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

(Coram: Catherine Bamugemereire, JA, Christopher, JA, Eva K. Luswata, JA)

CRIMINAL APPEAL NO. 0219 OF 2021

BETWEEN

1. MALONG LAWRENCE LAUL YOR
2. OKITALUNYI LOTA MIKE
3. GAVANA THEDEUS ZIKUSOOKA::::::::::::::::::::::::::::APPELLANTS

VERSUS

UGANDA::RESPONDENTS

(Appeal from the Judgment of Gidudu Lawrence, J, sitting in the High Court of Uganda, Anti-Corruption Division delivered on 16th August, 2021)

JUDGEMENT ON APPEAL

Introduction

1] The appellants were charged and tried on ten counts of offences contrary to the **Penal Code Act, CAP 120 (PCA)** and the **Anti-Money Laundering Act, 2013**. For constraints of space, we shall not reproduce the ten counts, which were well documented in the judgment of the trial Court and indictments found at pages 531 to 533, and 15 to 19 of the record of appeal (respectively). The appellants were convicted on counts 1, 3, 4, 5, 6, 9 and 10. Counts 2, 7 and 8 were dismissed as they were not proved beyond reasonable doubt. The facts admitted at the trial were also well summarized by

the trial Judge in his judgment. We provide an abridged version for the purposes of this appeal

2] Sometime during June 2017 while in South Africa, A1 approached PW2 Abebe Belay Engda an Ethiopian national with a proposal of business dealings in Juba, South Sudan. Both visited that country but PW2 declined to commit to any investment. The two continued to communicate on social media a result of which A1 introduced a gold business to PW2. The latter in turn interested PW1 Wagnew Gashaw Dessie in the trade, which the latter reluctantly agreed to try. Both PW1 and PW2 travelled to Entebbe in Uganda where they met A1 who introduced them to A2, A3, one who purported to be an army General from the Democratic Republic of Congo (DRC), and others at large.

3] A2 held out as the General's son or relative, and A3 as a clearing agent and one who would assist with exploring the gold, and its export. Others introduced by the appellants to PW1 and PW2 were the army General as owner of the gold, Emmanuel an interpreter, Patrick who posed as a URA officer, Hannington who posed as the General's lawyer, Oyino who posed as a Kenya Revenue Authority officer, another man from Interpol, and others.

4] PW1 and PW2 (hereinafter the complainants) were convinced that the deal was genuine and as a result, PW1 made several payments to the appellants for the purchase of gold all adding to a sum of USD 1,900,000. The transaction which the trial Court found to be a scam, was transacted in Kampala, Entebbe, Nairobi, Zambia and Hong

Kong. Over time, the appellants failed to deliver any gold as promised and in February 2018, both A2 and A3 cut off communications with the complainants. A1 then advised PW1 to report the matter to police claiming that he had received USD 50,000 to keep quiet. Later, A2 sent a video with A1 resting his head on a pile of US dollars and reported that he had taken all the money. PW1's report to the police in Uganda returned no arrests whereby he returned to South Africa.

5] During November 2018, PW1 learnt from the press that A2 and A3 had been arrested by ISO in another gold scum. He travelled to Uganda and reported to ISO who arrested the appellants. A1 and A3 were first released and then re-arrested and charged in Court together with A2 who had remained in detention. The appellants pleaded not guilty to each of the counts and denied ever transacting with the complainants or issuing any of the prosecution documents.

6] At the end of the trial, the trial Judge was convinced that PW1 lost an estimated to USD 1,900,000 the appellants and others at large in remittances for the gold scum, air travel and hotel expenses. He was in addition convinced that the appellants issued many fake documents purporting to facilitate the bogus transaction and convicted them accordingly.

7] The appellants being aggrieved with the conviction of the High Court, obtained leave of this court to lodge an appeal to this court.

8] The 1st appellant's (A1) appeal is premised on five grounds set out in the Memorandum of Appeal as follows:

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i. That the learned trial judge erred in law and fact when he convicted the appellant of the offence of obtaining money by false pretense for the money paid to other persons not party to the trial, thereby occasioning a miscarriage of justice.

ii. The learned trial Judge erred in law and fact when he ordered the Appellant to compensate the complainant a sum of US Dollars 1,092,000 (One Million, Ninety-Two Thousand) without evidence adduced to prove such sum existed.

iii. The learned trial Judge erred in law and fact when he convicted the appellant for the offence of conspiracy to defraud without credible evidence to prove the offence to the required standard thereby occasioning a miscarriage of justice.

iv. The learned trial Judge erred in law and fact when he convicted the appellant for the offence of uttering false documents without considering any evidence thereby occasioning a miscarriage of Justice.

v. The learned trial judge erred in law and fact when he imposed an illegal, harsh and excessive sentence on the appellant thereby occasioning a miscarriage of Justice.

9] The 2nd appellant's (A2)(hereinafter Lota) appeal is premised on one ground set out in the Memorandum of appeal as follows;

i. That the learned trial judge erred in law and in fact when he imposed illegal sentences of two year's imprisonment for obtaining money by false pretenses, 1 year's imprisonment for

conspiracy to defraud and 1 year's imprisonment for 5 counts of uttering false documents upon the appellant without subtracting the period the appellant spent on remand thereby occasioning a miscarriage of justice.

10] The 3rd appellant's (A3) appeal is premised on eight grounds set out in the Memorandum of Appeal as follows:

i. That the learned trial Judge erred in law and fact when he convicted the appellant for the offence of obtaining money by false pretence, conspiracy and uttering of false documents on the basis of speculation, unreliable, insufficient and unsatisfactory evidence thereby occasioning a miscarriage of justice.

ii. That the learned trial judge erred in law and fact when he convicted the appellant on the offence of obtaining money by false pretence, when the evidence on record clearly showed the falsity related to the future but not to the past or present (sic).

iii. That the learned trial judge erred in law and fact when he failed to assess what exact amount of money was paid for the purchase of gold and instead speculated to the figure, thereby occasioning a miscarriage of justice.

iv. That the learned trial judge erred in law and in fact when he held and convicted the appellant for uttering false documents in count 4,5,6,9, and 10 without considering the defence plea that

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the same were manufactured by one James Behangana, an agent of the complainant.

v. That the learned trail Judge erred in law and fact when he relied on speculative circumstantial evidence on convicting the appellant on the offence of conspiracy, which did not meet the standard of circumstantial evidence thereby occasioning a miscarriage of justice.

vi. That the learned trial Judge erred in law and fact when he sentenced the appellant to a term of 2 years' imprisonment and ordered the appellant to pay a sum of USD 1,092,000 (One Million Ninety Thousand United States Dollars) which sum was not verified in the first instance.

vii. That the learned trial Judge erred in law and fact when he convicted the appellant on a figure of money which kept on changing and was evidently exaggerated. This caused embarrassment and prejudice to the defence thereby occasioning a miscarriage of Justice.

viii. That the learned trial judge erred in law and fact when he held that the Appellant obtained money by false pretence, when the same according to the evidence on record was paid to a person not party to the trial, thereby occasioning a miscarriage of justice.

Representation

11] At the hearing of the appeal, the 1st appellant was represented by advocate Ben Ikilai, the 2nd appellant was represented advocate Shamim Nalule, and the 3rd appellant was represented by advocate Mungoma Stephen. The respondent was represented by advocate Abigail Agaba Kabayo for A1, advocate Gloria Inzikuru for A2 and advocate Harriet Among for A3, all Chief State Attorneys. Save for A2, each legal counsel submitted written submissions upon which this decision is premised.

RESOLUTION FOR GROUNDS OF APPEAL FOR A1

Grounds 1, 2 and 3

Submissions for the appellant (A1)

12] Counsel for the 1st appellant (A1) argued grounds 1, 2 and 3 together. He submitted that it was PW1's testimony that **USD 150,000** was paid to Oyine but there is no evidence of such payment and Oyine was never charged together with the appellants. He submitted that it was PW1's testimony that he gave Tony USD 100,000. However, there was no evidence on record and Tony was never arrested or charged.

13] Counsel further submitted that at page 59 of the record, PW1 stated that A1 asked for USD 30,000 to transport 20kgs of gold from Congo. However, he wondered why PW1 paid the same to A2 and not A1. That it was PW1's evidence that he paid the UN officials USD 60,000 in the presence of A3 at a hotel. However, there is no proof of that.

He submitted that hotels have cameras and such evidence should have been brought to court.

14] Counsel further submitted that it was PW1's testimony that he paid Hannington USD 200,000 and **USD 2000** for an air ticket. However, there was no evidence adduced and Hannington was never charged. That although PW1 testified that 1kg of gold was set at a cost of USD 23,000, he only paid USD 100,000 for 10kgs. However, no evidence was adduced to show who the money was paid to. At page 70 of the record, PW1 further testified that his gold was 200kg worth 1.9 million USD. In counsel's view, this was an anomaly that was never explained.

15] Counsel submitted that there was no evidence adduced to show that A.1 received money from PW1 as per exhibit **PE 19, PE 20, PE 21, PE 22, PE 23, PE 24, PE 25, PE 26.** That although there was evidence on record to show that PW2 received money, there was no evidence whatsoever adduced by the prosecution to show that upon PW2 receiving the money, he handed it over to A1.

16] Counsel further submitted that **PE13** depicts a future transaction. However, A1 was not the receiver of the money and neither was he a party to the agreement. Counsel contended that payments in **PE 15, PE 16** and **PE 17** were for future transactions which does not amount to obtaining money by false pretense.

17] Counsel contended further that court made a ruling in respect of documents from Dahabshill (hereinafter DHB) in Uganda to the effect that they could not be tendered through **PW3** and that it required

the managing director who certified them. For that reason, the documents were admitted as **PID1 – PID19** but subsequently admitted as **PE 15 – PE 33.** Counsel contended then that **PW5** was only admitted to certifying Exhibits **P.16** and **P.17,** but did not certify the rest. That for DHB Kenya, the defence objected to the documents since they were not notarized and court made a ruling that such documents only be admitted for identification as **PID 20-301.** However, the same court relied on documents that were not duly exhibited to make a finding that the appellant should jointly and severely compensate the complainants to the tune of USD 1,092,000.

18] Counsel further contended that there was no sufficient evidence adduced by the prosecution to prove that the 1st Appellant had obtained a sum of USD 1,092,000 from the complainant and the only evidence available related to USD 32,500 as demonstrated by **PE 15, 16** and **17**

19] Finally, counsel submitted that had the learned trial judge properly evaluated the evidence on record, he would have arrived at a just conclusion showing that **A1** did not owe the complainant any sum to justify such an order. He prayed that grounds 1, 2 and 3 be allowed.

Submissions for the respondents

20] In response, counsel for the respondent submitted that the reason PW1 and PW2 came to Uganda between May and December 2017, was because of a gold deal introduced to them by A1. That it was A1 who also introduced them to his colleagues including A2 and A3. That without A1, PW1 and PW2 would never have come to Uganda

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for the said deal and they would not have paid out all that money or traveled to various countries in pursuit of the gold.

21] Counsel further submitted that it was the testimony of PW2 at page 81 of the record, that he had known A1 for a while and had ever engaged in business with him in South Sudan in 2011. That he again testified at page 82 of the record that A1 showed him photos and videos of gold, and kept professing that he was a Christian who could not mislead PW1 and PW2 into a bad deal. PW2 believed and trusted in A1.

22] He submitted that it was the testimony of PW1 at page 45 of the record that he requested PW2 to go to Uganda and investigate the said gold business before he could make a decision. That indeed, PW2 traveled to Uganda in May 2017 and met A1 who showed him some gold and a license that purportedly authorized him to trade in gold. Counsel submitted that PW1 and PW2 support each other on that account. That it was both their testimony that when PW2 saw the purported gold and license, he encouraged PW1 to come to Uganda with him so they could start on the trade.

23] Counsel further submitted that PWI testified that when he arrived in Uganda on 13/6/2017, he found PW2 and A1 waiting for him at the airport and he was taken to Speke Resort Munyonyo where they had a meeting in which A1 introduced them to A2 as a brother to a Congolese General who was said to be the owner of the gold, and another man called Emmanuel, an interpreter. It was PW1's testimony that A1, A2 and the General plus the interpreter, took PW1

and PW2 to guarded premises in Muyenga from where he introduced A3 (as the clearing agent) who explained to them the process of exporting gold out of Uganda.

24] Counsel submitted further that it was PW1's testimony at page 46 of the record, that A3 promised them an Airways Bill and Certificate of Origin and they were led to a store in Muyenga where they found a black box which was locked. That A1 who knew the combination code unlocked the box in which PW1 and PW2 saw gold/ metal nuggets. They believed the same to be gold. That PW1 further testified that it was at that point that they negotiated with A1 on the price and concluded at USD 30,000 per kilogram including costs for URA and Insurance.

25] Respondent's counsel further submitted that it was PW1 and PW2's testimony that they wanted to take only one Kilogram of gold but were persuaded by A1 to purchase 10Kgs instead, saying it was a life changing deal. It was PW1's testimony at page 48 of the record that he got USD. 100,000 from his brother via DHB money Transfer at King Fahad Plaza, while A1 and A2 waited outside and took him back to A3 in Muyenga, where he paid the money. A1 later paid an additional **USD. 100,000** to the General in the presence of A1 which was supposed to be for security.

26] Counsel submitted further that PW1 and PW2 testified that they were asked to process their tickets to Dubai where the gold would be dispatched to and that A3 would come with the gold to the airport. That the complainants procured air tickets to Dubai and when they reached the Airport at Entebbe, A1 together with the General

informed PW1 and PW2 that URA had refused to clear 10Kgs of gold, and that they instead had to take 150Kg.

27] Counsel submitted that A1 later introduced PW1 and PW2 to a one Patrick presented as a URA officer who was supposed to help them process the 150Kg of gold. That Patrick demanded for USD150,000 for clearance and because PW1 and PW2 could not raise the said money, the General asked them to take the gold on credit, sell it and pay the money later.

28] Counsel submitted that PW1 obtained an additional USD 70,000 from his brother through DHB, and in the presence of PW1, A1 called A3 asking A3 to convince Patrick to let them go with the said gold. Additionally, that it was PW1's testimony at page 50, that after handing over the money to Patrick in the presence of A1, Patrick said he would give the necessary assistance and encouraged them to prepare for their journey to Dubai.

29] It was PW1's testimony at page 50 of the record that A1 gave them an Airways Bill for Blue Sky Express Cargo dated 28/6/2017 for 150 Kgs of gold, the consignee being A1 Matrooshi Uganda - Dubai. A3 assured them that they could claim the gold from Blue Sky Express Cargo at Dubai Airport. This Airway bill which was admitted on record and the said document was received from A1.

30] Counsel further submitted that it was PW1's testimony that when they asked for the license, A1 informed them that his had expired but that if they paid an additional USD. 10,000 he would get one for

them. PW1 and PW2 paid the said money to A1, and A1 gave them a license in his names.

31] Counsel further submitted that both PW1 and PW2 testified that A1 got for them Visas to Dubai and that on 28/6/2017, they went to the airport and together with A1, waited for A3 who said he had the gold. At the airport, A3 came with a black metallic box, opened it and showed them the said gold and then gave the key to PW2.

32] Counsel submitted that when PW2 reached Dubai, he was informed by the cargo officials that the documents he had were false documents. He painfully informed PW1 on phone. It was the evidence of PW1 that he called A1, who assured him that all was well and later informed him that the same gold was in Kenya with his brother, Oyino. That PW2 then traveled to Kenya where he met Oyine who also demanded for more money to have the gold secured. PW1 sent to A1 USD 150,000 (through DHB Money Transfer) and A1 counted this money on his bed in the hotel room. Later Oyine demanded for more money and PW1 sent another **USD150,000** to A1.

33] Counsel submitted that the General instead demanded that the gold be sent to Hong Kong to a refinery and **PW1, PW2** together with A1 returned to Kampala to meet the General's lawyer (one Tony) who had to travel to Hong Kong with the gold. It was PW1's testimony that Tony demanded for money to correct the Certificate of Origin and they had to pay Tony **USD. 100,000** in the presence of A1.

34] Counsel submitted that it was the evidence of PW1 and PW2 that when they reached Hong Kong, a Ugandan from Fidex Cargo met

them and showed them a black box which PW2 opened with the key saw the said gold which was kept by Tony, but who later disappeared. A1 further demanded for USD. 30,000 to purchase 20Kg of gold from the General's wife as they waited for Tony. PW1 gave the money to A2 and informed A1 it was the last payment he was making.

35] Counsel further submitted that it was the testimony of PW1 that Hannington who posed as a lawyer, in the presence of the A1, gave them a Certificate of Origin No. 47807 dated 14/8/17, marked on the record at page 60 as **"P7"** and an acknowledgement of receipt of USD. 200,000. PW1 further testified that he was later asked to raise more money for the documents which would allow them sell the gold in Hong Kong; They flew to Hong Kong on the 11/11/2017 but could not find Hannington who should have had the gold. That when the complainants contacted A1, he assured them that the gold was in Nairobi and was instead destined for the DRC. The complainants then left Hong Kong and traveled to Nairobi but still could not locate Hannington. It was at that point that A1 claimed he did not know where Hannington could be found. It was PW1's testimony that together with PW2, they returned to South Africa empty-handed. They had lost all the money and had not received or sold any gold.

36] Counsel submitted that it was the evidence of PW5 that A1 received some payments directly transferred to him. In fact, he even used his passport as an ID to get the money from DHB Money Transfer at King Fahd Plaza, Kampala Road, the company that was used to cash the transfers sent.

37] Counsel submitted that the Trial Judge rightly appraised the evidence before him as he made a finding that the Appellants committed the offences they were charged, and as such, the order for compensation to the complainants was valid. In counsel's opinion, the sentence was not illegal as it is provided for by the law, and is fitting in the circumstances.

Decision of court

38] A first appeal from the decision of the High Court to this Court requires this Court to review the evidence and make its own inferences of law and fact. See: **Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** (hereinafter COA Rules). On a first appeal, this Court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind but without disregarding the judgment appealed from. **See: Kifamunte Henry vs. Uganda, SC Criminal Appeal No. 10 of 1997.** Alive to the above-stated duty, we shall proceed to resolve the grounds of appeal after considering the record and decision of the court below, counsel's submissions on appeal, and the law applicable.

39] The main contention for A1 in ground one is that he was wrongly convicted of receiving money paid to other persons not party to the trial. The offence of obtaining money by false pretence is created by Section 304 and 305 Penal Code Act (PCA). It is provided that:

> *"Any person who by any false pretences, and with intent to defraud, obtains from any other person anything capable of being*

stolen, or induces any other person to deliver to any person anything capable of being stolen, commits an offence and is liable to imprisonment for five years".

40] In his decision, the Judge correctly outlined the elements of the offence that need to be proved by the prosecution beyond reasonable doubt as follows:

a. *That there was a representation by words, writing or conduct of a matter of fact either past or present.*
b. *That the representation was false.*
c. *That the person making the representation knew it was false or did not believe it to be true.*
d. *That the false pretence was made with intent to defraud.*
e. *That it is the accused who committed the offence.*

41] In his judgment, the trial Judge was convinced that the failed business relationship between the complainants and appellants was in place between 2011 and 2017. He was persuaded that A1 convinced the complainants to travel to Uganda where he would introduce them to investors who had gold to sale. That while in Uganda, he proceeded to introduce them to A2, A3 and others at large as the persons who were to make the deal a reality. He also found that when A1 offered to buy only 1 Kg of gold as a test purchase, A3 persuaded him to buy 10 Kg and after receiving payment, persuaded him to purchase 150Kg which on A1's advise, PW1 could sell and pay a balance to the Congolese General.

42] The Judge was persuaded that the documentary evidence adduced by the prosecution represented money paid or remitted by PW1 to the appellants but in return, the appellants issued false documents

to defraud PW1. He also considered it a false sale because the complainants were prevented from carrying the gold to the airport enroute to Hong Kong, leaving A3 as the clearing agent to do so.

43] In addition, the Judge considered as bogus the defence by the three appellants that they never knew, or had ever met any of the appellants or received any money from PW1. He was convinced that the appellants and complainants met over a period of six months in diverse places in Kampala and Nairobi and that money was remitted to A1 through Dahabshil Money Transfer in Nairobi, as well as payments made through other means.

44] The contention in ground one is that no evidence was adduced to prove that A1 received any payments from the complainants. That if A2 ever received any payment, he did not make any advancements to A1. It was in addition contended that **PE13** to **PE 17** represented future transactions and thus fell out of the ambit of Section 304 and 305 of the PCA.

45] Further that **PE 20-30** which were never notarized could not be the basis of confirming that A1 received the remittances by PW1 through DHB Kenya. The above notwithstanding, we note that in his submissions, the appellant's counsel appeared to concede that **PE16** and **17** which were notarized documents were properly entered into evidence and that it was proof that A1 received a sum of USD 32,5000 from PW1 through DHB Uganda. In our view, that submission would be an admission that the offence was to that

extent proved. However, as we shall show, there was other evidence that the trial Judge considered.

46] The trial Judge was more convinced by the prosecution's evidence as we are, that the appellants and others at large did on diverse dates between June 2017 and December 2017 meet up with the complainants on different dates at different addresses in Uganda and abroad over what turned out to be a botched gold deal. Evidence adduced during cross examination of PW1, showed that he had made journeys from South Africa into Uganda, out to Kenya, UAE and Hong Kong during the material times that these offences occurred. That would be circumstantial evidence of his meetings with A1 and his accomplices, as well as payments he made to them.

47] We in addition find that there was other documentary evidence to prove that other payments paid to A1 by money transfer through DHB Uganda. As we shall show later, on three different dates between 20/6/17 and 2/10/2017, PW1 transferred a total of **USD 32,500** to A1. PW5 the country director DHB Uganda adduced **(Exhibits PE 15, PE 16, PE 17, PE 18, PE 33)** to confirm that those payments were transmitted through them and received by A1. As shown, **PE 16** and **PE 17** which were handled much in the same way as the other documents transmitted through DHB Uganda, were not disputed.

Also as pointed out by the Judge, there was other evidence linking A1 to those payments. A copy of his passport **No. B00000256** with a clear photograph was presented by **PW4** with the payment

vouchers. A1 who conceded that the document was a copy of his passport but who claimed to never have stepped into DHB in Nairobi, failed to explain how the agents of that company could have received and retained that document. In contrast, PW5's explanation of how money transfers are ordinarily made in his company was convincing to explain why a passport of one sending or receiving money through their services, would be retained.

48] We in addition reject the argument that the payments reflected in **PE 13 – PE 17** were future transactions. We agree with respondent's counsel and there is ample authority to the argument that for the offence to be created, the false representation must refer to a matter of fact either in the past or present. See **R V Dent (1955)39 Cr App R. 131** and **Nyaga V R (1975) EA 118.** We do agree that during the preliminary period of the botched deal, the appellants promised to supply gold to PW1 after making payment.

49] The evidence from the several remittances made by **PW1** is that payment was made in installments and what appeared to be gold was procured. Both **PW1** and **PW2** testified to seeing gold nuggets both at the airport in Uganda and also in Hong Kong. In fact, a sample was at some point removed from the iron box, and taken for testing. Both PW1 and PW2 saw and touched the "gold". The gold were goods in real time and not a promise for the future.

50] For the above reasons, ground one for A1 must fail.

51] For ground 2, it was argued for **A1** that no evidence was adduced to prove the order for compensation in the sum of USD 1,092,000.

Appellant's council submitted that there was no evidence whatsoever adduced to show that USD 1,092,000 was obtained by A1 to justify the order of compensation in that amount. In response, counsel for the respondent submitted that the award was made as a discretionary order of the Court under Section 126 of the Trial on Indictment Act, Cap 23 (TID).

52] She then argued that the evidence adduced shows that the complainants lost **USD 1,092,000** but did not receive any gold from the appellants and those still at large. Counsel then relied on the decision of the Supreme Court in **Besaleri vs Uganda Criminal Appeal No. 36 of 2014** cited with approval in **Kiwalabye Benard vs Uganda SC Criminal Appeal No. 143 of 2001**. It was held that the appellate court is not to interfere with the sentence imposed by a trial court where the court has exercised its discretion of sentence, unless the exercise of 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 the trial court ignores to consider an important matter or circumstance which ought to be considered while passing sentence, or a sentence imposed on wrong principle.

53] We agree that in addition to a custodial punishment, a court may in her sentence make an order of compensation. It is provided in **Section 126 (1) of the TID** that:

"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. (Emphasis of this Court).

54] It appears from the above provision that the discretion of the Court extends first to loss that has been proved, and perhaps that which the victim or other person has suffered and which is directly connected to the offence. The latter need not necessary have actual proof through primary or secondary evidence. The Judge made his award of compensation of at page 18 of the judgment. He restricted the award to **USD 1,092,000** as the amount proved by PW1 in his testimony. He was specific that all other expenses (e.g. travel, meals and accommodation for the complainants) could be recoverable through a civil suit. That being the case, our task is to confirm whether the award was supported by admissible and cogent evidence. See **Kagwa Michael vs Olal & Ors CA No, 10/2017**.

55] The Judge covered what he considered direct payments to the appellants both in Uganda and elsewhere. Those payments were proved through several pieces of primary evidence which we can safely conclude are private documents which fall under the ambit of Section 84 Evidence Act that provides in part as follows:

"the court shall presume that private documents purporting to be executed out of Uganda were so executed and were duly authenticated if;

(c) In the case of such document executed in any country of the Commonwealth in Africa, it purports to be authenticated by the

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signature and seal of office of any notary public, resident magistrate, permanent head of a government department, or resident commissioner or assistant commissioner in or of any such country; and, in addition, in the case of a document executed in Kenya, it purports to be authenticated under the hand of any magistrate or head of a government department". Inter alia.

56] At page 15-18 of his judgment the Judge considered a host of payments made out and received by A1 and his accomplices both in DHB offices in Nairobi and Kampala. The total sum computed as received is **USD 163,587.** PW5 presented several payment vouchers indicating transfers of various sums transferred through DHB Uganda and collected by A1, A2 or A3 and payments in other forms. During PW4's testimony, an objection was successfully raised for the appellants that none of the payment vouchers representing payments paid through the DHB Kenya were properly notarized. On 08/01/2020, the Judge made a ruling in which he classified all vouchers coming in from the Nairobi office as foreign documents that required a notary seal for authentication. On the same date, those documents were admitted for identification purposes only. They were at that point not yet admitted on the record.

57] It appears the issue of the foreign documents was not revisited by either counsel. However, at pages 674-698 of the record, the same documents are reflected as properly notarized by one Njoroge Wachiro a notary public of the High Court of Kenya. It is also evident that on 16/9/2020, the Judge marked those specific documents as **PEX 50-59,** indicating that after authentication, they were properly

admitted into evidence. Neither A1 nor A2 raised any objection to those proceedings.

58] On the other hand, **PE 15, 16, 17, 18** and **33** being payments made through DHB Uganda were properly admitted as payments made to A1 and A3 and their accomplice Lota. It was the evidence of PW5 the Managing Director DHB Uganda, that the he certified those payment vouchers **(Exhibits P15, P16, P17, P18, P33)** by signing and stamping on them. He conceded that although some of the documents only bore a stamp but not a signature, it would not make them less authentic because the practice of the company was to insist on a stamp. It is evident from the record that those particular receipts were in fact original copies of the said exhibits. PW5 who worked for the same company and had verified them was a competent witness to adduce them.

59] On the other hand, we agree that **PE 3** and **PE 4** which are acknowledgment receipts on two different occasions issued to PW1 for the payment of 50,000 USD being shipment charges for 50kgs of gold from Inter Express Cargo Ltd, were properly admitted. We shall show later in our decision that we are persuaded as much as the Judge was that, A3 and A1 were accomplices in this fraud, and it is not far-fetched that it is A3 who arranged for those receipts.

60] The same would apply to **PE33** that reflects a payment of USD 9000 by PW1 on 20/6/17 and received by A3. The same would apply to **PEX 8,** a payment voucher from DHB Kampala for USD 5000 which Lota received after handing over his passport. However, we agree that the other payments that the complainants claim they made during

2017, were not receipted and appeared to have been made to other persons other than A1, A3 or A2 (hereinafter Lota).

61] We have for clarity reduced the payments proved in the tables below:

DAHABSHILL MONEY TRANSFER, UGANDA

DATE	PAYER	PAYEE	AMOUNT (USD)
19/06/2017	PW1	A1	30000 EXP 15
03/07/2017	PW1	A1	2000 EXP 16
12/11/2017	PW2	A1	500 EXP 17
02/10/2017	PW1	A2	5000 EXP 18
20/06/2017	PW1	A3	9000 EXP 33
TOTAL			**46,500**

DAHABSHILL MONEY TRASFER, NAIROBI KENYA

DATE	PAYER	PAYEE	AMOUNT (USD)
20/07/2017	PW1	A1	34000 EXP 51
06/07/2017	PW1	A1	25000 EXP 50
06/07/2017	PW1	A1	50000 EXP 52

31/07/2017	PW1	A1	31370 EXP 58
29/07/2017	PW1	A1	176027 EXP 59
21/8/2017	PW1	A1	1500 EXP 57
24/8/2017	PW1	A1	1500 EXP 56
04/09/2017	PW1	A1	1500 EXP 55
13/9/2017	PW1	A1	690 EXP 54
02/10/2017	PW1	A1	1000 EXP 53
TOTAL			**322,587**

INTER EXPRESS CARGO UGANDA LTD

DATE	**PAYER**	**PAYEE**	**AMOUNT**	**REASON**
18/10/2017	Inter Express Cargo Uganda Ltd (A3)	PW1	20000	Payment for 50kg of Gold (Exhibit P3) receipts available
20/10/2017	Inter Express Cargo Uganda Ltd (A3)	PW1	30000	Payment for 50kgs of Gold (Exhibit P4) receipts available
Total			**50,000**	

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Overall total of the amount that was proved in court was **USD 419,000 USD**

62] Respondent's counsel citing authority invited us to consider the award of USD 1,092,000 to include a sum in compensation for loss to PW1 and PW2 as envisaged under the TID. Unfortunately, that submission was not supported by the evidence. It was PW1's testimony that he would have earned USD 1,900,000 from selling 150kg of gold in Hong Kong. However, no explicit evidence was adduced to prove that fact, and the Judge only relied on the receipts adduced. The Judge in addition mentioned other expenses that PW1 and PW2 may have incurred and then advised PW1 to file a civil action to recover them. We are thus not persuaded to consider any other claims of compensation at this point of appeal.

63] Ground 2 raised for A1 therefore succeeds in part in that **USD 419,000 USD** was the sum proved as received by A1 and his accomplices Lota and A3.

64] In ground three, it was argued for A1 that that the prosecution did not adduce credible evidence to prove the offence of conspiracy to defraud. The offence is created by section 309 PCA which provides that:

"any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person commits a misdemeanor and is liable to imprisonment for three years".

65] It is explained further that a person who agrees with one or more other persons by dishonesty

a. *To deprive a person of something which is his or to which he would be or might be entitled; or*
b. *To injure some proprietary right of a person, is guilty of conspiracy to defraud at common law*[1].

66] The defence raised for A1, Lota and A3 was that, before their arrest, they did not know the two complainants, had never had any dealings with them and did not receive any payments from them. It was never contested that the money paid to the appellants was not the property of PW1, and as such, by making payments to the three appellants including A1, he was deprived of his property or his proprietary rights were violated by the appellants.

67] We have agreed with the trial Judge that sufficient evidence was adduced to prove that the three appellants conspired as a group with the common intention to defraud PW1 of his money. In our view, Lota and A3 were accomplices because they in one way or another participated in the fraud. According to the ***Black's Law Dictionary***[2]**;** An accomplice is a person who is in a way involved with another in the commission of a crime, whether as a principal in the first or second degree, or as an accessory.

68] In tandem with **S.19 -21 PCA,** it is stipulated therein that when an offence is committed, each of the following persons is deemed to have

[1] Halsbury's Laws of England Volume 11(1), 61
[2] Bryan A. Garner, Blacks' Law Dictionary, 10th Edition

taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it;

a. *Every person who actually does the act or makes omission which constitutes the offence;*
b. *Every person who does or omits to do any act for purpose of enabling or aiding another person to commit the offence;*
c. *Every person who aids or abets another person in committing the offence. (Inter alia).*

69] In addition, according to ***Halsbury's Laws of England***[3], generally, an accomplice is a person who participates in a crime with the *mens rea* of that crime. They may be convicted as a party to it if they are the perpetrator of it, or if they assist the perpetrator at the time of its commission, or if they assist or encourage the perpetrator before its commission.

70] The Judge believed the evidence of PW1 and PW2 that they met all three appellants in Uganda to discuss the gold deal and make some payments in cash. The payments made through DHB in Kenya and Uganda directly linked A1 to that conspiracy. In addition, during cross examination, A1 admitted that it was his passport that was tendered by PW4 and in addition that, EXP 2 which was a provisional gold licence issued by the Government of South Sudan belonged to him. It was credible then that it was him and no other who had handed it over to PW1 who had testified that one of the reasons he agreed to participate in the transactions, was because A1 stated that he had handed over to him the licence.

[3] 4th Edition, para 43.

71] On page 552 to 553 of the record of appeal, the trial Judge analyzed the evidence and made a finding that A1 was the master planner, Lota made the assurance that gold existed, whilst A3 was the paper work *"expert"* with connections in URA and the UN. The Judge also found that A3 who is a licensed gold smelter, trading under the name Gold Sacks Limited, used his business premises and operations to dupe PW1 and PW2 to believe they were in the right business whereas not. A2 took advantage of his Congolese nationality to dupe PW1 and PW2 into believing that he was a brother of the Congolese General who owned gold mines in DRC whereas not. The Judge found in addition that the entire team was assembled by A1 as the author of the script from which the sinister plan was acted. Each played a complimentary role to sustain the fraud.

72] After perusing the record, we do agree with the Judge that the defence did not offer any credible challenge to the prosecution evidence pinning the three and others on the run about this conspiracy which was well woven and lasted a whole six months before the script dried up, causing PW1 to report the matter to the police.

73] In our re-evaluation of the evidence here and when resolving grounds one and two, we found that A1, A2, A3 and others conspired to defraud PW1 of colossal sums of money. We do agree with the trial Judge that the charge was proved beyond reasonable doubt.

74] Therefore, ground 3 raised by A1 must also fail.

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Ground four

Submissions for the appellant (A1)

75] Counsel for A1 drew our attention to pages 553, 554, 855, 556, 557, 558 of the Record of Appeal. He then submitted that in respect to counts 4, 5, 6, 9 and 10 there is no evidence implicating A1. However, that at pages 559-560 of the Record of Appeal, the Learned Trial Judge came to the conclusion that the prosecution proved the charges in counts 1, 3, 4, 5, 6, 9, and 10 against each of the accused persons beyond reasonable doubt. It was his view that the learned trial Judge erred when he convicted A1 and then sentenced him to one year's imprisonment for uttering false documents without any evidence adduced by the prosecution to that effect.

Submissions for the Respondent

Count 4

76] In response, to count 4, counsel for the respondent submitted that certificate No. 50575 of 2017, dated 25/10/2017 for 50kgs was admitted on record at page 60 as "**P10.**" That it was purportedly issued by the Uganda National Chamber of Commerce and Industry. She submitted further that it was the evidence of PW1 that A3 gave him and PW2 the certificate of origin in the presence of A1. Counsel submitted that the trial judge after considering the evidence of PW11, found that document to be false. Counsel further submitted that A1 and his colleagues knew this document to be false as it was not issued by the purported issuer.

Count 5 and 6

77] In response to count 5 and 6, respondent's counsel submitted that an Export Permit No. 2896 dated 24/10/17 for 50kgs of gold bars was admitted as P5 and Export permit 004350 dated 14/8/17 was admitted as **PE11**. That **PE11** was issued in the name of PW2 Edgar Ebebe Balay. Counsel submitted that it was PW6's testimony that **PE 5** was expected to appear in the export book with certificates numbered from 02851 to 02900. It was his evidence that the said book was not used at the time and therefore, **PE 5** was a forged document.

78] She further submitted that it was PW8's testimony that the signature attributed to PW11 was not his and therefore forged. Counsel submitted it was the evidence of PW1 that A3 in concert with A2 and A1, gave him the said export permit, **PE11.**

79] In addition, counsel submitted that it was PW1's testimony that A3 with A1 and A2 gave him documents for exporting gold because A3 was acting as a clearing agent. The trial judge made reference to several meetings the accused persons had with PW1 and PW2 for a period of six months in different places and rightly concluded that a trade relationship was established between PW1 and PW2 and that it was his conclusion that bogus documents were given to PW1 and PW2 to make them believe it was a genuine deal

Count 9

80] In response to count 9, respondent's counsel drew our attention to **PE 6** the analytical laboratory report dated 23/10/2017 for

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50kgs of gold bars (Serial No. AN/17/036) purported to be a report for Inter Express Cargo. That it was purportedly issued by the Department of Geological Survey and Mines was issued to PW1 by A1, Lota and A3. That it was PW6's evidence that **PE 6** was not signed by the officers who were alleged to have analyzed and approved it, and PW7 testified that the said document was a fake. Counsel argued further that PW7 denied analyzing the said gold, or making the report and testified that the serial number did not exist in their records. He also stated that he was not in the country at the time it was stated to have been made. Counsel finally submitted that the trial Judge rightly concluded that it was a false document.

Count 10

81] Counsel submitted that it was the evidence of PW2 that A3 gave him the airways bill, **PE 12** and the certificate of origin and this was done in the presence of A1 and A3. Counsel continued that both PW1 and PW2 believed the documents to be genuine and travelled to Hong Kong with them. However, PW1 and PW2 never took possession of any gold in Hong Kong and when they called A1, he kept giving them false assurance of its availability. She submitted further that in order to prove that this was a false document, prosecution tendered a letter dated 19/6/2019 from the Uganda Registration Services Bureau (URSB) confirming that Global Freight and Cargo was not reflected in their system as a registered entity in Uganda as alleged in the Airway Bill that was admitted as Exhibit **PE35.**

Decision of Court

82] Counsel for the appellant submitted that there was no evidence implicating A1 of the offence of uttering false documents and that the

learned trial judge should have acquitted him. In response, counsel for the respondent submitted that there was evidence that A1 and his accomplices did utter and hand over false documents to PW1 and PW2.

83] The offence of forgery is created under Section 347 POA which provides as follows:

"Any person who forges any document commits an offence which, unless otherwise stated, is a felony and is a liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for the three years."

84] The intention of the offender is important. According **Halsbury's Laws of England:**[4]

"if a person makes a false instrument, with the intention that he or another will use it to induce somebody to accept it as genuine, and by reason of so accepting it to do or not to do some act to his own or any other to do or not to do some act at his own or any other person's prejudice, he is guilty of forgery....."

85] Further, the offence will not be complete if the instrument has been merely accepted as genuine. There must be an intention to induce the recipient to act or omit to act to their own or another person's prejudice. *See:* ***R vs Tobierre [1986] 1 ALL ER 346, 82 Cr App Rep 212.*** This Court in her decision of **Tweheyo Wilson Atutereraine vs Uganda Criminal Appeal 26 Of 2021[2022] UGHCCRD 4** found that the prosecution had to prove beyond

[4] 11th Edition (1), para 606,

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reasonable doubt that that the document offered by the appellant was false and that it was the accused who was responsible for for giving it with the intent to defraud the complainant.

86] Again according to **Section 351 PCA:**

"Any person who knowingly and fraudulently utters a false document commits an offence of the same kind and is liable to the same punishment as if he or she had forged the thing in question.

Both in cases of forgery and in uttering, "fraudulently" is equated with 'intent to defraud'.

87] From the above provision, the intent to defraud exists when a false document is brought into existence with no other purpose than to deceive a person. One who puts forward such a document with knowledge of its falsity and with intent to defraud, commits the offence of uttering. **See: *Tweheyo Wilson Atutereraine V Uganda (surpra)***

88] At pages 24-29 of his judgment, the trial Judge considered and was then persuaded that **PE 5, 6, 10, 11, and 12** were false documents uttered by either or all the appellants with an intention to defraud. All those documents were on 30/9/2019, admitted into evidence as prosecution documents without contest as part of the documents investigated by PW10 D/Sgt Okwaja.

89] Specifically, PW1 testified that he received **PE10** from A3 after he paid USD 50,000 for the purchase of 50 Kg of gold from the DRC,

which was receipted in **EXP3** and **4.** PW11 Dr. Churchill Bachwa the former Secretary General of the Uganda Chamber of Commerce and Industry (UNCC & I) testified that the institution has the mandate to issue certificates of origin of business for those who wish to trade outside Uganda. He perused and classified both **EPX 7** and **10** as forgeries never issued by them. He gave reasons for his conclusions in particular that the signature on **PEX 10** did not belong to any staff member, and a wrong stamp was used.

90] PW11 clarified further that although he had not joined the institution by 2017, he did confirm from existing records that the impugned certificate was absent in their data bank and had no duplicate copy on file. In our view, this was a competent witness to give such evidence which was strong and cogent. It was also reasonable to believe that A3 who had confirmed connections to Express Cargo, had handed over the document to PW1 in the presence of A1, his accomplice. As pointed out by the Judge, A3 knew that **PE 10** was false because no gold was ever shipped as promised. His background as a gold smelter would point to his knowledge of how to procure or utter such a document.

91] A response was also made in respect to **PE 5**, and export permit **No. 02896** purporting to authorize gold bars weighing 50Kgs originating from Buhweju in Uganda. PW8 gave evidence to confirm that it was a bogus document. It was reasonable for the Judge to believe that it is A3 who handed over that document to PW1 and 2, because of the long business relationship they had built over a period of six months. PW1 received no gold and as such, the offence was complete.

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92] Similarly, for **PE 11** and Export Permit **No. 004350** dated 14/8/2017, PW8 Kato a former Director and Commissioner in the Geological Survey and Mines department, confirmed with reason that it was a forged document. He was able to confirm that his purported signature was forged. The Judge was correct to conclude that A3 the *"paper manufacturing expert"* in concert with A1 and A2, uttered that document and did not deliver the alleged 150Kgs of gold.

93] Zachary Baguma Atwoki an Ag Director in the Directorate of Geological Survey was called to confirm the authenticity of **PE 5, 6,** and **11.** He took the Court through the formal procedures before dealer licences in precious minerals are issued. He confirmed all three to be fake and an indication that the holder did not pay any royalties to Government. It was conceivable as stated by PW1, that A3 gave him that document, which he in turn handed over to police.

94] Like all the other documents, the three appellants in concert, uttered or abated in uttering and then handing over false documents to the complainants who, as the Judge noted, were gullible to be fleeced of more money. The intention of all the three appellants was to induce the complainants to pay more sums of money to their prejudice.

95] PW1 testified that A3 issued him with **PE 12,** an Airway Bill No 170814261914 from Global Freight & Cargo Ltd. As the Judge correctly found, in P35, a formal communication from the URSB, confirmed that the company was at the material time not a registered entity in Uganda. They could not purport to issue any document which indicated authorization to transport 150Kg of gold to Hong

Kong, which was neither delivered nor received by the complaints. The detailed evidence of PW1and 2 about the saga in Uganda and Hong Kong far outweighed the blunt denials offered by the three appellants that they had no knowledge of that, and the other documents confirmed as false.

96] We therefore agree with the learned trial judge that he properly found that the prosecution proved the charges in count 4, 5, 6, 9 and 10 beyond reasonable doubt.

97] We therefore find no merit in ground 4, which fails.

Ground 5

Submissions for the appellant (A1)

98] Counsel for the appellant submitted that the sentence of three years' imprisonment for A1 on count 1 was illegal, harsh and excessive. He submitted specifically that the offence in count 1 carries a maximum penalty of 5 years, count 3, three years and count 4,5,6,9, and 10, three years. He argued that in this case, A1 had already been on remand for close to three years as stated by the learned Judge. He argued then that the sentence of 3 years on top of the period spent on remand would make it 6 years in total, which would be an illegal sentence contrary to Section 305 of the Penal Code Act.

99] Counsel submitted further that for count 3, A1 was sentenced to 1-year imprisonment yet he had been on remand for 2 years and 9 months. Counsel submitted that an additional year made the

sentence illegal. He further submitted that for counts 4,5,6,9 and 10, A1 was sentenced to one-year's imprisonment yet he had been on remand for two years and 9 months and therefore one year's imprisonment made the sentence illegal. That in addition, the learned trial judge failed to take into account the fact that A1 is a first time offender.

100] In conclusion counsel submitted that a sentence arrived at without taking into consideration the period spent on remand is illegal for failure to comply with a mandatory constitutional provision. Also that failure to define the exact period A1 spent on remand makes the sentence ambiguous.

Submissions for the respondent

101] Counsel for the respondent disagreed. She argued that on age 508 of the record, the trial judge took into account the remand period before sentencing A1. In her view, the respective sentences handed down by the trial Judge were legal and neither harsh nor excessive in the circumstances of each count and the facts.

Decision of court

102] It is a well settled position of law that the appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion. The appellate court will only interfere where the sentence is illegal or where satisfied that in the exercise of its discretion, the trial court ignored to consider an important matter or circumstances which ought to be considered when passing the

sentence or that the sentence was manifestly so excessive or low as to amount to an injustice. **See Livingstone Kakooza vs Uganda SC Criminal Appeal No. 17 of 1993.**

103] It was the A1's appellant's contention that the trial Judge delivered an excessive and illegal sentence as he did not consider the time spent on remand in relation to the sentences imposed on A1. Further that the Judge did not consider the mitigating factors that A1 was a first time offender who committed the offences at a relatively young age. Respondent's counsel disagreed. In her view, the sentences were justified and legal.

104] **Article 23(8) of the Constitution of the Republic of Uganda** provides as follows:"

"Where a person is convicted and sentenced to a term of imprisonment for an offence, any period he or she spends in lawful custody in respect of the offence before the completion of his or her trial shall be taken into account in imposing the term of imprisonment"

105] The trial Judge pronounced himself on sentence at page 501 - 503 of the judgment. With respect to A1 he stated as follows:

"The punishment in count one is 5 years' imprisonment.
The punishment in count 3 is 3 years' imprisonment.
The punishment for uttering false documents is 3 years' imprisonment.
Taking into account the aggravating and mitigating factor (sic) at play and bearing in mind that A1 and A2 have been in prison for close to 3 years, I sentence the convicts as follows: -
A1 has been in prison for about 3 years. I take this into account. I would have sentenced him to 5 years but he has served at least half

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of the sentence in count 1. If they had been serving sentence in prison they would have done 3 years plus. I therefore sentence A1 to 3 years imprisonment on count 1.
The punishment for conspiracy in count 3 is 3 years' imprisonment. The convict (A1) has almost finished that in prison. I sentence him to one year's imprisonment on count 3.
A punishment for uttering false documents is 3 years' imprisonment. A1 has almost spent that period in prison.
I sentence A1 to one year's imprisonment each on counts 4,5,6,9 and 10.

106] The sentencing proceedings for all three appellants took place on 16/8/2021, a date after the directions made by the Supreme Court in her decision of **Rwabugande Moses vs Uganda SC Criminal Appeal No. 25 of 2014 (2017) UGSC 2.** The Court emphasized then that :

".... a sentence couched in general terms that court has taken into account the time the accused has spent on remand is ambiguous. In such circumstances, it cannot be unequivocally ascertained that the court accounted for the remand period in arriving at the final sentence.

Subsequently, the same Court in **Segawa Joseph vrs Uganda SC Criminal Appeal No. 65/2016** while emphasizing the importance of the doctrine of precedence, directed that all decisions on sentencing following Rwabugande's decision, must not deviate from it. The above constitutional provisions have now been restated in paragraph 15 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013, wherein it is stated that:

15. (1) The court shall take into account any period spent on remand in determining an appropriate sentence.

(2) The court shall deduct the period spent on remand from the sentence considered appropriate after all factors have been taken into account.

107] Therefore, it was incumbent upon the Judge to precisely determine and then deduct the period A1 had spent on remand with respect to all the charges. He did not do so because his sentencing order was rather ambiguous. We note that although he took into account the period spent on remand as required by the law, he did not specifically deduct from his final sentence the period spent on remand. The result is that he issued an illegal sentence and we are mandated under **Section 11 Judicature Act** to impose a sentence that we consider appropriate in the circumstances.

108] The record indicates that A1 had at the time of his trial spent two years and 9 months on remand. It was submitted for the prosecution during allocution proceedings that, all three appellants were first offenders who had committed offences that a now rampart in Uganda. Prosecution invited court to issue a punishment that would send a severe message to the public and at the same time protect genuine traders intending to, or already involved in the gold business.

109] Respondent's counsel argued that the complainants were over a period of six months defrauded of a colossal sum of money to the extent that PW1 lost his properties in South Africa and as a result, suffered financial ruin. That although redress is possible under civil action, the Court ought to meet out punishment and in addition issue an order of compensation in the sum of USD 1,092,000. In

response, Counsel for A1 submitted in mitigation that his client had spent a long time in custody away from his family. That he got involved into a complicated business deal with the complainants who could recover their money through civil redress. He begged for leniency.

110] In our view, the aggravating factors appear to far outweigh what was stated in mitigation. We believe the evidence of PW 11 on his account of the estimated revenue lost to Government in this botched deal. Equally, the complainants who must have suffered severe emotional and financial stress when they confirmed that this was a bogus deal. We do agree with the trial Judge that it was a spectacular example of a scam of exceptional proportions well thought out and executed by A1 with the assistance of his accomplices. A1 was by choice absent from his family for long as he helped to spin this charade of a gold deal. It is not an injustice that he should serve a term in jail. However, the mitigating factors ought to be given equal attention, and in our view, a sentence of three years' imprisonment would be appropriate in the circumstances. As mandated by the Constitution, we deduct the period spent on remand to reduce the period to three months' imprisonment with effect from 16/8/2021, the date of sentence.

111] For the same reasons, we find a sentence of one years' imprisonment for count three as appropriate in the circumstances. As mandated by the Constitution, we deduct the period of two years spent of remand.

112] In the same vein, we find a sentence of one year's imprisonment on count 4,5,6,9 and 10 appropriate. As mandated by the Constitution, we deduct the period of two years spent of remand.

113] All sentences to run concurrently in respect of A1 with effect from 16/8/2021 the date of sentence.

114] Since A1 had by the time of his conviction and sentence spent three years in lawful custody, he is deemed to have already served his sentence with respect to counts 3, 4, 5, 6, 9, and 10.

115] Accordingly, we find merit in ground 5 which succeeds.

APPELLANT TWO (A2)

116] The appeal of A2 Okita Lunyi Lota Mike, was withdrawn

RESOLUTION FOR GROUNDS OF APPEAL FOR APPELLANT THREE (A3)

Ground 1, 2, 3, 7 and 8

Submissions for the appellant (A3)

117] Counsel for A3 contended that the offence of obtaining money by false pretence by his client was not proved as he did not make any representation by words, writing or conduct of a letter of fact either past or present. He then submitted that it was the complainants' evidence, that they travelled to Hong Kong with one Tony alias Hannington, who allegedly sold the said gold to them, while in Hong Kong, the gold was tested and found to be genuine.

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118] Counsel contended further that the complainants failed to put the gold on the market due to their failure to raise USD 5,000 for the customs clearance and the gold was for that reason returned to Nairobi. That while in Nairobi, they still failed to raise USD 150,000 for customs clearance as was requested by Owino. In his estimation, the entire transaction was premised on a future transaction because the complainants hoped to raise the money from the sale of the 150Kgs of gold in Hong Kong to cover the purchase price and make a profit. He repeated that A3 was not part of the sale that took place either in Nairobi or Hong Kong, and in fact, the prosecution did not adduce any evidence to show that A3 received any specific amount of money and indeed the forex bureau denied the allegation that A3 received any payments.

119] Counsel further submitted that the State obtained a copy of A3's National ID from his bail application papers which without any explanation they attached to **PE 33.** Further that the prosecution evidence was of no assistance to the Court since the complainants did not adduce any air travel, hotel receipts or town operation receipts. That they also failed to adduce evidence of their source of income.

120] On the issue of identification, A3's counsel submitted that his client was not sufficiently identified and the only attempt by prosecution to have him identified was during the trial when the state directly confronted PW1 with the question of whether or not he knew A3 as one of the suspects. Counsel contended that the police ought to have conducted an identification parade. He further contended

that no CCTV footage was tendered to show A3 picking any money, and no witness testified seeing A3 pick money from the forex bureau.

121] In addition, counsel submitted that the receipts from the forex bureau that were tendered as exhibits, were never proved to be true copies or to have been authored by the appellants, and no hand writing expert report was availed to confirm his handwriting. In conclusion that the documents relied on were most likely manufactured by the appellants.

Submissions for the respondent

122] Respondent's counsel argued that A3 who professed to be a professional smelter of precious metal, admitted that PW1 paid for 1kg of gold which was availed. That it was the appellants and the General who changed the number of kilograms to 150kg which was transported to Hong Kong. He continued that even 1kg of gold which A3 admitted to be a clean deal, never materialized since the number of kilograms was increased to 150kgs including that one 1kg of gold.

123] Counsel further submitted that the appellant's arguments support the complainant's version of evidence in examination in chief and even cross examination. That A3's arguments buttresses the fact that he knew the deal/scam right from inception through to Hong Kong, back to Nairobi and until PW1 run out of money, after which A3 switched off his phone. In his view, USD 150,000 demanded by Oyine was just one of the protracted series of conning tactics coined by appellants to prevent the complainants from accessing the gold.

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124] Counsel contended further that although A3 was not physically present at the time money was being given to either of the con men, he was at all material times in the know because he would after each payment call the complainants and purport to address the particular issue for which money was being demanded. That at page 53 of the record of appeal, when USD 70,000 was paid to one Patrick for a certificate of origin, A3 called the complainants and purported to have secured one. This means that all actors were acting in a syndicate manner and pursuing a common goal.

125] Counsel also submitted that **PE 33** the national ID was tendered in court by agreement and no issue was ever raising to contest it on the ground that it was retrieved from a bail form, which she rejected as lies or a reckless submission.

126] Counsel further submitted that the trial court took note of the documents issued to the complainant by Golden Sack Company confirmed to belong to A3 to link him to the complainants and the gold deal. That the discrepancies in the amounts of money can be explained because the amount defrauded in terms of gold price, air travel, food and internal travel are unknown. That in any event, two witnesses gave a consistent oral accounts of the events as they unfolded from the beginning to end and the defence failed to shake their evidence during cross examination.

127] Counsel further submitted that in addition to oral accounts of PW1 and PW2, the trial Judge also relied on other witnesses like PW3 a security manager. That PW4 a director of DHB Money Transfer and Forex Bureau also testified confirming that dollars were being sent

from South Africa to the complainants, A1, A2 and A3 during the period in question. Therefore, that A3's contention that he did not make any representation by word, writing, conduct, letter or fact either past or present is untenable in the face of these pieces of evidence which show that the gold deal and all those acting as sellers including A3, were falsely representing themselves to the complainants.

128] Counsel continued that the facts of the case did not require an identification parade as the parties were not strangers to each other. And in relation to the documents, she contended that it is the appellants who handed them over to the complainants, and therefore, it was a correct interpretation that they must have known who forged those documents and it was therefore correct to charge and convict them with the offence of uttering false documents.

Submissions for A3 in rejoinder

129] A3's counsel reiterated his earlier submissions that the prosecution failed at the trial to adduce evidence to show that A3 did receive any money from the complainants. He stressed that all monies were paid to persons with whom A3 had no nexus and no proof for payments of air and internal travel or accommodation were shown. Counsel further contested A3's participation stressing that the State conceded at the trial that his prosecution premised on a *"communication matrix"*. He argued further that the false documents were not proved because none were ever subjected to a handwriting expert or documentary analyst.

Our decision

130] We have considered the submissions of counsel, the record of appeal, the precedents and the law applicable. We observed that the memorandum of appeal to present A3's appeal was badly drafted. The grounds were repetitive. For example, what appeared in ground 1 was repeated in grounds 2, 4 and 8. Similarly what was raised in grounds 6 and 7 had been previously raised in ground 3. This kind of drafting offends Rule 66 (4) COA Rules and is a strain on Court's time and resources. It may explain why counsel chose to argue his submissions in clusters. However, since it remains our duty to re appraise the evidence afresh, we shall accommodate the grounds of appeal in their current form, and proceed to resolve the appeal.

131] We have when resolving grounds 1, 2 and 3 for A1 addressed the grounds needed to be proved to sustain a conviction of the offence of obtaining goods/money by false pretenses. We may add that a false pretense is a representation, either by words, conduct or otherwise, of a matter of fact either present or past, which representation is known to the accused to be false, and which is made with a fraudulent intent to induce the victim to act upon such representation. A material fact is one that would be important to the victim, but it does not have to be the only factor, in his or her decision-making process. The owner is induced by the pretenses to give his or her consent. The offence connotes the existence of untruthful representations or deceit underlying an offender's receipt of property. ***In Re: London & Clobe Finance Corporation Ltd (1903) 1 Ch. 728*** **Buckley J** held as follows:

"a person acts with intention to deceive when he induces another to believe that a thing is true, which is false, and which the person practicing the deceit knows or believes to be false."

132] When a person is charged with obtaining goods by false pretense, there must be some deceit spoken, written or acted to constitute a false pretense **(See *Regina v. Jones [1898] 1 Q.B. 119*).** The misrepresentation does not have to be made in an express statement; it may be implied from behaviour or other circumstances. It ordinarily means to deprive dishonestly a person of something which is his or hers, or of something to which he or she is or would or might but for the perpetration of the fraud, be entitled. The intended means by which the purpose is to be achieved must be dishonest. It should involve a fraudulent misrepresentation such as is needed to constitute deceit; a misrepresentation as to the accused's intentions.

133] To support a conviction for obtaining property by false pretenses, it had to be shown that A3 made a false pretense or representation with intent to defraud the complainants of their money and that the complainants were indeed defrauded of their money. The false pretense or representation must have materially influenced the complainants to part with their money. On the whole, when evaluating the evidence concerning A1, we found that he committed all the offences in issue in close concert with A3. Without being repetitive, we shall again point out our evaluation of specific facts concerning A3, and the charges against him to which he is opposed in this appeal.

134] According to the prosecution, at the trial, A3 represented himself as a professional smelter of precious metals who had interests in a company called Golden Sacks. The evidence admitted at the trial is that PW1 paid for 1kg of gold which was tested by A3 from his company premises. It was also the prosecution's evidence on Page 46 of the record of appeal that A3 informed PW1 and PW2 that he would assist them export the gold and even explained to them the process of its export. At page 47 of the record, PW1 explained that A3 informed them that by law, URA would not allow the complainants to export only one Kg of gold. He advised them to raise it to at least10 Kgs. It was at this point that A3 promised to introduce the complainants to a URA official called Patrick who proposed that the complainants take 150 Kgs of gold instead.

135] PW1 further testified on page 61 of the record that A3 gave them an airways bill dated 10/11/17, in the presence of A1 and A2. That document was admitted into evidence as Exhibit **'PE 8'**. A3 further introduced PW1 and PW2 to a UN official who came with a UN Vehicle to enable them get a UN Certificate so that the gold is transported from Congo.

136] It is our view that in the circumstances, there was representation by A3 to the complainants about the gold deal from the time when he was introduced to them as a clearing agent. The false representations also resulted into his making/uttering several documents to facilitate moving the gold, and him convincing PW1 and PW2 to purchase more gold. His conduct induced the complainants into believing that indeed the gold deal was not a scam

but an authentic transaction which prompted them to pay up money every time a demand was made by either or one of the appellants.

137] In addition, there is strong evidence that A3 did receive USD 9,000. At page 107 of the record of appeal, PW7 testified that that sum was remitted to A3 by PW1 on 20/1/2017. He further testified that he checked information on all originals and verified with the copies of the passport from PW1 and National ID of A3. We agree with counsel for the respondent that **PE 33** was tendered in court without contest and at that point, A3 raised no issue that a copy of his National ID was removed from his bail form and smuggled into evidence. That claim would as such be baseless.

138] We agree with A3's counsel that there were some discrepancies and contradictions in the prosecution evidence with respect to the actual sum that the complainants were defrauded. Some of the contradictions were minor and could be explained by lapse of time and the fact that for most payments, no receipts were given since A3 and his accomplices were spinning a scam. Even then, we find that A3's flimsy denial of never having met the complainants before his arrest were greatly discredited by the complainant's testimonies and those of other witnesses. To resolve this seemingly difficult situation, this Court only allowed a sum of USD 419,000 as proved to be the money that the complainants lost in the botched gold deal as a result of the actions of A3 and his various accomplices.

139] We do agree with respondent's counsel that in the circumstances of this case, an identification parade was not a necessary requirement during police investigations. We are in this supported

by the Supreme Court decision of **Stephen Mugume v. Uganda, Criminal Appeal No. 20 of 1995 (SC)** where court held that:

> *"It is, we think, common sense that a witness would normally not be required to identify a suspect at a parade if the witness knows the suspect whom he/she saw commit an offence. Identification parades are, as a practice, held in cases where the suspect is a stranger to the witness or possibly where the witness does not know the name of the suspect. In such a case the identification parade is held to enable the identifying witness confirm that the person he has identified at the parade is the same person he had seen commit an offence.*

140] There was strong evidence adduced to support the complainant's evidence that they came to know and continued to interact with A3 and his accomplices for at least six months. Those interactions involved intimate meetings, long discussions in person and on telephone, protracted travel, as well as money transfers. The complainants could hardly be mistaken as to who had committed the offences. PW2 testified that he came to know A1 from south Africa and they had together dealt in some business transactions way before this gold scam was crafted.

141] That it was A1 that introduced PW1 and PW2 to Lota, A3 and other accused persons still at large, and there is no way the appellants could be mistaken. In deed as soon as PW1 saw in the media on 8/11/2018 that Lota and A3 had been arrested as accessories in another gold scam, he promptly returned to Uganda and made a report that resulted into the arrest of A1, Lota and A3. It is therefore our view that there was no need for an identification parade and

failure to conduct one did not weaken the prosecution case because as the evidence sufficiently connected A3 and his accomplices to the commission of the crime. Failure to hold an identification parade was not fatal to the conviction of the appellants.

142] We therefore find no merit in grounds 1,2,3,7 and 8 and they fail.

Ground 5

143] A3's argument here is that the offence of conspiracy to defraud was in his case based on speculative circumstantial evidence which resulted into a miscarriage of justice. We note however that A3's counsel made no specific submissions on this ground. State counsel likewise made no response. However, she did draw our attention to the provisions of Section 20 PCA and submitted that although the money claimed was obtained from the complaints over a period of time and from different actors, each of the appellants, (A3 inclusive), was culpable and therefore guilty in the same measure for the role played by each.

144] We did when resolving ground three for A1, extensively dealt with the legal doctrine of common intention. We found that A3 was an accomplice because in one way or other, he participated in the joint fraud. We believed the complainants on their testimony that A3 was part of the group that met them to discuss the initial stages of the gold deal. Subsequently, A3 aided or enabled the fraud by holding out as an expert in the business and procuring and then handing over fraudulent documents to the complainants allegedly to enable export of the gold. He was on some occasions present when A1

received payments from PW1, and on several occasions reassured the complainants that the gold deal was genuine, whereas not. In our view, that was both direct and circumstantial evidence that connected A3 to the offence, and his blunt denials of never having met either complainant were thus rebutted.

145] We accordingly find no merit in ground 5 of A3's appeal and it fails.

Grounds 6,

Submissions for the appellant

146] Counsel submitted that during sentencing proceedings, the Learned trial Judge omitted to deduct the one year A3 had spent on remand and the 2 months he had spent in a safe house. He further submitted that the Learned Trial Judge imposed an omnibus compensation order and did not specify for which offence and to which convict the order referred, or how much each convict was to refund. Counsel submitted that the money which was allegedly received by A3 was not received by him as the receipts indicate a company that is not owned by him, and also that the final amount also kept varying and was not proven. He prayed that the appeal be allowed.

Submissions for the Respondent

147] Conversely, it was submitted for the respondent that the learned trial Judge expressly considered the period A3 had spent on remand and while giving reason for his sentence, the learned judge stated that he was a paper manufacturer, and clearing agent. In addition,

counsel considered the period A3 had spent in police custody as an illegal detention and that giving attention to it would amount to sanctioning an illegality.

148] Counsel submitted then that the there was no error in making the omnibus compensation order. He considered it fair for all the three appellants to jointly and severally compensate the complainants of the entire amount ordered.

Our decision

149] We have in paragraphs 59 – 63 of this judgment extensively covered the evidence with regard to the sum of money that the complainants lost to A1, A3 and Lota. We have found that **USD 419,000** only was proved and ought to have been the compensation awarded. However, it was not shown that this disparity in figures caused A3 any prejudice or embarrassment. It is only a matter of evidence that fell short of the bar required in criminal matters. Thus Grounds 6 and 7 raised for A3 only succeed in part on that point.

150] We were also tasked in ground 6 to confirm whether the sentence of two years against A3 could stand. It is well settled law that the appellate court is not to interfere with a sentence imposed by the trial court which has exercised its discretion on sentence unless the sentence is illegal or the appellate court is satisfied that in the exercise of its discretion, the trial court ignored to consider an important matter or circumstances which ought to be considered when passing the sentence, or that the sentence was manifestly so

excessive or low as to amount to an injustice. **See Livingstone Kakooza versus Uganda SC Criminal Appeal No. 17 of 1993.**

151] We have when resolving ground 5 of A1's appeal, fully articulated on the law regarding sentencing in respect of convicts who are at the material time in lawful custody. The current position of the law is that the period spent on remand must be deducted arithmetically and accounted for in the sentence. See **Rwabugande Moses (supra)**

152] A3 required the Court to have deducted from his sentence the two months he had spent in a safe house. We do agree with his counsel's submission that safe houses if they exist, are outlawed by the Constitution. Indeed, Article 23 (2) of the Constitution of Uganda, provides that a person arrested, restricted or detained shall be kept in a place authorized by law. That said, we saw nothing in the record to show that A3 proved his allegations that he had spent some time in what he termed a safe house. Even so, our understanding of Article 28 of the Constitution is that the only deductible period is that spent in lawful custody of the State. Much as this Court does not condone and in fact abhors illegal detentions of all kind, we do not see how such a detention can fall within the ambit of that provision.

153] There are of course alternative remedies in tort and under the Human Rights Enforcement Act where a victim can seek compensation. At best, A3's counsel could have raised A's unfortunate detention in such a facility as a mitigating factor, or advised him to seek other redress. We would thus have no reason to

fault the trial Judge for not considering and then deducted two months from A3's sentence.

154] The Judge's sentencing ruling with respect to A3 was as follows. He stated:

"The punishment in count one is 5 years' imprisonment. The punishment in count 3 is 3 years' imprisonment. The punishment for uttering false documents is 3 years' imprisonment. Taking into account the aggravating and mitigating factor at play and bearing in mind that A1 and A2 have been in prison for close to 3 years, I sentence the convicts as follows: -

.... For A3, this one was the paper manufacturer. He was the schooled person in the group who knew the procedures- The clearing agent so to speak. I sentence A3 to one year's imprisonment on count 3 just as I did for the other two. He has been on bail for about one and half years. His paper work enabled A1 and A2 to obtain more resources or money from PW1. He is in the same category as a co-conspirator. I sentence A3 to 2 years' imprisonment on count 1.

I have imposed a custodial sentence on each of the convicts to protect the innocent public who may wish to deal in gold business in Uganda. The reputation that trading in gold is risky business must be contained by punishment to those that use the trade to cheat the public of colossal sums of money.

The money obtained from PW1 over a 6 months' period was over one million USD. For an average businessman that is a total loss. The convicts shall jointly and severally compensate PW1 money to the tune of 1.092.000 USD.

The convicts shall serve their sentences concurrently because if they stay for long in prison then they may not be able to compensate PW1 of the loss".

155] Going by the decision of Rwabugande (supra) above, the Court ought to have deducted the period of two months that he had spent on lawful remand. The result is that he issued an illegal sentence

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that we are mandated to, and do set aside. We are again mandated under **Section 11 Judicature Act** to impose a sentence that we consider appropriate in the circumstances, and after taking into account A3's participation in the offence, as well as mitigating and aggravating circumstances presented.

156] We have noted what was presented in mitigation for A3. He had no previous record and was at the relevant time relatively young with the possibility of reform. He did not abuse his bail terms because he diligently attended his trial. However, similar to A1, we find the aggravating factors strong. A3 helped to master mind and participated in a spectacular scam of a gold deal, that lead the complainants on a wild chase across several boarders. PW1 lost colossal sums of money and suffered financial ruin which may last long. Further, A3 used his knowledge and warped skills in the gold business to obtain fraudulent documents that could compromise the integrity of state institutions of commerce, and also resulted into loss of revenue to the State.

157] Our decision on an appropriate sentence is hinged on the principle of complementarity. The offences here are most often tried at the magisterial level. In **Sseguya John v Uganda CA Criminal Appeal No. 21/2018,** an appellant faced with similar charges in the Chief Magistrate's Court of Kampala City Hall, was sentenced to three years for uttering false documents, and five years for obtaining money by false pretenses, to run concurrently. The facts of that case were that the appellant forged a certificate of title and then sold land

he did not own for Shs. 120,000,000. Both the High Court and this Court confirmed the sentences.

158] Taking into account the facts of this case, we accordingly sentence A3 to two years' imprisonment on count 1, one years' imprisonment on count three and two years' imprisonment on counts 4,5,6,9 and 10. The sentences shall run concurrently.

159] It appears from the record that A1, A3 and Lota were placed in lawful custody for two years and nine months before their sentencing date. A3 was released on bail and remained so for at least one year. That being the case, he remained in lawful custody for one year and nine months only. The period of one year spent on bail must be added back to his sentence. Thus, from the sentences on all counts, a period of one year and nine months is deducted in accordance with the law.

160] Thus A3 shall serve three months on counts 1, 4, 5, 6, 9 and 10 with effect from 16/8/2021, the date he was sentenced. For all counts, the deduction of the period spent on remand means that he has by the date of delivery of this judgment, his served his sentence.

161] Thereby ground six succeeds in part.

162] For the avoidance of doubt, both A1 and A3 have now served their terms. They are entitled to an immediate release unless charged or serving term for any lawful convictions. However, both are still bound

to pay compensation of **USD 419,087** to the complainants being the sum we have confirmed as proved by the prosecution.

Dated at Kampala this .....13th..... Day of ...Jan..... 2022

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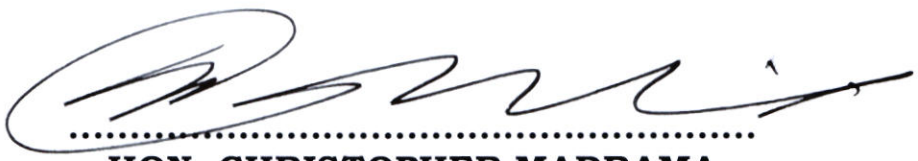
HON. CATHERINE BAMUGEMEREIRE
JUSTICE OF APPEAL



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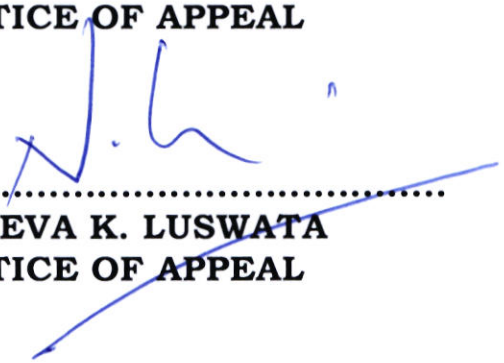
HON. CHRISTOPHER MADRAMA
JUSTICE OF APPEAL



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HON. EVA K. LUSWATA
JUSTICE OF APPEAL