecution adduces evidence regarding the integrity of the computer system to record, store and generate reports of the type the prosecution has presented through PW2.*
>
> *Consequently, I shall put on record this bundle as* ***P.I.D2*** *pending the production of witnesses that will vouch for the integrity of the MTN system to produce data of the type the prosecution seeks to rely on."*

During the testimony of PW3, Phrase Donald Lubega, on the 12th February 2015, the prosecution applied to tender in through him 3 statements in respect of the mobile money account of Saudah Nakimbugwe (Always Uganda Ltd). The witness testified that he generated the reports in issue from the mobile money platform. He was at the time the General Manager in charge of Sales and Distribution, Service Delivery and Enterprise Applications at MTN. Both counsel for the appellant and for A4 objected.

The grounds were that: (i) the witness was not the author of the documents; (ii) section 29 (5) of the Computer Misuse Act required the evidence regarding the standards, procedures, usage and practice of how the electronic record is recorded or stored to be adduced before the record is admitted; and (iii) the person tendering in the document should not be a party to the proceedings pursuant to section 29 (5) (c) of the Computer Misuse Act.

In reply, Mr Mwebesa for the DPP stated that: (i) section 29 (5) Electronic Transactions Act, gives a range of factors and that (ii) all of them need not be present before the record is admitted; (iii) the challenges experienced with the system that were detailed by the witness were not with regard to recording information but were a result of congestion due to too many subscribers using the system. That this did not affect the integrity of the system; and (iv) that if the evidence of PW2 was read together with that of PW3, it would become clear to the court that the objections were unfounded.

The trial judge found for the prosecution and admitted the contested documents as **PEX7** and **P9**, for the reasons that: (i) the fact that the witness is not the author did not apply in view of the provisions of section 29 (1) of the Computer Misuse Act which excludes the application of the rules of evidence, especially the *"best evidence rule;"* (ii) PW3 started his testimony by demonstrating on the projector how the messages and information between subscribers and the system are recorded, stored and retrieved which satisfied the provisions of section 29 (6) of the Act; and (iii) PW3 did not store the data on the MTN computer system and so could not alter it because the storage thereof was an automatic function that he could not manipulate within the meaning of sections 7 and 8 of the Computer Misuse Act.

To facilitate comprehension of the decision on this point, the relevant provisions are reproduced here below.

Section 29 (5) (c) of the Computer Misuse Act provides that:

(1) In any legal proceedings, the rules of evidence shall not be applied so as to deny the admissibility of a data message or an electronic record—

(a) merely on the ground that it is constituted by a data message or an electronic record;

(b) if it is the best evidence that the person adducing it could reasonably be expected to obtain; or

(c) merely on the ground that it is not in its original form.

(2) A person seeking to introduce a data message or an electronic record in any legal proceeding has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be.

(3) Subject to subsection (2), where the best evidence rule is applicable in respect of an electronic record, the rule is satisfied upon proof of the authenticity of the electronic records system in or by which the data was recorded or stored.

(4) When assessing the evidential weight of a data message or an electronic record, the court shall have regard to—

(a) the reliability of the manner in which the data message was generated, stored or communicated;

(b) the reliability of the manner in which the authenticity of the data message was maintained;

(c) the manner in which the originator of the data message or electronic record was identified; and

(d) any other relevant factor.

(5) The authenticity of the electronic records system in which an electronic record is recorded or stored shall, in the absence of evidence to the contrary, be presumed where—

...

(c) it is established that the electronic record was recorded or stored in the usual and ordinary course of business by a person who is not a party to the proceedings and who did not record or store it under the control of the party seeking to introduce the record.

(6) For the purposes of determining whether an electronic record is admissible under this section, evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic records are to be recorded or stored, with regard to the type of business or endeavours that used, recorded or stored the electronic record and the nature and purpose of the electronic record.

On the other hand, sections 7 and 8 of the Computer Misuse Act provide for the definition of modification of content and unauthorised modification as follows:

"7. Modification of contents

A modification of the contents of any computer takes place if, by the operation of any function of the computer concerned or any other computer connected to it result into—

(a) a program, data or data message held in the computer concerned being altered or erased; or

(b) a program, data or data message being added to its contents.

8. Unauthorised modification.

Modification is unauthorised if—

(a) the person whose act causes it, is not entitled to determine whether the modification should be made; and

(b) he or she does not have consent to the modification from a person who is entitled."

We observed that the prosecution took pains to lay down a detailed background for the production and admission of electronic evidence. This was necessary because it was the best evidence and the only evidence that they had to prove the charges against all of the accused persons in the case.

The evidence of PW2, Barbara Nalukwago, Finance Manager, Easy Money Limited set the pace. She explained that she carried out the first audit requested by A6 who was her supervisor and wanted to know whether the money on the system was safe. This was in view of the sudden resignation of the appellant.

PW2's testimony was a detailed exposition of the history of mobile money at MTN, the first company to start that business enterprise in Uganda; the registration of agents and how they were activated on the mobile money platform and given a number to identify them; the opening of subscriber accounts; limits of money on the system for subscribers and agents; and the trading model restricted to subscribers accessing funds through agents, not directly from mobile money accounts in the bank or from the system. She also explained the role of agents and the various staff of MTN in the Mobile Money Department, including the major role played by the appellant as the Finance Administrator with super user rights, as opposed to other Finance Administrators and Administrators.

PW2 also explained the different accounts that were used in the business and the relationships between them, the rules for operating them and the rights and obligations of the agents and the subscribers. She focused on explaining the roles of the accounts in issue such as the Adjustment for Discrepancies Account as a non-trading account and the dispute and mobile money accounts as a trading account. She further explained terms such as *"float"* and its *"liquidation,"* the main subjects of the fraud in this case.

PW2 also explained how the mobile money system was linked to Bank Accounts, and the system of reconciling the internal and external accounts. She testified about the background to the mobile money fraud and how it was discovered.

PW3's testimony was most instructive about the manner in which evidence was extracted from the system in order to provide information for the auditors, M/s Grant Thornton, who doubled as forensic investigators. It is this evidence that was the basis for the charges in the indictment and the report used in evidence, **PEX17**; although the appellant's counsel only found fault with **PEX14** which was just a list of users of FUNDAMO. **PEX14** simply specified the names of staff, roles

in the Mobile Money Department and their usernames on the computer system.

The most important parts of PW3's testimony for purposes of authenticity and therefore admissibility of evidence in court from the system were that:

> *"The finance Administrator has a token which allows the creation of users. In 2011 it was A1 with that token – set of secrets of characters. Only one person at a time keeps the token for the security of the system. ...*
>
> *One is not allowed to share passwords or to operate from another person's log-in. If call centre people receive a request of a financial nature they refer it through the system to the Financial Administrators who then rectify the problem. E.g. getting money from a wrong account number to the correct account number.*
>
> ...
>
> *All traffic into the data bases is recorded at the firewall logs. The data base servers themselves have a record of individuals who have logged and the activity done.*
>
> ...
>
> *The firewall, Gemalto servers, and data bases all have capabilities to record all transactions they have handled either successfully or not.*
>
> ...
>
> *Fundamo has a separate data base where it maintains all its information. MIS has an independent databases into which it pulls information from fundamo to facilitate business reporting.*
>
> *MIS is a program to pull information from fundamo at less peak business times for business reporting. It is an independent share point."*

The detailed evidence adduced by the prosecution about the impugned computer system and the manner in which the trial judge approached the evidence both show that the prosecution and the trial judge observed the principles in sections 7 and 8 of the Computer Misuse Act. They also took cognisance of the provisions of section 29 of the Electronic Transactions Act.

Ground 4 of the appeal therefore also fails and it is dismissed.

Ground 6

The appellant's grievance in Ground 6 was that the sentence in Counts 3, 4 and 5 was manifestly harsh and excessive in the circumstances of the case, compared to sentences that the trial judge imposed for similar counts. He must have meant Counts 1 and 2 for which sentences of 2 years each were imposed upon the appellant for embezzlement.

Submissions of Counsel

The appellant's counsel submitted that the offences of embezzlement under the amended indictment are all stated to have occurred around the same period, between May and December 2011. He submitted that there was no basis or justification for imposing a term of 10 years in Counts 3 and 4, when 2 years each were imposed for Counts 1 and 2.

He asserted that the sentence of 10 years for electronic fraud was also harsh and excessive in the circumstances of the case. That having noted that the appellant was a first offender, had young children and was remorseful, the trial judge ought to have weighed these in his favour and given him a lenient sentence; a uniform sentence of 2 years for each of these offences. He referred us to the decision in **R v Sawedi Mukasa s/o Abdulla Aligawesa, Court of Appeal of Eastern Africa Criminal Appeal No 182 of 1945,** for the principle that where a person commits more than one offence at the same time and in the same transaction the practice is to impose a concurrent sentence.

In reply, counsel for the respondent stated the principle that the appellate court is not to interfere with the sentence imposed by the trial court unless the exercise of its discretion is such that the sentence imposed is manifestly excessive or so low as to amount to a miscarriage of justice. She referred us to the re-statement of that principle in **Hudson Jackson Andrua & Another v Uganda, Supreme Court Criminal Appeal No 17 of 2016** and **Kiwalabye Bernard v Uganda, Supreme Court Criminal Appeal No. 143 of 2001**.

Counsel for the respondent then pointed out the maximum sentences for each of the offence for which the appellant was convicted and stated that the trial judge considered both the aggravating and mitigating

factors for each offence before sentencing the appellant and A2. That he exercised his discretion judiciously in passing the sentences. She asserted that they were not manifestly excessive.

The respondent's counsel also agreed with the principle expressed by the appellant's counsel that where one commits more than one offence, concurrent sentences ought to be imposed upon that person. She submitted that the trial judge observed this principle while sentencing the appellant because the sentences imposed upon him were to run concurrently.

Resolution of Ground 6

We observed that the trial judge considered the mitigating and aggravating factors presented in respect of the appellant in his sentencing ruling as follows:

> *I have addressed my mind to submissions by both sides. On the basis of the evidence that was adduced and the reasons contained in my judgment of today. (sic) It is very clear that Mr. Patrick Sentongo was the architect, the schemer, master planner and the originator of the plot to steal money from the MTN mobile money system.*
>
> *He was so sophisticated and cunning. He had super user rights on the system that allowed him to do anything to get what he wanted.*
>
> *It is a finding of fact that he manipulated the system to create user names either standing alone or linked to existing users to steal money from the mobile money platform.*
>
> *Once he had filled his guts, he disabled the users and exit points. He then left the company to go into hiding. He was arrested only after being trapped late in the night. He had become a nocturnal animal.*
>
> *I would say that A1 was a game ranger turned into a poacher. These are aggravating factors.*
>
> *I however consider that at forty years, A1 is a young adult who is very well educated and understands information technology well. If he puts his IT knowledge to better use, the country would benefit.*
>
> *I have been asked to consider that he has children left by his wife who is on the run. He is also a first offender although this is*

diminished by the fact that he habitually stole money for 6 months and only left on his own terms not because he was stopped in the act."

He then imposed sentences upon the appellant for each offence as follows:

Count 1: Embezzlement of UGX 8,000,000 - 2 years' imprisonment

Count 2: Embezzlement of UGX 67,000,000 - 2 years' imprisonment

Count 3: Embezzlement of UGX 3,684,290,304-10 years' imprisonment

Count 4: Embezzlement of UGX 5,846,000,000 -10 years' imprisonment

Count 5: Electronic Fraud by making false transactions resulting in the transfer of UGX 10,220,178,132 - 10 years' imprisonment.

We make no reference to Count 8 (conspiracy to defraud) in respect of which the sentence and conviction against the appellant have already been set aside earlier in this judgement.

We are guided by the principle restated by the Supreme Court in **Kiwalabye Bernard v Uganda** (supra) that:

"The appellate court is not to interfere with the sentence imposed by a trial court which has exercised its discretion on sentence unless the exercise of the discretion is such that it results in the sentence imposed to be manifestly excessive or so low as to amount to a miscarriage of justice or where a trial court ignores to consider an important matter or circumstances which ought to be considered while passing the sentence or where the sentence imposed is wrong in principle."

The principles that guide the courts in sentencing were conveniently reduced into one document, *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013.* Direction 6 sets out the general principles of sentencing which are a guide. They include the gravity and nature of the offence, the need for consistency with appropriate sentencing levels, and any information provided to court concerning the effects of the offence on the victim or the community, and the offender's personal family. Also included on the list are the circumstances prevailing at the time the offence was committed up to the time of sentencing, any previous conviction of the offender or any other circumstances that the court considers relevant.

We find that the trial judge addressed his mind to most of these principles before coming to what he considered to be an appropriate sentence for the appellant, in the circumstances of the case.

The appellant seems to be complaining about the failure to observe the need for consistency with appropriate sentencing levels. But that does not require the judge to consider sentences for similar offences committed by the offender in the same series of transactions or at the same time. Had the trial judge addressed his mind to this principle, he would have considered sentences that have been imposed by the High Court and appellate courts for similar offences, not similar offences committed by the appellant for which he was convicted and sentenced at the same time.

Nonetheless, the maximum sentence for the offence of embezzlement is provided for in section 19 (d) (iii) of the Anti-Corruption Act. It provides that the maximum sentence for the offence of embezzlement is 14 years imprisonment and a fine not exceeding three hundred and thirty six currency points, or both.

In this case the trial judge considered the mitigating and aggravating factors and deemed it fit to sentence the appellant to 10 years imprisonment with no fine. It was below the maximum provided for by law.

The appellant's complaint that the sentence of 10 years for the offence of electronic fraud was also harsh and excessive in the circumstances was also unfounded. Section 19(1) of the Computer Misuse Act provides that:

> **(1) A person who carries out electronic fraud commits an offence and is liable on conviction to a fine not exceeding three hundred and sixty currency points or imprisonment not exceeding fifteen years or both.**

Given the maximum sentence provided for this offence, the trial judge exercised his discretion and sentenced the appellant to a term of imprisonment of 10 years, only. He did not impose the maximum of 15 years; neither did he impose a fine upon him in spite of the gravity of his actions.

In **Teddy Seezi Cheeye v Uganda, SCCA No 32 of 2010,** the appellant was convicted of embezzlement of UGX 120,000,000 from his own company. He was sentenced to 10 years' imprisonment. The sentence was confirmed by this court and the Supreme Court. It is therefore our view that 10 years' imprisonment for the large amounts of money that the appellant syphoned from his employer in this case was a lenient sentence.

We are also mindful of the fact that the trial judge sentenced the appellant to sentences to run concurrently, consistent with an established sentencing principle, drawn to our attention by counsel for the appellant, and agreed to by the respondent's counsel.

We found no reason to interfere with the sentences imposed by the trial judge. Although he did not consider sentences passed for similar offences on other convicts, the trial judge considered all the mitigating and aggravating factors that were presented to court. We therefore uphold the sentences he imposed.

Ground 6 of the appeal therefore has to fail and it is dismissed.

Ground 7

Submissions of Counsel

The appellant's main complaint in this ground was that the trial judge erred in law and fact when he ordered the appellant to pay compensation of **UGX 5,000,000,000**, because it was not proved that MTN lost that amount. Counsel for the appellant further submitted that the quantum was excessive and exorbitant. He reiterated the arguments that the prosecution failed to prove its case against the appellant and that the investigation report relied upon, **PEX17,** was not supported by documents to show how this amount was arrived at.

The appellant's counsel went on to submit that in order for the court to order compensation, it must be proved, with cogent evidence, that there was loss resulting from the acts of the accused. That in particular, PW4, the author of **PEX17** clearly testified that she examined documents that were adduced in evidence to support the loss. But there were no audited books of account brought to court to show that MTN Uganda indeed lost

UGX 10,220,178,132, or the **UGX 5,000,000,000**, ordered as compensation by the trial judge.

He referred us to the ruling of the trial judge on sentence where he stated that *"It was difficult to tell how much each of the convicts took or how much other accomplices not in court took out of the stolen money."* He concluded that it was erroneous for the trial judge to order the appellant to pay **5,000,000,000** in compensation and prayed that this court sets it aside.

In reply, the respondent's counsel submitted that it was proved that MTN suffered loss. She pointed us to the testimony of PW5 who submitted that the loss occasioned was **UGX 10,200,000,000**. And that according to the same witness, MTN had to transfer **UGX 13,000,000,000** from its current account to the mobile money account to make good the loss.

Counsel then submitted that the compensation ordered by the trial judge was less than the actual loss incurred by the company. That the trial judge was justified in ordering compensation to the tune of **5,000,000,000** on the basis of section 126 of the TIA. She further referred us to sections 1, 2, 3 and 4 of the Anti-Corruption Act, which empower the court to order for compensation. She finally drew our attention to section 35 of the same Act which provides that the loss suffered by the principal should be made good by the agent who occasioned it.

She then prayed that Ground 7 and the whole appeal be dismissed.

Resolution of Ground 7

The main contest in Ground 7 is the propriety of the order for compensation to the complainant for the loss suffered as a result of the acts of the appellant. Peripheral to that is the contest that it was not proved that the appellant was responsible for the loss of **UGX 5,000,000,000** which the trial court ordered him to make good.

We are guided by the principle that the appellate court is reluctant to interfere with the discretion of the trial court unless it is shown that the decision was erroneous or contrary to the law or that an award is manifestly excessive or so low as to amount to a miscarriage of justice.

It was observed that in their submissions on sentence at the trial, the prosecution submitted that asset recovery is important in the fight against corruption; convicts should not be allowed to get away with their loot. Further that MTN lost money and had to pay it back as shown in the impact statement produced by the company, which revealed both financial loss and reputation damage.

The prosecution relied on Article 126 (2) of the Constitution and section 126 of the TIA and prayed that court orders the appellant and A2 to compensate MTN to the tune of UGX 9.8 billion. Counsel for the convicts did not respond to this prayer.

On making the order for compensation against the appellant, the trial judge ruled as follows:

> *"Under Article 126 (2) (c) of the Constitution, victims of wrongs are entitled to adequate compensation.*
>
> *Similarly, under section 126 of the TIA, the court is empowered to use its discretion to order a convicted person to pay such compensation as court deems fair and reasonable where it appears from the evidence that somebody has suffered material loss. Because it is difficult to tell how much each of the convicts took and how much other accomplices not in court took out of the stolen money, I will exercise my discretion with a lot of caution. I do not want to impose compensation that would make the punishment disproportional.*
>
> *Consequently, as against A1, I make an Order that he shall compensate MTN Uganda to the tune of five billion.*
>
> *In the context of A2's participation which just earned her tokens of appreciation, I shall make not make an order of compensation against her."*

We will first address the appellant's contention that the prosecution did not prove loss of UGX 10,220,000,000 and/or 5,000,000,000, because they did not produce audited books of account of MTN in court to prove the loss.

The appellant's counsel advanced the same arguments in respect of Counts 1, 2, 3 and 4. We addressed it by pointing out the evidence on record from the electronic accounts of MTN on Mobile Money which were

audited by M/s Grant Thornton, Certified Public Accountants. Details of the actual loss quantified by Grant Thornton were included in their main report at page 11, as Established Fraud, amount tracked: **9,897,024,395**; amount unreconciled: **323,153,739**. The actual loss that was established after the audit by Grant Thornton was therefore **UGX 9,897,024,395**.

Peter Ochen (PW5), the Senior Manager Treasury also testified about the various transactions unearthed in the fraud. He classified them and then explained the loss and how MTN had to make it good as follows:

> *"About 10.2 billion was lost through the 17 subscribers, Always (U) and Public Access accounts.*
>
> *The total e-money in the MTN mobile money must be equal to the bank escrow account. What we got because of this fraud is that there was more e-float (e-money) than actual money in the bank.*
>
> *An external audit was done. The loss was quantified. MTN had to transfer funds from its current account into the mobile money account to cover the loss. A corporate liquidly fund was opened in the mobile money system to ... the funds to cover the loss. 9.9 billion was transferred first and then 3.1 billion was transferred to this Corporate Liquidity Account in August 2012. I can identify these transactions on the current account statements (JK9 and JK10)."*

PW5 seems to have rounded off **9,897,024,395** to **9.9 billion** shillings. The former is the actual amount that was proved to be lost and for which the complainant (MTN) may be compensated.

We will next address the complaint about the statement that *"it was difficult to tell how much each of the convicts took"* out of the amount that was stolen, and whether this would affect the result.

It was established that the theft in this case was achieved by transferring money on the MTN mobile money platform by passing fictitious journal entries by debiting the general ledger account called the *"Adjustment Account for Discrepancies"* and creating fictitious e-float (e-money) in the *Public Access Shop* that was operated by Joan Nabugwawo (A2). We consider that this money was stolen once it left the Adjustment Account for Discrepancies because this ledger was not

a trading ledger but a suspense account. Any removal of money from this account to create fictitious money amounted to theft.

The fictitious e-money transferred to Public Access was then liquidated by Nabugwawo, to get cash upon which the appellant would collect cash from her. She too transacted in the balances after the appellant had collected some of the cash. The money stolen through this route amounted to **UGX 3,759,319,389**.

The other route was the creation of fictitious journals from the Adjustment Account for Discrepancies whereby e-float was transferred directly to the account of Always (U) Ltd, operated by the appellant's wife. Once again the offence of theft by the appellant was complete once the money was moved from the Adjustment Account for Discrepancies, a non-trading account, to the account of Always (U) Ltd. This money transferred through this route amounted to **UGX 291,000,000**.

Thirdly, 17 fraudulent subscribers were created. Using the same method, money was transferred from the Adjustment Account for Discrepancies, through the Dispute Account and directly credited to the 17 fraudulent subscribers. The subscribers withdrew and used the money to purchase commodities. But the theft was complete once the money without authority the appellant moved the money from the Adjustment Account for Discrepancies to the Dispute Account. The total amount transferred was **UGX 5,846,000,000**.

The trial judge found, and we agree with his finding, that Joan Nabugwawo could not have created the money. She had no access to the mobile money system. She did not steal the money from MTN; she was an accessory after the fact of the theft in that she received the fictitious money and liquidated it into cash. This enabled the appellant and others to get a hold of it.

We therefore find that the fictitious money, which was turned into cash and which MTN had to refund into the Mobile Money Account, was all created by the appellant. Had he not transferred money from the adjustment account for discrepancies to other accounts, he and his accomplices would not have gotten access to the cash. It may not have been proved that he got all of it, or how much he got, but he is squarely responsible for the theft of the money from the mobile money system, established to be **9,897,024,395**.

The appellant complained that the quantum of **5,000,000,000** ordered by the trial judge was excessive and exorbitant, and so ought to be set aside. We shall therefore next consider the principles for determining quantum in orders for compensation in such cases, starting with Article 126 (2) (c) of the Constitution.

Article 126 (2) (c) of the Constitution provides that one of the principles to be applied in adjudicating both civil and criminal cases is that the courts shall, subject to the law, award *adequate compensation* to victims of wrongs. This principle is carried into the TIA where the relevant parts of section 126 provides for compensation as follows:

> **(1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, *in its discretion* and in addition to any other lawful punishment, order the convicted person to pay to that other person *such compensation as the court deems fair and reasonable*.**
>
> ...
>
> **(3) At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section.**

The discretion granted to the High Court under section 126 of the TIA is very broad and unrestricted. What may be fair and reasonable to one judicial officer may seem exorbitant to another, given the circumstances of the particular case. However, the Magistrates' Court Act (MCA) has an almost similar provision that empowers courts to award compensation in section 197. It provides as follows:

> **(1)When any accused person is convicted by a magistrate's court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed *and that substantial compensation is, in the opinion of the court,***

***recoverable by that person by civil suit*, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person *such compensation as the court deems fair and reasonable*.**

...

(4) At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section.

A slight difference exists between the two provisions in that the provision in the MCA specifies that compensation should be such as would be recoverable in a civil suit. However, both show that the award is at the discretion of court and it should be *fair and reasonable*. In both statutes provision is made for consideration of the compensation already awarded to the victim in any subsequent civil suit. This leads us to the conclusion that the legislature intended to achieve the same purpose by both provisions of the law.

This court considered the import of section 197 MCA in **Senkungu Lutaya v Uganda, Criminal Appeal No. 67 of 2012,** and held that:

> *"It appears to us clearly that from the law set out above court is required to act judiciously before making an order for compensation. In this case the Court is required to determine with sound reasons and evidence that the personal injury inflicted upon the complainant was compensatable (sic) through a civil suit.*
>
> *The Court, in our view, would then determine the compensation being guided by what the complainant would have positively recovered by the way of a civil suit taking into account the means of the convict."*

We consider this to be a fair interpretation and adopt if for purposes of determining whether the trial judge in the instant case exercised his discretion judiciously.

It has been established that the prosecution went to great pains to prove the amount that was lost. They produced an investigation report and called two witnesses that were experts in the field of accounts and audit, and IT to prove the loss. They placed the loss of more than **UGX**

9,000,0000,000, within the space of six months at the appellant's door, through his ingenious schemes.

The appellant admitted that during the period of the fraud, he received **UGX 241,000,000/=** from A2 and the fictitious Ronald Sebugenyi. It was also proved by the prosecution, through PW10 and PW11 that the appellant had property that he acquired during and immediately after the fraud was discovered. We observed that investigators traced and saw this property and it was attributed to the appellant, though some of it was registered in the names of his brother, Godfrey Kato. The property was described by PW10 and PW11 as follows:

i) Land with 7 houses on it comprised in Block 254 Plot 264 at Kabalagala, Kampala acquired on 28/02/2012;
ii) Land with houses comprised in Block 246 Plot 1451 at Kyeitabya, Kyadondo, acquired on 4/10/11 and transferred to Godfrey Kato on 27/4/2012;
iii) Land with a house comprised in Block 245 Plot 164 at Kiwuliriza, transferred to Godfrey Kato on 9/3/2012;
iv) Land with 2 houses comprised in Block 249 Plot 1006 at Bunga; in the names of the Patrick Sentongo, acquired on 8/12/2012
v) Motor vehicle UAQ 575K acquired on 7/11/2011

The manner in which this evidence was presented shows that the trial judge clearly addressed his mind to the means of the appellant. Having found him guilty in respect of 4 counts that constituted the fraud, as well as for the offence of computer fraud, the trial judge ordered that he do compensate his former employer to just a fraction of the amount that was lost.

The appellant's counsel did not show that the trial judge applied any wrong principle in coming to the decision that he did. Instead, the trial judge properly cautioned himself and addressed his mind to the matters that he needed to in such a case. We therefore found no reason to interfere with the award of **UGX 5,000, 000, 000** as compensation to MTN, and it is upheld.

Ground 7 of the appeal therefore also fails and it is dismissed.

In conclusion, this appeal only partially succeeds, and we make the following orders:

i) The conviction and sentence of 10 years for the offence of conspiracy to defraud c/s 309 of the Penal Code Act is hereby set aside;

ii) The appellant shall serve the sentences imposed by the trial court for the rest of the offences for which he was convicted; and

iii) The appellant shall compensate the complainant, MTN (U) Ltd, in the sum of **UGX 5,000,000,000.** The warrant in execution of the order shall be issued to the complainant company, MTN Uganda Ltd., not the respondent.

It is so ordered.

Dated at Kampala this .15th....day of ...Oct...2021.

Kenneth Kakuru
JUSTICE OF APPEAL

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

Irene Mulyagonja
JUSTICE OF APPEAL