

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
SESSION CASE NO. HCT-00-CR.SC 15/2013

UGANDA:.....PROSECUTOR

VERSUS

A1. SSERUNKUUMA EDRISA
A2.MAGOMBE JOSEPH JOSHUA
A3.SEGUJJA DANIEL
A4.MATOVU HENRY EDGAR
A5.IRENE KAUMA
A6.OKETCHO JACKCHAR JEROM
A7.AYEBARE PETER
A8.KULABA JOSHUA
A9.NASEJJE MARY

.....ACCUSED

JUDGMENT BEFORE HON.JUSTICE PAUL K. MUGAMBA

Nine accused persons are indicted in this case. A.1 is Sserunkuuma Edrisa, A.2 is Magombe Joseph Joshua, A.3 is Segujja Daniel, A.4 is Matovu Henry Edgar , A.5 is Irene Kauma, A.6 is Oketcho Jackchar Jerome, A.7 is Ayebare Peter, A.8 is Kulaba Joshua while Nasejje Mary is charged as A.9. In Count 1 the charge is Embezzlement, contrary to section 19(b)(i) of the Anti Corruption Act. In Count 2 the charge is Theft, contrary to sections 254(1) and 261 of the Penal Code Act. In Count 3 the charge is conspiracy to commit a felony, contrary to section 390 of the Penal Code Act. In Count 4 the charge is Unauthorized Access, contrary to section 12(1) and 20(1) of the Computer Misuse Act. There is, in addition, the offence of Electronic Fraud, contrary to section 19 of the Computer Misuse Act charged in count 6.

In the indictment A1 is charged with four offences, specifically in count 2, count 3, count 5 and count 6. A2 is charged under counts 2, 3, 5 and 6. A3 is charged under counts 1, 3, 5, and 6. A4 is charged under counts 2,3,5 and 6. A5 and A6 are charged under counts 2, 3, 4 and 6. The charges against A7 are in counts 2,3,4,5 and 6. The three counts under which A8 is charged are 2, 3, and 6. Charges leveled against A9 are in counts 2 and 3.

Forty prosecution witnesses testified for the prosecution. They are:

PW1 Micheal Sekadde

PW2 Peter Ochen

PW3 Bernard Bryner Oweyi

PW4 Kiyingi Karim aka Robert aka Sengendo Johnson

PW5 Nelima Moses

PW6 Ingwara Betty Teddy

PW7 Elizabeth Ntege

PW8 Diana Matovu

PW9 Omony Robert

PW10 Catherine Tumwebaze

PW11 Wycliff Waiswa

PW12 Kisukiro Daniel

PW13 Joseph Henry Mwambala

PW14 Angela Tracey

PW15 Murumba George

PW16 Kyarituha Ann

PW17 Umar Katumba

PW18 Deborah Wamala

PW19 Ainembabazi Shavin

PW20 Micheal Collins Mugisha

PW21 D/SP Mutungi Charles

PW22 D/SP Owao Denis
PW23 D/AIP Makhokha Thompson
PW24 D/AIP Kawanga Daniel
PW25 D/AIP Watum Benson
PW26 Olweny Abdul Nasur
PW27 D/AIP Turyahamwe Felix
PW28 D/ASP Ayebare Emmanuel
PW29 Godi Heavenfalls
PW30 John Semakula
PW31 Alanyo Christine
PW32 John Kamanyire
PW33 Biira Loyce
PW34 Mujuni Lauben
PW35 Ben Turyasingura
PW36 Sergent Warder Okello Peter
PW37 Tom Reagan Kasule
PW38 D/C Ogwal Tom Richard
PW39 D/AIP Otim Egidio
PW40 D/Sgt Bonyo Julius

The case for the state is that on 25th January 2013 a sum of shs 3,150,000,000/= was transferred from the MTN Dispute Account in seven equal installments of shs 450,000,000/= each to MTN

Agent lines employing fraudulent means. A detailed explanation was given regarding how the mobile money system operates, by PW2 in particular. It was stated that the system operates in an external environment which involves banking and agents as well as subscribers on one hand. On the other hand there is the internal system called fundamo specifically for mobile money .Within fundamo there is the bank control account and the dispute account. A deposit is made by an agent on an escrol account in the Stanbic Bank. That deposit is then electronically synchronized into fundamo through the dispute account and onward to the intended beneficiary. This should happen without manual intervention. It was prosecution evidence that what comes through the fundamo system and gets out is influenced by virtual cash, floats. It is prosecution case that what happened on 25th January 2013 was loss which occurred when the dispute account was debited.. The loss was to MTN consequently .It was prosecution case that the money which went into agent lines was later transferred to a total 138 subscriber accounts and that it was withdrawn in cash or tokens. Immediately this was detected the system was closed and investigations commenced. It is prosecution case that whatever left the dispute account on the occasion comprises the money allegedly stolen.

Exhibit P.21 shows journal transactions which happened pertaining to this case between 10:21:25 am and 10:27:20 am on 25th January 2013. The agent accounts involved were Ari Telecom And Phone Accessories Ltd on line 0772201316, Ari Telecom And Accessories Ltd on line 0772201317, Ari Telecom And Accessories Ltd on line 0772201318, Tyra Enterprises Limited Rubaga on line 0772102087, Wesley Investments Ltd Rhino Camp Arua on line 0772100889, Rukungiri District Employees Co-operative SACCO Rukungiri on line 0772101427. The dispute Account was on the occasion debited and shs 450,000,000/= was transferred to each of the lines , bringing the total amount deducted to shs 3,150,000,000/= .This evidence is contained also in Exhibit P.15 which goes ahead to show how the money was further distributed from the agent lines to several account holders. Further fortification of this evidence is in the forensic examination report contained in Exhibit P.31.

The prosecution led evidence to show that the journal transactions in issue were carried out using a computer which belonged to MTN and was located in the Recreation Centre. This was arrived at after due audit was done and it was ascertained that the unauthorized journals were posted using a computer with the IP address -10.151.53.101. Further it was established that the IP address belonged to that computer in the Recreation Centre whose name was

ylcspco1 .Subsequently it was not in contention which computer it was which generated the journal transactions alluded to.

None of the accused persons was arrested in the course of committing the offences alleged against them. The prosecution arrested them subsequent to the transactions and assembled what evidence there was linking them to the charges. That evidence was largely circumstantial. To justify an inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See **Musoke V R [1958] EA 715**.

Regarding A1 evidence was adduced by PW4 that A1 gave a flash to A7 so that A7 would insert it in one of the computers on the 9th floor and obtain some information. PW4 testified A1 paid money to A7 amounting to shs 600,000/= .It was his evidence on 27th January 2013 A1 made the final payment of shs 500,000/=. On his part PW20 testified that between 25th January 2013 and February 2013 he recovered US\$11,500 from Mariam, sister to A1. PW20 could not recall the exact date but he said it was at CPS. On his part PW21 stated that he recorded a charge and caution statement from A1 on 2nd February 2013. In that statement A1 admits to have participated in the fraud together with A2, A3 A4 and A5.The forensic report was made by PW32. In it he alleged that A1 sourced a key logger which was used to capture information from the computer on floor 9. It was his allegation also that A1 co-ordinated the exercise using A5 and A7 at different stages. PW34 testified that he found A1 at home in Bwaise with a black Nokia phone, single line. There were several MTN numbers in the phone and it was his finding that A1 had sent fifty million shillings (50,000,000/=) to A8 using the same phone. He took A1 to Kisugu police station. PW34 added that on 1st February 2013 A1 admitted to have stolen some of the money and kept it with a girlfriend .The girlfriend could not be traced but A1's sister, Mariam Semwanga, brought with her US\$11500 she said she had received from A1's girlfriend. It was his evidence Mariam produced the money after A1 called using his (A.1's) phone which was being kept by PW33 at the time. It is PW34's further testimony that it was PW39 who handed over the Nokia phone recovered from A1 to the store man following its recovery by PW33 on the 3rd February 2013. The messages were taken in picture and handed to him. He stated also that when A1's home at Bwaise was searched nothing was recovered but that A1 helped police track A8 down.

Evidence concerning A2 was given by PW17 who stated that during December 2012 he received some money in an envelope from A2's brother. He said he did not count the money but it was meant to pay for windows which were ordered by A.2's sister. He handed over the money when he was arrested and told to surrender it to police. He added that he was made to sign a statement which police had not read back to him. PW20 testified that when he carried out investigations he discovered the registered agent for the company purportedly registered by A2 to be someone else, one Paul Wasike. On his part PW29 stated that he recorded a charge and caution statement from A2. In the statement A2 admitted involvement and mentioned A1, A3, A4 and A5 as others he acted with in the fraud. PW32 in his report stated that A2 was a beneficiary of the money lost in the fraud. The evidence of PW34 is that he and PW39 were led by A2 to the workshop of PW17 at Kiwatule and that afterwards PW17 picked money from a metal box and handed it to PW40 from police. A search certificate was made to this effect and the amount received was shs 4,000,000/=

PW1 testified that Daniel Ssegujja (A3) had earlier served as Area Sales Representative for MTN and that he ceased to be so employed after his arrest by police. PW11 stated that A3 had picked PW11's laptop at Ntinda from the car of A5 on 7th September 2012. The laptop had been in the car together with an MTN Mobile Money Agent kit for Wesley Investments Ltd. A3 did not pick the kit according to the evidence. In his evidence PW20 stated that he interviewed PW26 who said he got tokens from A3 on the 25th January 2013. Of the shs 4,500,000/= he received he was to retain shs 500,000/= and hand over the rest to one Sebagala for onward transition to A3. PW25 stated that he recorded a charge and caution statement from A3 on 6th February 2013. In the statement A3 admitted he was involved in the fraud together with A1. The evidence of PW26 was that he used to work with A3 in the field at Kotido and that on 25th January 2013 he received shs 4,500,000/= .He said A3 called him on phone number 0782702227. He said of the money he received he kept shs 500,000/= .He said he sent the shs 4,000,000/= through Sebagala to A3. It was his evidence his communication with A3 was in English, a language he said he understood but could not speak. The forensic report PW32 made mentions A3 as a beneficiary of the fraud and that he used various mobile phone agents. PW32 said he got this information from PW20 .He stated that in the call data record the number 0782357507 was in handset 356995041977140 and that A3 had with him line 0772201317 belonging to Ari Telecom And Phone Accessories Ltd. PW32 did not retrieve the line belonging to Ari Telecom And Phone Accessories from A3. He had no evidence to show correspondence between A4 and A3 or one Opiyo Stephen .It was the

evidence of PW34 that A3 led them to the home of A4 in Kikumbi .On the 4th February 2013 A3 led PW34, PW39 ,PW40, and PW33 to his house where shs 4,000,000/= was recovered under a television stand. A search certificate was made to this effect.

Evidence given against Edgar Matovu (A4) by PW1 was that A4 was formerly employed by MTN but that on 27th December 2012 he was dismissed as Area Sales Representative because he was dishonest. PW19 testified that on 26th January 2013 A4 gave her shs 29,600,000/= to convert into £ sterling. She went to the Forex Exchange at Lugogo where she exchanged the Uganda currency for £6900. She handed that money and receipts at her home to PW33.PW28 recorded a charge and caution statement from A4 .In the statement A4 implicated himself and A5.In the forensic report PW32 cites A4 as one of the beneficiaries in the fraud. PW34 stated that details of A4's whereabouts were given to police by A3.On 31st January 2013 A4 admitted he had stolen money which he had kept with his girlfriend Ainembabazi Shavin (shs30,000,000) and shs 20,000,000/= with another girlfriend Tamasha Namirembe. Shavin had exchanged the money into pounds sterling and had cash £6900.Shavin led police to Kifampa, Salama Road, where that money was recovered. A search certificate was made to effect. When the other girlfriend, Tamasha, was interviewed she admitted A4 had given her shs 20,000,000/= which she kept at her mother's house at Namugongo .It was found in a pillow up in the ceiling. In all shs 19,900,000/= was recovered on the occasion and a search certificate was made. The testimony of PW39 was that A4 led them to the recovery of £6900 from Shavin Ainembabazi and shs 19,900,000/= from Tamasha Namirembe.

Regarding Irene Kauma (A5) it was the evidence of PW3 that he reversed the CCTV Camera recordings at MTN Towers and that he saw in the footage a woman who was with A6 in the Recreation Centre. The time shown on the recordings was 10.30 on 25th January 2013.It was stated by PW7 that A5 was an employee of NFT Consult and that she had been recruited in February 2011 as a Records Assistant at MTN but that owing to gross misconduct her employment at MTN was terminated in November 2012. Evidence was given by PW9 that he received a call from A5 on 15th December 2012 .He stated that the call was from A5's phone 0785618136 to his 0772520593 and that following the call A5 got a loan from PW9 which she paid back on 5th January 2013 .That loan was of Shs 300,000/= and it was paid back using mobile money. It was the evidence of PW9 that A5 confided in him and disclosed her plan to hack the MTN system .According to the witness, he jokingly requested her to lend him Shs

1,000,000,000/= .He said he sent that message by sms. He added that later he sent A5 another message asking for a loan of Shs 1,000,000/= .None of the two messages were responded to by A5 according to PW9. When PW9 called A5's phone on 26th January 2013 it was off air. Evidence given by PW11 was that on 7th September 2012 he left his laptop and a mobile money kit for Wesley Investments Limited in A5's car after he picked them from his house. He stated that A5 asked for the car later in order to go and pick her child from school since it was wet. Later when PW11 was in the company of A3 and Kalibbala he sought to go to Ntinda in order to retrieve his laptop and the kit from A5's car. A3 offered to go by motorcycle to pick the items since there was heavy traffic. Later A3 returned with the laptop only. It was subsequently in the afternoon that PW11 realized the kit had not been collected. Upon asking A5 regarding the kit A5 said she had already sold off the car. However A5 promised PW11 that she would try to find the kit.PW12 testified that at about 3am on 26th January 2013 he was at home when he heard a bang at the door. Immediately A5 handed over cash shs 8,600,000/= to him to keep. He kept it until next day his sister Jennipher Ichuma requested him, on phone, to take the money to Plot 77 Yusuf Lule Road, opposite Garden City. It was the evidence of PW12 that he had already used some of the money .He said he handed over to police shs 8,120,000/= .The evidence of PW13 was that he had gone to a party but that on the morning of 26th January 2013 his younger sister Pamela called asking him to open the door at home because people, including police, wanted to enter their residence. Following a search of A5's room she was arrested and taken away. He was asked to pay shs 2,000,000/= to secure bond for A5 .PW13 stated that on the occasion A5's greenish blouse, a pair of dark blue jeans, a flash disk and a Nokia phone were taken . The Nokia phone belonged to PW13.It was the evidence of PW20 that he reviewed the CCTV footage and saw A5 on camera. In the footage A5 entered the MTN Recreation Room from the left. He said he saw A5 and A6 move first to the fourth computer. It was his evidence that A5 moved to different computers while she spoke on phone. He said A5 wore a multi colored blouse with a dark overcoat and a dark cap bearing an MTN logo. She wore a dark pair of jeans also. It was his evidence the time A5 operated the computers was the same time money was moved in the seven transactions. He said he got details of A5's residence from Jennipher Ichuma, A5's sister. He testified that A5 admitted to having participated in the fraud but said she was forced to do so. PW20 added that A5 rang her brother afterwards asking him to take the money received to Plot 77 Yusuf Lule Road .The brother produced shs 8,120,000/= .It was his evidence when they watched the CCTV footage police was not present. The evidence of PW32 was that he identified

A5 on video footage as she moved to different computers. He said he had seen A5 in the footage as he entered the Recreation Room in the company of A6. In his evidence PW39 said he recovered a black Nokia telephone set number 354558055658933 from A5. The phone had in it line 0772520593. He stated that he recovered shs 8,120,000/= from A5's brother and that shs 300,000/= was taken to him by PW12 on 26th January 2013, saying he had received it from A5. In the charge and caution statement A5 made she implicated herself as well as A1, A2, A3 and A4.

Prosecution evidence against Oketcho Jerome Jackchar (A6) given by PW3 was that he reversed the CCTV camera at the MTN Tower and that on camera he saw A6 with a lady and that the two moved to different computers. He said he knew A6 earlier and that the time of the recording was at 10:30am on 25th January 2013. PW8 stated that A6 was employed by MUBS Entrepreneurship Centre in 2008 as a Customer Advisor at MTN. He said MTN asked for termination of his services in January 2013 owing to fraud. According to PW20 on 25th January 2013 he saw and recognized A6 on the CCTV footage at Plot 77 Yusuf Lule Road. He looked for A6 and collected A6 from Kamwokya. He took A6 to the MTN Boardroom at Yusuf Lule Road. A6 denied involvement when he was asked. The evidence of PW27 is that he recorded a charge and caution statement from A6 on 4th February 2013. The statement bears names different from those of A6. A Jackson appears in the statement. The statement makes no admission to involvement. PW32 testified that he wrote the forensic report and that he recognized A6 in the footage. He stated that A6 authorized access to the Recreation Centre to the person who posted the transactions in issue. In his evidence PW34 said he together with PW39 and PW40 interrogated A6 on 28th January 2013 at Special Investigations Unit Kireka. He said following the investigation A6 told them he was approached and convinced to steal money from the MTN Dispute Account. The testimony of PW39 was that he saw A6 on a CCTV footage in the Recreation Room in the company of A5 and that A6 wore a stripped T-shirt. The T-shirt was kept by PW40 in his custody.

Prosecution evidence given regarding Ayebare Peter (A7) by PW3 is that he saw a video footage of a cleaner in the corridor on the 9th floor MTN Towers. A7 was not involved in any transaction. Evidence was given by PW4 who said that during January 2013 he introduced A7 to A1 to carry out some errand at MTN Finance Department. He said A7 was to insert a flash in the computer for information and return it to A1. Payment for that service was agreed at shs 600,000/= .It was his evidence A7 was a cleaner working with A & M Cleaning Services who worked on the 10th

floor but he could access the 9th floor .The testimony of PW5 was that A7 worked for A &M Cleaning Services on the 10th floor MTN Towers and that A7 worked under his supervision. A7 worked together with Harriet Namazzi .He said it was not possible for a cleaner for one floor to access another floor except where one stood in for another. He said that it is normal for a worker to report for work at 5.20am. It was his evidence the floor is accessed by lift while the offices are entered using access cards. The evidence of PW20 was that at the time in issue the doors at MTN Towers were faulty and that it was possible then to access an office by just pushing the door. PW25 testified that he recorded a charge and caution statement from A7 on 2nd February 2013.In the statement A7 implicates himself and A1 .He added that PW4 asked him to do the work he did with a view to opening a kiosk for someone. Afterwards he was paid some money by A1.PW32 was positive in his evidence that A7 deployed the key logger on the critical computer given that a CCTV footage had him on the 9th floor on the morning of 24th January 2013 and 25th January 2013 at about 5am.It was the evidence of PW32 that A7 used the fire exit door to access the 9th floor.PW32 said that A7 did not say anything about the key logger but he is certain A7 was contracted by PW4 to deploy the key logger onto the computer.PW34 testified that he arrested A7 at MTN Headquarters on 2nd February 2013. The testimony of PW39 is that he interviewed A7 and that A7 admitted he inserted a flash disk into the computer in question.

Prosecution evidence against Joshua Kulaba (A8) was given by PW20 who stated that A8 was a mobile money agent and owned an agency known as Extra Link .There was no proof of that however. PW32 said A8 was a beneficiary of the fraud. In his report PW32 stated that A8 was a Trade Development Representative employed by another agency but assigned to MTN. The report alleges A8 was involved in past frauds and that he received money from A1 through mobile money agent line 0772201317 in the name of Ari Telecom And Phone Accessories Limited. The report states A8 received tokens even. He was arrested in Jinja but nothing important was recovered from him. PW34 testified that he was in the company of other detectives when he went to arrest A8 on 4th February 2013 and that A1, who was with them , assisted them locate A8 who was alleged to have received shs 50,000,000/= . All A8 had on him when arrested was a black Itel phone which had no cover. Numbers in the phone corresponded with those in the phone of A1. A8 disclosed he had thrown other lines in River Nile. He said also that he had withdrawn Shs 4,000,000/= which he had used up and that the system was blocked before he could withdraw more. PW34 was definite A1 was the person who helped trace A8. He said it was a mistake to say it was A4 who helped in that respect. It was the evidence of PW34

that A8 received Shs 54,000,000/= and withdraw shs 5,000,000/= when asked if this did not contradict his earlier testimony, PW34 said the earlier statement had been an oversight. The evidence of PW39 was that with the assistance of A1 he had gone to arrest A8 on 3rd February 2013. A dual sim phone Itel IT 2010, made in China and bearing Warid and Airtel lines was recovered from A8 . PW39 asked the scene of crime officer to take photographs of messages found in the phone.

Prosecution evidence given against Mary Nasejje (A9) by PW7 shows that A9 was recruited by NFT as Trade Development Representative and she had worked for MTN and Ezeemoney respectively. This ended when she was arrested. PW10 testified that on 4th January 2013 A9 went to MTN Ntinda offices and picked lines for Ari Telecom and Phone Accessories Ltd. She first produced receipts from the bank indicating due payment and her identity .The receipts were respectively for shs 1,000,000/= and shs 82,000/= .The identity card was issued by NFT Consult. The three lines taken were 0772101316, 0772101317 and 0772101318. The serial number for the handset was 35792503850705. The testimony of PW20 was that Noah Kasajja was a fictitious person. The print out data showed that the staff number 0772712179 of A9 which was allocated to her communicated with Nakyole Ruth's number 0784281828. PW23 testified that on 9th February 2013 he recorded a charge and caution statement from A9. The evidence of PW32 was that A9 was a signatory to Ari Telecom and Phone Accessories Limited. In his testimony PW34 said A9 had signed for three lines which were all used in the fraud.

In Count 1 there is the charge of embezzlement, contrary to section 19(b)(i) of the Anti Corruption Act. As noted earlier, the charge is against A3. To prove the charge it behoves the prosecution to prove that accused was employed by the complainant, MTN. The prosecution should prove also that accused stole the property of his employer, MTN. There must be proof that the property was received by accused on behalf of the complainant and that such receipt was owing to accused's employment with the complainant. It is alleged by the prosecution that A3 on 25th January 2013 embezzled shs 3,150,000,000/= belonging to MTN. It was never contested that A3 worked for MTN at the time material to this case. Indeed the prosecution tendered in Exhibit P.25 , the charge and caution statement of A3 to support its case. The charge and caution statement significantly does not mention receipt of money from anywhere but states that on 4th February 2013 the accused, ' led the team of Otim a police officer and others to [my] home to recover the balance of 4.000.,000= out of the 6.000.000= the 2.000.000= had been used'.

That is all there was regarding alleged receipt of money. There is no indication where the money came from, whose money it was or when it was he received it. The charge of embezzlement has not been proved by evidence on record. In order to be admissible as a confession a statement must either admit the terms of the offence or substantially all facts that constitute the offence. See **Uganda V Yosamu Mutahanzo [1988-1990]** HCB 44. Obviously this is not the case here. The gentlemen assessors in their joint opinion advised me to find the prosecution has not proved the charge in count 1 against A3 .I agree with the verdict and acquit A3 on Count 1.

COUNT 2 THEFT, Contrary to section 254(1) and 261 of the Penal Code Act .To prove this charge the prosecution ought to prove that there was asportation of the thing said to have been stolen., the person or persons taking it must have no claim of right and must have had the intention to permanently deprive the owner of that thing. It ought to be proved also that the person charged participated in the offence. The charge has been preferred against all accused persons save A3 .It is prosecution evidence that on 25th January 2013 money left the MTN Mobile Money Dispute Account in seven fraudulent transactions and proceeded to agent lines .There were seven agent lines involved. The agent lines are said to have in turn transferred the money to 138 subscriber lines. It is the prosecution case that in the process asportation happened. Exhibit P.21 shows that Ari Telecom and Phone Accessories Ltd did receive shs 450,000,000/= on four separate occasions during the transaction in issue. Three other transactions took place then and each of them involved the sum of shs 450,000,000/= . Involved in the heist was Tyra Enterprises Limited Rubaga, Wesley Investments Ltd Rhino Camp Arua and Rukungiri District Employees Co-operative SACCO Rukungiri.

In his charge and caution statement A1 confesses he and others participated in planning and later stealing the money in question. I should state at this stage that A1 contested the charge and caution statement .In **Tuwamoi V Uganda [1967] EA 84** the position was settled when court held that no clear distinction exists between repudiated and retracted confessions given that in order for any of them to be accepted by court great caution was needed and that it was incumbent on court to first satisfy itself that all circumstances surrounding the confession do not negative it. It was the evidence of PW4 that he linked A1 to A7 and that following that linkage A7 carried out an errand on a computer as directed by A1.PW4 however does not state what it is that transpired besides narrating his role in linking A1 to A7.There are extra judicial statements of A2, A3,A4,A5 and A7 where A1 is mentioned .All those five persons are accused together with

A1 and it is gainful to note that a statement is not a confession unless it is sufficient to justify the conviction of the person making it of the offence with which he or she is being tried. See **Anyangu V R [1968] EA 239**. Evidence of a co –accused is of the weakest kind. Though it could be taken into consideration against a co-accused it could be used as lending assurance to other evidence. It could not be used as the basis of the case against a fellow accused. Such evidence is hearsay given that its worth is not subject to testing by cross examination of the maker by the co-accused against whom the allegation is made.

The evidence of PW20 is that he recovered US\$11500 from Mariam, A1’s sister at CPS . According to PW32 A1 was instrumental in giving to A7 the device which A7 went ahead to install in a computer .The respective charge and caution statements of A1 and A7 testify to this. I should remark that there is no evidence to support the testimony of PW34 that evidence had been found at the house of A1 regarding shs 50,000,000/= A1 had sent to A8 .However the confessions of A1, A2 and A5 reveal that A1 did participate in meetings preparatory to the insertion in computers of the device alluded to which led to the theft of MTN mobile money .Section 19 of the Penal Code Act relating to aiding and abetting would see him included amongst the participants in the theft. I agree with the verdict of the assessors and convict A1 on count 2.

Concerning the part played by A2 in the offence under count 2, it is admitted in the confession of A2 that he took part in the theft. However given that he contested his charge and caution statement in court there is need to look for other evidence to rely on. PW17 testified that he received money from the brother of A2 but I find that the witness said he received that money in December 2012 before the offence happened. Evidence was given by PW20 that A2 was not the person behind Magombe company. However A1 and A5 in their respective charge and caution statement stated that A2 planned with them how to go about the execution of the plan to steal money from MTN. The plan eventually led to the fraud under review. The assessors advised me to find A2 guilty on count 2. I agree with their opinion and convict A2 on count 2.

Regarding A4, he admitted to the charge of theft in his confession but adding that he could not identify the agents from whom he withdrew the money. It was his statement that from various places he was able to withdraw over shs 55,000,000/= and gave shs 5,000,000/= to A5. As regards the confession there is obvious need for caution for the reasons given earlier. The prosecution led evidence that on 26th January 2013 A4 handed about shs 29,000,000/= to PW19

which PW19 proceeded to exchange into £6,900 . When police investigated into the matter PW19 surrendered the money and relevant receipts to them. There was evidence also that A4 gave shs 20,000,000/= to Tamasha Namirembe , another girlfriend .Of that amount shs 19,900,000/= was recovered from the ceiling of her residence wrapped in two pillow covers. Needless to say in his charge and caution statement A4 related to a sum of over shs 55,000,000/= he received in the fraud. It is significant that it was he who led police to recover the money he had earlier entrusted in the custody of his two girlfriends. Big sums of cash aside, the fact that he chose to give cash money to his girlfriend on 26th January 2013 in the wake of the heist and some more to another, also in cash and that it was he who led police to recover that money leads one to the conclusion that there is evidence besides the extra judicial statements he himself A1, A2 and A5 made that he participated in the theft. I agree with the advice of the assessors and convict A4 on count 2.

Prosecution evidence against A5 was given by PW3 who reversed the CCTV camera recordings at MTN Towers. He testified that a woman was seen in the company of a male on CCTV footage at 10: 30am on 25th January 2013 .He identified that woman as A5. Exhibit P51 was tendered in evidence as that footage which had been saved.

Video evidence is no longer a rare phenomenon in courts of law. In the United Kingdom it was held in **Kajalave V Noble (1982) 75 Cr. App. R 149** that where a witness knows the defendant sufficiently well to recognize him as the offender depicted in the photographic image, he can give evidence of this and that this may be the case even if the photographic image is no longer available for the jury or court as stated in **Taylor V The Chief Constable of Cheshire [1987] 1ALL ER 225.**

Needless to say the authenticity and integrity of electronic evidence is not in question until the party suggesting otherwise can produce evidence to prove so. The clothes A5 wore at the time she was allegedly captured on CCTV were handed to police by her brother PW13 following her instructions for him to do so. Those items of clothing were exhibited in court as Exhibit P.44 and P45 .The video evidence in this respect was not contested. I am satisfied A5 was the person who was captured on the CCTV footage at the time in issue. There was evidence also of PW9 who stated that A5 earlier on had communicated to him that she planned to hack into the MTN system. Evidence of PW11 is that on 7th September 2012 he left his laptop and a mobile money agent kit for Wesley Investments Ltd in A5's car. He stated that he was unable to recover the kit

since A5 sold off the car immediately afterwards. There is also the evidence of PW12 who stated that at about 3am on the morning of 26th January 2013 A5 handed him shs 8,600,000/=after a bang was heard on the door to the house. A5 was arrested soon afterwards and he was asked by his sister Jennipher Ichuma to take the money he had received from A5 to MTN .He took shs 8,120,000/= and handed it to police. PW20 also watched the CCTV footage in issue. His evidence was that the transactions alluded to on the footage happened at 10:21am on 25th January 2013. PW39 stated that he recovered shs 8,120,000/= from the brother of A5 who said he had received the money earlier from A5. I have considered the fact that A5 was at the Recreation Centre where she was not authorized to be and that she was working on computers. The time she was in the Recreation Centre was the time money was dissipated from the Mobile Money Dispute Account of MTN. The evidence of PW9 regarding A5's intention to hack into the system and the fact that A5 produced shs 8,600,000/= which she gave to PW12 to keep for her lead to suspicion. Suspicion is further raised when one recalls the charge and caution statement of A5 in which she admitted participating in the fraud and receiving shs 5,000,000/= from A4 and shs 5,000,000/= from one Seguya. I agree with the opinion of the gentlemen assessors that A5 was involved in the theft .I find her guilty on count 2 and convict her.

Evidence against A6 given by PW3 is that he reversed the CCTV recordings at MTN Towers. It was his evidence that on camera he saw A6 in the company of a lady and that they moved to different computers. It was his evidence the recording was captured at 10:30am on 25th January 2013. Further evidence was given by PW20 who said that he saw A6 on the CCTV footage at Plot 77 Yusuf Lule Road on 25th January 2013. There was evidence also of PW32 who recognized A6 in the footage. He does not say A6 gave the woman in the footage access to the room on 4th floor. Others who testified to seeing A6 in the footage were PW34 and PW35.In the charge and caution statement attributed to him A6 does not admit to having participated in the theft in any way. The charge and caution statement attributed to him in any case refers to a 'Jackson Oketcho'. A6 denied ever making a statement. I have earlier related to video evidence as presented to court. A6 was recognized in the footage by PW3 , PW20,PW32,PW34 and PW35. I am satisfied he was the person identified on the occasion. No evidence has been adduced to show that A6 participated in the theft. It is true he was at the location but whether he participated called for proof. On the other hand to be guilty of aiding and abetting, a person should be proved to have been consciously participating in what was being done and there

should be present facts that constitute the offence. I agree with the gentlemen assessors that the prosecution has not proved the charge of theft against A6. I acquit him on count 2 accordingly.

Concerning the charge of theft, A7 in his charge and caution statement admitted that he inserted a flash in a computer because someone wanted information to open a mobile money kiosk. This extra judicial statement was contested by the accused. Caution would require that some other evidence be checked on to see if it is supportive of the confession. It is the evidence of PW3 that he saw a cleaner on the CCTV footage. That was on the 9th floor and the cleaner involved in other transactions not connected with the computer alluded to. PW4 testified that he introduced A7 to A1 in January 2013, adding that A7 did the job he was requested to do and was paid for it. It was the evidence of PW32 that the password material to this case was stolen using a keylogger and that A7 was instrumental in this. PW 39 testified that he interrogated A7 and that A7 had admitted to having inserted the flash device in the computer. There is no evidence connecting A7 to theft.

What evidence there is besides A7's retracted confession is the similarly retracted confession of A1 which is contested by the maker and the evidence of PW4 who is for all intents and purposes an accomplice. It is his admission he secured the services of A7 for A1. He is an accomplice for all intents and purposes and his word cannot be easily trusted.

While the evidence of A4 can be taken into account no evidence is on record to show A7 is involved in the alleged theft or that he knew about the theft. The gentlemen assessors advise me that A7 did not commit the alleged offence. I agree and acquit him on the charge in Count 2.

Also charged on Count 2 is A8. It is the evidence of PW20 that A8 was a mobile money Agent for MTN and his agency was known as Extra Link. No evidence was adduced to this effect besides the verbal assertion. It was the evidence of PW32 that A1 sent money to A8 using mobile money agent account 077220317 in the name of Ari Telecom and phone Accessories Limited as well as Mobile money tokens. To this effect no evidence was produced. It was the testimony of PW34 that A8 received shs.54,000,000/= but that A8 had withdrawn shs.5,000,000/=. Earlier in his testimony PW34 had alleged that A8 told him he had withdrawn 4,000,000/=. It was the evidence PW39 that when he arrested A8 in Jinja on 3rd February 2013, he recovered an ITEL dual sim phone IT2010 made in China, bearing Warid and Airtel lines. Court would not admit photographs taken of messages found in the phone because their authenticity was not established

properly. From the evidence assembled nothing implicates A8 in the theft alleged. I agree with the gentlemen assessors that the prosecution has not proved theft against A8 in Count 2. He is acquitted on that Count.

Against A9 in Count 2 is the evidence of PW10 who stated that on 14th January 2013 A9 went to MTN Offices at Ntinda to pick lines for Ari Telecom and Phone Accessories Ltd. She collected the kit. Records initially show that on that occasion she received lines 0772101316, 0772101317 and 0772101318. It is not disputed the lines she signed for were involved in the fraud. It was never established who ultimately took the lines she signed for. Names like Nakyole, Opiyo and Kasaja were mentioned. It is the evidence of A9 that Nakyole Ruth was her sister, on whose behalf she had signed for the lines. Later Nakyole asked A9 to sell the lines to someone. After the sale she did not know what happened to the lines or who took them. There was no evidence linking A9 to the theft let alone to any of the persons with whom she stands charged. The gentlemen assessors advised me that the prosecution has not proved the offence of theft against A9. I agree with their opinion and find A9 not guilty on Count 2. She is accordingly acquitted on that count.

COUNT 3 CONSPIRACY , contrary to section 390 of the Penal Code. The offence is committed when there is an agreement between two or more persons to prosecute an unlawful purpose. In this case theft is the offence.

The charge involves all the accused persons. The charge and caution statement of A1 mentions that there were meetings held and he mentions attendants to these meetings besides himself, as A2, A3, A4 and A5. In the same regard A2 mentions meeting with A1, A3, A4 and A5 in his charge and caution statement. The charge and caution statement of A5 mentions her meeting with A1, A2, A3 and A4. It is not easy to capture details of meetings especially at meetings where no recording is made of the proceedings. However I am satisfied that the charge and caution statements of A1, A2 and A5 are corroborative of each other and that evidence of meeting to conspire to commit a felony emerges from them. The three confessions implicate the makers as well as other co-accused in the offence of conspiracy. A Court can find a conviction on an uncorroborated repudiated confession as long as it is satisfied that it is true but it is unsafe to do so. However in the instant case there are three confessions. Each of the confessions implicates the maker before going on to mention the co-accused. It is borne in mind of course that a statement is not a confession unless it is sufficient to justify the conviction of the person making

it of the offence with which he is being tried. See Anyangu v R already cited. Consequently the confessions of A1,A2 and A5 provide sufficient evidence that A1,A2,A3,A4 and A5 attended the meeting where they conspired one together with others to commit the felony of theft. The gentlemen assessors in their opinion advised me to find A6 and A7 guilty in addition to the five and to acquit A8 and A9. While I partially agree with the verdict of the assessors, I respectfully find that not only A8 and A9 should be acquitted in Count 3 but A6 and A7. There is no evidence of conspiracy against them on record. I convict A1,A2,A3,A4 and 5 in Count 3.

COUNT 4 UNAUTHORISED ACCESS, contrary to section 12(1) and 20(1) of the Computer Misuse Act. This charge is preferred against A5, A6 and A7. Section 12(1) states that a person who intentionally accesses or intercepts any program or data without authority or permission to do so, commits an offence. Section 2 of the Act interpretes data as electronic representation of information in any form. The same section interpretes “program” or “computer program” to mean data representing instructions or statements that, when executed in a computer, causes the computer to perform a function. “Function” is also interpreted in section 2 to include logic, control, arithmetic, deletion, storage, retrieval and communication or telecommunication to, from or within the computer. It is gainful to get the interpretation of ‘access’ within the same section 2. It means gaining entry to any electronic system. No evidence was adduced to show that A6 accessed or intercepted any program or data, let alone intentionally. Regarding A7 evidence was given that he was on Floor 9 but no evidence was given of him entering Christine Alenyo’s office, getting anywhere near her computer or any computer for that matter. Prosecution did not prove the intention required for A7 to commit the offence either, if he was on an errand as alleged by the prosecution. As regards A5 she made a confession in her charge and caution statement that she was on a mission to gain access to the MTN mobile money electronic system and that she did. Evidence was tendered by the prosecution that A5 was at the Recreation Centre at about the same time as the time of the fraudulent journal transactions of 25th July 2013 which happened between 10:21:25am and 10:27:20am. Exhibit P21 fortifies this position. The assessors advised me to find all the accused guilty. For the reasons I have given I do not agree with that opinion. I find A6 and A7 not guilty and acquit them in Count 4. I find A5 guilty and convict her accordingly.

COUNT 5 UNAUTHORISED ACCESS, contrary to section 12(3) and 20(1) of the Computer Misuse Act, the charge is preferred against A1,A2,A3,A4 and A7. The offence reads:

“A person who wrongfully produces, sells, offers to sell, procures for use, designs, adopts for use, distributes or possesses any device, including a computer program or a component which is designed primarily to overcome security measures for the protection of data or performs any of those acts with regard to a password access code or any other similar kind of data commits an offence”.

The state case is that computers in the MTN Recreation Center were operated by A5 who used stolen logon credentials of Christine Alenyo and that the five charged in this Count committed the offence herein charged. It is the evidence of PW4 that he procured A7 for A1 to carry out an errand on computers. PW4 had no knowledge of what A7 actually did. In his charge and caution statement A7 admitted to having received a flash in order to get information from a computer. In his confession A7 admits that he was paid for his efforts. Obviously if he had done something that was in the course of his employment he would most likely not be paid for it. A7 was not taking instructions from his employer. He took instructions from a stranger. A7’s confession is corroborated by that of A1 and by the testimony of PW4. What he did was an unlawful act and this is what S.12(3) of the Computer Misuse Act is about. I find him guilty of the offence. A1,A2,A3 and A4 connived and agreed to send someone to insert a device in an MTN mobile money computer. The computer belonged to Christine Alenyo. In the process Alenyo’s financial administrator access rights were captured on the device.

The confession of A1 and that of A2 show that these four accused did meet to make the preparations. They know that what A7 was being asked to do was wrong and irregular.

Section 19 of the Penal Code Act relates to principal offenders. Regarding aiding and abetting it is provided.

‘(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it

(a).....

(b).....

(c) every person who aids or abets another person in committing the offence’.

It must be borne in mind however that in order for one to be guilty of aiding and abetting one must be proved to have been consciously participating in what was being done and should have facts that constitute the offence. The four accused convened and took a decision. There is evidence also payment was made to A7 through their intermediary. Consequently A1,A2,A3 and A4 admitted the offence in Count 5 and are guilty as A7. The assessors in their joint opinion advised me to convict A1 and A7 on Count 5 but to acquit A2,A3 and A4. For the reasons I have given I respectfully disagree with their verdict. I find A1,A2,A3,A4 and A7 all guilty of the offence in Count 5.

COUNT 6 ELECTRONIC FRAUD, contrary to section 19 of the Computer Misuse Act. All the accused persons save for A9 are charged under this Count.

The provision reads:

- (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.
- (2) For the purposes of this section “electronic fraud” means deception, deliberately performed with the intention of securing an unfair or unlawful gain where part of a communication is sent through a computer network or any other communication and another part through the action of the victim of the offence or the action is performed through a computer network or both.

The evidence on record against A6, A7 and A8 does not implicate them in electronic fraud related to the financial transactions of 25th January 2013. No evidence was led to show they were aware they were happening. I agree with the joint opinion of the gentlemen assessors that there is no proof that A6,A7 and A8 are guilty of the charge in Count 6. Accordingly they are acquitted on that Count. A1,A2,A3,A4 and A5 met and agreed to carry out the fraudulent transactions central to this indictment. The project was well calculated in inception and cunningly executed. Certainly it has the hallmarks of digital predators. The gentlemen assessors advised me that no evidence exists to convict A3 in this charge. I respectfully disagree with that opinion. I find A1,A2,A3,A4 and A5 guilty on count 6 and convict them.

Before I take leave of this case I must comment on a matter the defence related to at the trial. It was a fact that extra judicial statements had been recorded from suspects who had been in police detention beyond 48 hours without being produced in court. The defence contended that such statements were ipso facto illegal and inadmissible in evidence. I agree the law requires a person held as a suspect like the accused were ought to be produced in court within 48 hrs or released. However I do not agree that a statement made by a suspect who has been in detention for over 48hours is rendered inadmissible by reason of the extended period. The law provides circumstances where a statement will not be admissible and extended detention on its own is not one of them. Furthermore evidence derived from the charge and caution statements was not basis for a conviction in the absence of some other evidence to corroborate it. Where there was a compelling body of evidence to support a charge inevitably a conviction ensued.

Ultimately A6,A8 and A9 stand acquitted. A1 is convicted in Counts 2,3,5 and 6. A2 is convicted on Counts 2,3,5 and 6. A3 is convicted on Counts ,3,5 and 6. A4 is convicted on Counts 2,3,5 and 6. A5 is convicted on Counts 2,3,4, and 6. A7 is convicted on Count 5.

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PAUL KAHAIBALE MUGAMBA

JUDGE

27th April 2015

SENTENCE:

The State as well as the defence have passionately expressed their views about what I should take into account when passing sentence on the convicts. For the defence not only the respective Counsel but also the convicts themselves have had a say. The learned State Attorney besides her spirited submission on the matter filed for my consideration a victim impact statement and a community impact statement. She urged me to take into consideration the sentencing guidelines. The defence on the other hand while seeking lenient sentences urged me to exercise discretion.

In count 2, which is theft, A1, A2, A4 and A5 are the convicts involved. I have taken into account the fact that cybercrime is on the rise and that our society ought to learn that crime does not pay. I have taken into account the relative ages of the convicts who I should describe as youthful. It is hurtful to recognize that such persons should be involved in activities that are likely to bring down society rather than build it. They are remorseful but they should be punished for the offence of theft. I have taken everything into account including the fact that they were first offenders and the period of over 2 years they have spent on remand already. I have deducted the 2 years from the sentence I would otherwise have handed down to each of them. Accordingly I sentence A1, A2, A4 and A5 each to 7 years' imprisonment.

In count 3, I consider the raise in the cases of cybercrime, the fact that it is harmful to our society who had found comfort in utilizing mobile money services. I have noted that the crime was premeditated and therefore carefully executed. All that was thanks to the meetings held in that respect by the convicts. I have taken into account the ages of the convicts, their remorsefulness, the fact that they are first offenders and the period spent on remand. I have deducted the period spent on remand from the sentence I would otherwise have handed down. I sentence A1, A2, A3, A4 and A5 each to 7 years' imprisonment.

In count 4, I have considered the relative ages of the convict, her remorsefulness and the fact that she is a first offender. On the other hand I have considered the serious danger society stands in owing to unauthorized access such as A5 was found guilty of in count 4. Indeed the maximum sentence under the law is life imprisonment, to show how serious the offence is. Having taken everything into account and deducted the period spent on remand from the sentence I would otherwise have imposed, I sentence A5 to 9 years' imprisonment.

In count 5 is another offence relating to unauthorised access. It concerns A1, A2, A3, A4, A7. I have been guided by considerations I had regarding the offence in count 4 above. I must note that the period spent on remand has been taken into account and in that respect deducted from the sentence I would otherwise have handed down. A1, A2, A3, A4 and A7 are each sentenced to 9 years' imprisonment.

Regarding electronic fraud in count 6, I have considered that the offence was premeditated, that it is on the increase, that the community stands to lose confidence in the mobile money systems and that the complainant is sapped of credibility by such activities. I have considered that were this to continue it would impede social progress. I have also considered the youthful ages of the perpetrators and their domestic responsibilities. I have taken into account the period of over 2 years spent on remand. I deduct that period from the possible sentence I would have given. I sentence A1, A2, A3, A4 and A5 each to 7 years' imprisonment.

The sentences are to run concurrently.

In addition I order that all that money which was confiscated from the convicts and admitted as exhibits in court be handed over to the complainant in compensation for loss incurred.

Paul K. Mugamba

JUDGE

28/04/2015

Right of Appeal explained.

Paul K. Mugamba

JUDGE

28/04/2015