

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CRIMINAL SESSION NO. 32 OF 2012

UGANDA:.....PROSECUTIO

N

VERSUS

1) MPOYA SETH alias WANTE PATRICK :::::A1 CONVICTED

2) SANDE PANDE NDIMWIBO ::::::::::::::: ACCUSED N02

BEFORE: THE HON. JUSTICE ALIVIDZA

JUDGEMENT

The Accused person Mpoya Seth hereinafter referred to as A1 and Sand Pande Ndimwibo hereinafter referred to as A2 were charged with the following offences;

Count one: Obtaining money by false pretence **contrary to section 305 of**

the Penal Code Act. Particulars are that A1 and A2 with others still at large between June and July 2009 at Kampala with intent to defraud URA made false Value Added Tax Claims to URA in the names of Sure Telecom Uganda Ltd, fraudulently opened an account in the names of Sure Telecom Uganda Ltd with ECO Bank Uganda. The Accused persons then obtained shillings nine hundred and seventy million six hundred and twenty three thousand, three hundred and forty eight shillings (970,623,348/=) from the URA and banked it on the said account hereby defrauding URA of the said amount.

Count two; Making false documents contrary to **section 345 (a) of the Penal Code Act.** The particulars are that A1 and A2 with others at large between June and July 2009 in Kampala with intent to defraud knowingly made a memorandum and articles of association purporting them to be of Sure Telecom Uganda Ltd whereas not.

Count three; Making a false document contrary to section 345 (a) of the

Penal Code Act. The particulars are that A1 and A2 with others still at large between June and

July 2009 at Kampala with intent to defraud knowingly made a certificate of incorporation number 69434 purporting it to be of Sure Telecom Uganda Ltd whereas not.

Count four; Making a false document **contrary to section 345(d) and (ii) of the Penal Code Act.** The particulars are that A1 and A2 with others still at large between June and July 2009 in Kampala with intent to defraud knowingly made an identification card in fictitious names of Wante Patrick a person alleged to exist.

Count five; Procuring another to do or not to do an act which could constitute an offence **contrary to section 19 (2) of the Penal Code Act.**

The particulars are that A2 and others still at large between June and July 2008 procured Mpooya Seith alias Wante Patrick to open an account in the names of Sure Telecom Uganda Ltd with ECO Bank Uganda Ltd well knowing that the said Mpooya Seith has never been a Director of Sure Telecom Uganda Ltd.

Count six; Being a Director of a corporation and privy to the act of falsification of the company documents **contrary to section 323 (b) (1) of the Penal Code Act.** The particulars are that A2 with others still at large between June and July 2009 in Kampala District knowingly and fraudulently was privy to the making of the false memorandum and articles of association for Sure Telecom Uganda Limited.

Both Accused persons denied the charges. The brief facts are that

between 2008 and April 2010, the Accused persons A1 and A2 are alleged to have intended to defraud the URA by making false VAT claims in the name of Sure Telecom Uganda Ltd. They fraudulently opened a bank account with ECO Bank in order to receive said funds. The Accused persons are alleged to have obtained UGX 970,624,348 from the URA in the account at ECO Bank where it was further dispersed to personal accounts of A1, A2 and other parties. To perpetuate the fraud A1 and his accomplice Abdul Mukama (now deceased) employed false identification cards and articles of incorporation of Sure Telecom. A1 asserts that A2 ordered him to perpetuate the fraud and was instrumental in carrying out and controlling the criminal acts.

The Prosecution presented a strong case against A1, who towards the end of the Prosecution's case, changed his plea to guilty was convicted accordingly. A1 testified in the present trial against A2. Only the guilt of A2 for charges 1, 2, 3, 4, 5, and 6 is at issue in this judgment.

The Prosecution produced 13 witnesses and tendered in countless documents. The defence called one witness, A2. Both parties filed written submissions both at the stage of no case to answer and at the end of the defence's case. I have taken into consideration the issues raised while making my decision.

I will start with procedural issues raised by the defence before looking at the substantive ones that deal with the merits of the case.

The defence raised an issue with the framing of the indictment on count 1, 2,3,4,5 and 6. That the timeframes stated in the indictment of June and July 2009 were very different from the evidence adduced, which showed that the offences were committed in a different period. The prosecution argued that the Accused had sufficient information to understand the offences for which he was being tried.

Section 22 of the Trial on Indictments Act (TIA) provided for the contents of indictment. It states that *“Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged/T.* think that what is important is for the Accused to be provided with “reasonable information” in order to understand the charges and prepare his defence if necessary.

Counsels for A2 contended that the offenses charged occurred from October 2009 until early 2010, and not from June to July 2009 as stated in the indictment. The Eco Bank account was opened on 25th November, 2009 and money was paid into the account on the 17th of December 2009, the 18th of March 2010, and 19th April 2010. Defence argued that the particulars, the

correct dates of the criminal activity, should have been included and been factually accurate in order to give A2 reasonable information to the nature of the offense so that he could prepare an adequate defense to these allegations. Defense submission further argued that the information in counts 2, 3, 4, and 5 were not specific enough to constitute a proper indictment of A2.

*The prosecution submitted that **Section 50(1) of the TIA** provides that “Every objection to an indictment for any formal defect on the face of the indictment shall be taken immediately after the indictment has been read over to the accused person and not later ”*

Prosecution argued that the raising of this procedural issue at the end of the prosecution’s case is a calculated move to derail and otherwise stall this case

or get it thrown out on a technicality. They further argued that the incorrect dates did not prejudice A2’s defense case in any way and that the charges alleged in the indictment were very specific.

In support of this view they cited Arim Felix Clive v. Uganda CR. CA 07 of

2010, where it was raised that there was an omission of the place where the offense was committed, it was held that though unfortunate, it did not prejudice the defense in its preparation of its case.

The court agrees with prosecution's argument. This issue should have brought up as soon as this minor procedural inconsistency was noted. This should have been done earlier in the trial in order to spare expense and time to this court. I understand that this fact only came out after the trial started and witnesses started testifying.

The purpose of providing reasonable information in the indictment is to put the defendant on notice of the crimes he is alleged to have committed and to provide ample time to prepare a defense. The many and very specific criminal charges contained within the indictment gave A2 and his counsels ample notice and opportunity to prepare a defense. While the Prosecution should take great care in preparing a sufficient and accurate indictment, defense should have raised this issue earlier in the trial. I believe that this omission did not unduly prejudice their case.

Furthermore the interests of justice would not be served by allowing this minor and correctable procedural error to be the basis of determination of this case especially since I know for a fact that at the beginning of the trial, the defence were given copies of most of the documentary evidence that the Prosecution intended to rely on. This included witness statements and copies of exhibits. I also know that some witnesses made statements after the trial had started. The defense has had sufficient information to fully understand the nature of the charges and even the evidence to be adduced so that they would prepare for defence.

Another issue raised was that count 2,3,4 and 5 are defective since they are based on section 345 which is a definition section and did not create the offence and punishment.

I have looked carefully at all the sections dealing with offences of; forgery, making of false documents and uttering false documents. I have reproduced them here for emphasis

Section 345 (a) of the PCA provides that any person; makes a false document purporting to be what in fact it is not.

Section 345 (d) (i) of the PCA provides that any person who signs a document in the name of any person without his or her authority whether such name is or is not the same as that of the person signing;

The above sections deal with making false documents and are closely related to the definition of forgery provided for in **section 342 of the PCA** which defines forgery as the making of a false document with intent to defraud or to deceive.

Section 346 of the PCA defines what amounts to intent to defraud or deceive as “An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded by it, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he or she had, or thought he or she had, a right to the thing to be obtained by the false document.

Since making false documents is related to forgery. The law provides for the punishment for forgery in **section 347 of the PCA** as; any person who forges any document commits an offence which, unless otherwise stated, is a felony and is liable, unless owing to the circumstances of the forgery or the nature of the thing forged some other punishment is provided, to imprisonment for three years.

The same applies to uttering false documents which is provided for in **section 351 of the PCA** that states that 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.

Therefore I am of the opinion that all the above offences are co related. The connecting factor is the false documents with intend to defraud or deceive. Whether one makes the false document or utters it, the punishment is the same as for the offence of forgery.

I see no irredeemable procedural error committed by the prosecution since the law does not provide for a separate section in the PCA that provides for punishment for making false documents. As a result this objection by the defence holds no water and is disregarded. The problem is the wordings of the law which is beyond the control of the court.

The defence also raised the issue of prosecution of the case by URA instead of the DPP. That the DPP can delegate its mandate but only to the URA for matters pertaining to prosecutions under the Tax Statutes. This court sees nothing improper in having the URA prosecute this case with a mandate of the DPP. The crux of this matter is obtaining money by false pretenses through the use of fraudulent VAT claims. The URA is said to have been defrauded of UGX 970 million by these false tax claims. It is well within their powers and expertise to prosecute such a claim, especially when given delegated powers by the DPP. Section 136(1) of the Trial Indictment Act states:

“All prosecutions before the High Court shall be conducted by a member of the Attorney General’s chambers or by such other person as the Director of Public Prosecutions may, by writing under his or her hand appoint. ”

The URA prosecutors were appointed by the DPP and remained answerable to the DPP. They produced proof to this effect. In the absence of authority and more persuasive reasons why URA should not have prosecuted this case, I am inclined to dismiss this argument.

I will now consider whether the prosecution has proved its case beyond reasonable doubt.

This Court is reminded of its duty as a trial court to determine whether the prosecution has proved its case beyond reasonable doubt. In discharging this duty, this court must ensure that the prosecution has proved all the ingredients of the offences before convicting A2.

The Court also bears in mind that the Accused has a constitutional right of presumption of innocence and the decision as to his guilt should not be based on the weakness of his defence but on the strength of the prosecution's case. I am so alive to the fact that when this court is evaluating the evidence adduced at the trial, it should evaluate all the evidence as a whole and not the case of the prosecution and the defence in isolation. The formula for evaluating evidence was laid down in the case of **Abdu Ngobi V Uganda. S. C. Cr. Appeal No 10 of 1992**

I as a Judicial Officer can only make fair and just decisions based on law and evidence. A judicial officer is prohibited from making judicial decision based on fanciful theories, rumors, speculations and conjuncture (refer to Court of Appeal case **Mbabazi Rovence Natukunda and Loyce Kahunda Vs Uganda. (Criminal Application Number 47 of 2012)**; where this trite law was re-emphasized.

I will start with count 2, 3 and 4 before determining count 5, 6 and 1.

COUNT 2, 3, and 4 concerns offences dealing with; making false documents c/s 345(a) and (d) (ii) to wit articles and memorandum of association and certificate of incorporation of Sure Telecom. The other false documents are identification cards in fictitious names of Wante Patrick and Mukama Abdul.

Section 345(a) and (d)(ii) of PCA deals with making false documents and states that; Any person makes a false document who (a) makes a document purporting to be what in fact it is not; alters a document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; introduces into a document without authority while it is being drawn up matter which if it had been authorized would have altered the effect of the document; (d) signs a document— . . . (ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;

A2 stands accused of making or helping to make the following false documents:

- 1) Count 2: false memorandum and articles of association in name of Sure Telecom (U) Ltd.
- 2) Count 3: false certificate of incorporation of Sure Telecom (U) Ltd.
- 3) Count 4: false identification card in the name of "Wante Patrick."

The evidence on record which is not disputed by the defence is that the documents including, VAT invoices, memorandum and articles of association, certificate of incorporation, identity cards and company resolutions among others were all false documents. These false documents were used to open a "pseudo" account.

The false documents in question were all tendered to Eco Bank by the person of Al, acting in the false alias of "Wante Patrick" when opening up the "pseudo" bank account. PW1, 2, 3, and 4 testified to that effect. Al and the deceased accomplice Abdul Mukama presented themselves as the directors of Sure Telecom with false articles of incorporation when opening up this account.

Al testified that the false documents were given to him by A2 who was his boss at the time. Al stated that he was acting under A2's orders when opening up the account in Eco Bank.

Al implicated A2 as being involved in this fraud. He stated that "from 2008 to 2009 November, I was employed by Sure Telecom Uganda limited as office administrator/ accountant. I was in charge of the day to day matters of the office, receiving visitors to the office and updating my immediate boss at, that time he was the director finance and administration, Mr. Sunday Pandy, Ndimwibo. The other responsibility I had was receiving tax invoices for my boss Sunday Pande Ndimwibo which tax invoices I was using to compute the tax position of the company.

Further along in his evidence, he identified all the VAT related documents he submitted to defraud URA and admitted signing the documents. He admitted that the tax invoices from UCC were false documents. He adds that "Those invoices were given to me by my Director Finance and Administration Mr.

Sand Pande Ndimwibo"..... So he came to me and said look ,still money is not forth coming but there is only one way we can get money and for me to be able to pay you salary, then I asked what is the way we can use to get money so that we can be able to pay me? He said the only

way we can do it is to inflate the returns and this is how he overcame the problem by bringing in undue invoices. So I knew some of them were genuine and some of them were not but I could not differentiate until the URA people came up with specifics of which ones were genuine and which ones were not. So that is how it came. I had taken over one year without being paid salary. He gave me a condition that unless I succumb to his demand, then I will lose the job and then even fail to be paid "They were all paid; they were paid to the company account. At

first the money went to Tropical Bank account but later on they were diverted to Eco Bank." "The signatories to that account in Eco bank were Wante Patrick and Mukama Abdul who was messenger? This account was opened by my Director Finance and Administration."

He went ahead and added that"...As he came and explained the whole situation to me, he said we must inflate the claims that were going to URA, we must for that, get a separate account that these monies will be going to, so that it becomes easy for us to get the money and you get paid. So what he did he convinced me to give him my photograph, he prepared an ID but not in my actual names, in the names of Wante Patrick and he took that of the messenger and he went. So he said he is going to send a bank officer to come and take details from us which bank officer came from Eco bank in the names of Sylvia Nakiyimba and she took the details from both of us and after that when the money went on to that account, we started operating that account. However even when money started going we were not being paid until when the company had been sold off....I was all the time going to the bank in his company. He would escort me. Mr. Sande Pande Ndimwibo was escorting me to the bank when I was going to withdraw. So after getting the money across the counter, I could hand it over to him, he drives me back to the office and then he goes.

A1 identified the Memorandum and Articles of Association, Certificate of incorporation and an identity card in the names of Wante Patrick. He stated that "...The directors were Wante Patrick and Mukama Abdul. These documents my lord were brought to me by my director Finance and Administration, so I don't know where he got them from but he gave them to me to submit to use them open the account. I used to go pick the money in his escort, after withdrawing the money, he would put it in the bag, I go to his car and he drives me back to the office, then he goes. So whatever happened after that, I could not tell. May be one other time is when we received money and he instructed me to instruct Eco bank to wire 217 million to Tropical bank account belonging to Sure Telecom Uganda LTD. I also didn't know how it was distributed until recently when I was just in

this court one witness from Tropical bank came here and produced evidence of how it was spent; otherwise I didn't know also how ”*There is nothing I did short of my directors instruction, everything I did, I performed under strict instruction. I was in constant touch, he was all the time calling me, he put air time on the office phone all the time I was updating him about these claims, he was inquiring, I was also calling him to inform him about the progress on these claims. I was under strict supervision and instruction about these claims.*

It is noted that although A1 admitted all the offences, he insisted that he was acting on the instructions on A2. A1 told court that he was doing work *and answerable only to A2. Al's testimony amounted to an accomplice confession. Confession implicating other person is provided for in **Section 27 of Uganda Evidence Act (UEA) Cap 6** which states “that when more than one person are being tried jointly for the same offence and one of them makes valid confession affecting himself and the other(s), court may take in consideration the confession as against the person making it and other(s) therein implicated”.*

.In the case of UGANDA VS. AKAI [1979] IICB8, it was held that it is trite law that a confession by an accused cannot be taken into consideration against a co- accused unless it implicates the maker to the same extent.

Al turned state witness at the later part of the trial, incriminated himself as well as A2.He was accordingly sentenced to 15 months imprisonment to run concurrently on all counts for his role in this fraud. The defence at a later stage claimed that this was a frame up and Al had been used by URA. I also note that despite intensive cross examination of Al, no questions were put to Al as regards his role in the conspiracy with URA to frame A2 with these crimes.

I have to caution myself about the danger of relying on uncorroborated evidence of an accomplice. There is no direct evidence to prove that A2 was indeed the maker of the false documents. All the evidence indicated that Al was the person who uttered the said false documents.PW2 told court that when she visited the offices of Sure Telecom offices, she met with the manager who was Al.

I will go ahead to consider the credibility of Al so as to weigh the value to attach to his evidence.
During his testimony and cross-examination Al expressed contradictory statements pertaining to:

- His financial situation at the time of committing the fraudulent acts. He stated that he was broke and desperate. However the bank records showed he had lots of money at the time these crimes were committed.
- The whereabouts of his accomplice Abdul Mukama. He stated that he did not know where Abdul Mukama was, but later admitted to being at his funeral.
- His length of years studying as a student. He was not very clear as how long he was in school. Was it for 3, 4, 5, or 6 years?
- He was not very clear on the process of how the money was obtained fraudulently from the URA.
- Where and how he obtained the false identity cards and other false documents is not very credible.

I was also not impressed by his demeanor in court. He was evasive when asked some questions. I believe that he was untruthful especially on issues dealing with his finances. This court cannot convict a person solely on the basis of the testimony of a co-conspirator in the crime. There is need to corroborate his testimony with independent testimony and/or evidence. However I take note of the fact that the law allows me to convict on uncorroborated evidence of a co-accused person after I have warned myself and the Assessors about the danger.

I find that the prosecution has not adduced sufficient evidence to prove that it was A2 who made the false documents. There was need to find corroborative independent evidence. It was not enough to rely on A1's evidence that it was A2 who gave him the false documents to use when opening the "pseudo" account in Eco bank. Therefore I find A2 not guilty on count 2,3 and 4 and acquit him accordingly.

I will also look at COUNT 6: BEING A DIRECTOR OF A CORPORATION THAT WAS PRIVY TO THE ACT OF FALSIFICATION OF COMPANY DOCUMENTS C/S 323 (b) (i) OF THE PENAL CODE ACT. This section provides that "Any person who— being a director, officer or member of a corporation or company, does any of the following acts with intent to defraud— (i) destroys, alters, mutilates or falsifies any book, document, valuable security or account, which belongs to the corporation or company, or any entry in any such book, document or account, or is

privity to any such act;

A2 is listed as a Director for Sure Telecom under the original and genuine articles of incorporation, owning 30% of the shares along with Brigadier Matayo and Mwesigwa Edward. A2 was not listed in the fake articles of incorporation listing A1 and Abdul Mukama as directors.

Defense submission asserts that Sure Telecom Uganda Ltd. should have been the entity charged in Count 1 of the indictment for claiming false VAT refunds claims rather than the individuals of A1 and A2. The court does not find this argument persuasive. Prosecution has presented a case where the individual persons of A1 and A2 are alleged to have made fraudulent VAT claims with false documents and articles of incorporation. A1 and A2, should they be proven guilty, should be held answerable for these criminal offenses.

That the VAT provides for offences related to fraudulent claims and URA did not charge A2 under this since they should have charged the company. Furthermore that other directors were not prosecuted and that A1 was used to frame A2. Court notes that the evidence implicates persons who were not charged.

PW 10), Mr. Ruta from URSB testified as to the status of Sure Telecom as a company. He stated that as per the 2010 last annual return on the file, the *company had 8 Directors. A2 was pointed out as one of the directors. A1 stated that he was acting under the orders of A2 who was the director of finance and administration. On the other hand, A2 admitted starting the company and investing a lot of money in it but he was not invoked in the fraudulent transactions. He stated that “My lord I have never helped Mpooya to commit these crimes as he said I did. From 2007 to 2011, I was very busy and neither was I having a desk at the Sure Telecom office because I had other responsibilities. Mpooya operated the office I can say alone but with the supervision of the company secretary. So I was not there to help him or either to advise him because I had three important projects that I was running that time.*

I will consider why A2 was singled out as culpable instead of the other directors of the company. From the proceedings, the evidence linking A2 to the fraud is outlined in detail below. I felt it

necessary to reproduce the evidence in narrative form.

PW6, Awori Gloria Kyeyune, the Assistant Manager at Tropical Bank Kampala Branch testified and told court that she was able to identify A2 as ...’’one of the customers at Tropical bank for one of the companies that is our client and a signatory to a bank account in Tropical bank. In November of 2007 a company by the names of Sure Telecom limited came to Tropical Bank to open an account. The requirements among others included the particulars of Directors, certificate of incorporation and identity cards which were presented to us and we opened. There was also a resolution required from them in opening an account at Tropical.

She identified a resolution to open up an account with Tropical Bank from Sure Telecom. It’s both the original and the photocopy of the same. She testified that “In this case the Directors of the company include Mr. Matayo Kyaligonza who is a Ugandan, Mr. Sande Pande who is also a Ugandan and Mr. Edward Mwesigwa who is also a Ugandan. Yes it does state Mr. Balondemu David as secretary of the Company. This is a photocopy of the same document but certified by Tropical Bank as well. This is a specimen signature card for the account operators and it also has a photocopy which is certified by Tropical Bank. For this account the authorized signatories are Brigadier Matayo Kyaligonza as the Principal Signatory and also a Director, Mr. Sande Pande a Director and Mr. Edward Mwesigwa a Director.

PW6 further informed court that she was involved in some of the transactions that were on that account after it was opened. She identified the following documents;

- The account’s statements and explained some transactions.
- The transfer document of Shs. 66 million from account 0010132479 to account 0010104076 dated 30th April 2010.
- A document called a personal banking relationship application of Sande A2 dated 22nd January 2007 where the 66 million was transferred to the account is accepted as prosecution exhibit no.29. .
- A document called a cash withdraw cheque no.47 for 15 million paying Mr. Sande P. Ndimwibo dated 29th April 2010.
- One of the cheques that was used to withdraw cash from that account. The cash withdraw

was in favour of Mr. Sande Pande Ndimwibo.

- A cheque of 15 million dated 9th April 2010 in favour of Sande, which was accepted as prosecution exhibit no. 30
- A cheque of 67 million of 67 million in favour of Matayo Kyaligonza to Bank of Baroda
- A cheque of 20 million in favor of Seth Mpooya in Stanbic bank
- A cheque of 30m in favour of Balondemu
- A notification from ECO bank of 217 million paid into the Tropical bank dated 30th April 2010.

The evidence on record shows that money from the “pseudo” Account in Eco bank was transferred to an Account in Tropical bank where A2 was a signatory. He also received money from the Eco bank “pseudo” account which was paid into his personal account in Stanbic bank.

This above evidence proves that there were several persons who benefitted from this fraud. It is very unfortunate that efforts to procure the other directors Matayo Kyaligonza and David Balondemu were futile since they both refused to appear in court as court witnesses. I was irked that David Balandemu who is a officer of the court ignored the court summons and did not come to assist the court in establishing the truth and reaching a just decision.

The State did not explain why they were never prosecuted or called as state witnesses. Since it is the prerogative of the State to choose whom to prosecute, I will leave this issue at that and strongly advise the State and URA in particular to follow up all the actors involved in the fraud concerning Sure Telecom.

Further evidence was adduced indicating that A2 went to ECO Bank personally to protest the freezing of a fraudulent money transfer. The evidence of PW5 of Umaru Kasaga who was working with Eco bank was very credible. He stated that “...Yes I do know both Accused persons. I know Mr. Wante Patrick, he was a signatory to Sure Telecom and I served them on a number of occasions. He withdrew Uganda shillings local currency and at times foreign currency.....Wante was one of our customers; he withdrew large sums of money both in foreign currency and in local currency. As a head teller at the branch, I was the one serving him at that particular time.He held a company account that received payments from

URA tax refunds at that moment. He particularly was interested in foreign currency to pay Chinese Vendors as I recall of Huwawi. He would request to negotiate a rate so that he can take the money in dollars and when he found the bank rate not favourable he withdrew in Shillings and went and exchanged the money elsewhere. I think the first transaction we had with him was the opening balance when he opened the account for an initial balance of 100,000/=. The next in flow that came in was in January 2010 of about 340 million. He withdrew it and the first bit was three hundred million, we negotiated for him a rate and took it in dollars (an equivalent of 300m UGX in dollars). He came back after a few days and withdrew another 40 million. We negotiated for him a rate and he still took in dollars. The second batch of money that came, he wasn't happy with the rate we gave him and he had negotiated a better rate with some people down town and he requested that we call our Kikuubo Branch and have money ready because he didn't want to move with Bulk money all the way down town. So we called our Kikuubo and we asked them to organize if I recall 150 million. He went to Kikuubo and he withdrew the money from there at our Kikuubo branch. Yes he came and withdrew the remaining money Bombo road branch where I still served him. Yes there is a third transfer that came in, in April; one which was an initial withdraw. It was of 347 million I think , I am not sure of the exact amount but 347 million. A withdraw was made on the first day of the transfer was credited into the customer's account and on the next day he delivered two transfer copies, one transferring the 10 million to Mr. Sande Pande and another of 217 million to beneficiary Sure Telecom in Tropical Bank.

I will next consider the circumstances in which PW5 identifies A2 as coming to ECO bank to follow up on money paid by URA into the "pseudo" account.

He stated that.....The particular last transfer caused a bit of controversy in the branch. On the day after the transfer was done, Mr. Wante came in to the branch with two gentlemen where I sit and they were quarrelling with the branch manager that the transfer had not been affected; the second transfer of 317 million had not been credited to their account in their Tropical Africa Bank. One of the gentlemen identified himself as Mr. Sande Pande and Mr. Wante Thomas said that this is a big man in Sure Telecom. To the CSO but our branch is very small, you can easily hear what is happening on the next door. They introduced Mr. Sande Pande a big man in their organization. He is that gentleman there in a pink shirt in the dock.

The manger had to come in and intervene at this point because they were shouting on top of their voices threatening to close the account and possibly sue the bank for not effecting their transfer on time. So she had to come in and calm them down and took them to her office after which she called our operations department and asked them to effect the transfer as soon as possible. The gentlemen said they will wait until they get their RTDS transfer confirmation before they left. So they sat in the manager's office as they waited for the RTDS remittance copy.

PW5 added that.....Mr. Sande was the most annoyed; was the one quarrelling the most. Mr. Wante was a bit calm because he had actually called the day before and asked to follow up about the transfer and we had told him we were working on it. No he wasn't part of the account holders, we knew Mr. Wante and Mr. Mukama. The operations was able to effect that transfer and they sent her a transfer copy and she printed it, picked it at the printer, gave it to them and apologized. Briefly after that they left. The transactions are reflected on your bank statement.

PW5 identified the bank statement of the "pseudo" account and indicated how money was credited into the account in Tropical bank where A2 was a signatory. PW5 narrated that ...The next transfer came in on the 24th of March 2010, the total amount was 274,815,828/=. On the 24th of March. Remuneration was EFT by order of URA. The first big one was 352,481,764 on the 7th of January 2010. The third transfer came in on the 26th April 2010, the total amount was 343,326,756/ =. An inward EFT from Stanbic Uganda from URA. The first withdraw was on the 27th April from our Bombo road Branch of 36 million Ug. shillings, the second transaction was an RTDS that's the

transfer we used in the bank to Sande Pande of 10 million Uganda shillings. This was on the 29th of April 2010.

PW5 implicated A2 when he stated that...it was a transfer to Standard Chartered bank to Mr. Sande Pande's personal account. The next transaction was on the 30th April 2010, an RTDS in favour of Sure Telecom Tropical bank of 217 million Uganda shillings. We have transfer instructions which are signed by the customer. A cheque should be attached signed by the authorized signatories and after the transfer has been effected, we print out a remittance copy and attach it to the instructions and we file the instructions. An RTDS remittance copy has the sender's details, in this case they

will be Sure Telecom, the date of the transaction, the receiver in this case who should have been Sure telecom in the first one and Sande Pande the second one the receiving bank, the account number for the receiver and the amount of money being sent. That's what would be the key components of a remittance copy.

PW5 identified remittance copies printed through Eco bank of Uganda RTDS platform. He also identified A2 as one of the people who came with A1 in relation to the third transaction from URA. His evidence amounts to evidence of identification of A2 as having not only knowledge of “pseudo” account but also following up on transactions involving the account.

The position of the law and practice in handling evidence of identification was laid down in **Nabulere and Others Vs Uganda [1979] HCB 77** and has been emphasized in more recent cases.. In the above case factors were laid out which are ordinarily used to decide whether the conditions under which the identification was made are conducive for positive identification without the possibility of error or mistake. They include,

- I. whether the accused was known to the witness at the time of the offence,
- II. the conditions of lighting,
- III. the distance between the accused and the witness at the time of identification and
- IV. the length of time the witness took to observe the accused.

This position of law was re-emphasized in the case of Bogere Moses & Kamba Vs Uganda Supreme Court Criminal Appeal 1 of 1997, the Supreme Court had this to say that "this Court has in very many decided cases given guidelines on the approach to be taken in dealing with evidence of identification by eye-witnesses in criminal cases. The starting point is that a court ought to satisfy itself from the evidence whether the conditions under which the identification is claimed to have been made were or were not difficult, and to warn itself of the possibility of mistaken identity. The Court should then proceed to evaluate the evidence cautiously so that it does not convict or uphold a conviction, unless it is satisfied that mistaken identity is ruled out. In so doing, the court must

consider the evidence as a whole, namely the evidence if any of factors favouring correct identification together with those rendering it difficult. It is trite law that no piece of evidence should be weighed except in relation to all the rest of the evidence.

See Sulemain Katusabe V Uganda SC Cr. App No 7 of 1991 (unreported)

*This position of the law was further re-emphasized in the Court of Appeal case of **Obwana Samson, OKAI JOSEPH and SGT ODONGO WILLIAM Vs Uganda CRIMINAL APPEAL NO.56 of 2003** where it was held that “...It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night such evidence should not ordinarily be acted upon to convict the accused in absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth but he might as well be mistaken.*

This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of a conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence. If after administering the necessary warning the trial judge finds that the identification of the accused was positively made without the possibility of an error or mistake, she/he can convict an accused person in absence of corroboration.

The conditions which are considered favourable for correct identification without any possibility of error have been laid down in a number of authorities such as Afedalla Bin Wendo v R (1953)20 EACA 166, Roria v R 19671 EA 583 Abdalla Nabulerere others v Uganda fl979] HCB 77, Moses Bogere & another v Uganda Criminal Appeal No.1/97(SC) (unreported)

Moses Kasana v Uganda [1992-831HCB 47.

I will look critically at the conditions under which PW5 identified A2 as the person he saw at ECO bank in the company of Al.

Whether the accused was known to the witness at the time of the offence: *PW5 admitted never having seen A2 before. He stated in cross examination that...” There is nothing particular about suits. The fact that Mr. Wante was a person we were used to; actually he was a casual dresser, when*

he came in with two gentlemen wearing suits, very smart guys we were intimidated knowing that these were the bigger guys.....Because they were accompanied by the account holder and he was also asking questions and introduced them as their bosses.....I wouldn't call a signatory a stranger to that account because he was the person who came in with the two gentlemen. And he was also inquiring about the transfer. I talked about two gentlemen; I talked of Mr. Wante and two gentlemen. And that is when I stated that two gentlemen wearing suits.

Though PW5 did not know A2 before which factor did not favour a positive identification, he was able to describe in detail the circumstances in which he noticed A2 at the bank.

The conditions of lighting: This identification took place during banking hours in broad day light. This condition favours positive identification.

The distance between the accused and the witness at the time of identification: *PW5 stated that....” First and foremost, I would like to inform you, the Eco Bank teller cabins are not glass proof; I sit here and the person sits there. So there is no glass proof, it's more; less not teller cabin. Mr. Sande Pande did not sign anywhere; Mr. Wante had already delivered the transfer instructions signed by both signatories. I didn't say he was introduced as director, I said as a big person in the company. The words of Mr. Wante Patrick who was the signatory that this is a big man in the company.*

This evidence indicates that the identification was made at close range and this favoured a positive identification.

The length of time the witness took to observe the accused.

PW5 stated that A2 was at the bank for some time. He stated that ...: The manger had to come in and intervene at this point because they were shouting on top of their voices threatening to close the account and possibly sue the bank for not effecting their transfer on time. So she had to come in and calm them down and took them to her office after which she called our operations department and asked them to effect the transfer as soon as possible. The gentlemen said they will wait until they get their RTDS transfer confirmation before they left. So they sat in the manager's office as they waited for the RTDS remittance copy.

A2 in his defence stated that he never procured Mpooya or Wante in opening up that account neither Sure Telecom did not have an account in Eco bank. He stated that “First and foremost I have never met Kasaga I only saw Kasaga in court. I have never been to Eco bank for any transaction I don’t have an account with Eco bank and I don’t intend to have an account with Eco bank. So there is no way I would have appeared in Eco bank when I don’t have an account or business in Eco bank.

However the evidence of PW5 as outlined above clearly implicates him in the fraud. He gave details that showed that he positively identified A2 as coming to the bank. Although, he did not know him before, there was enough day light, time and distance for positive identification.

PW5 stated that A2 was at Eco bank following up on the third payment from URA of 317 million which had been credited to the account set up by A1. He gave convincing evidence as to why he remembered A2. He stated that *Mr. David Balondemu was the other gentleman in suits. Mr. Sanda Pande was*

attended to by the manager of the branch, Dorah Namubiru..... “I stated he introduced himself and I was at the branch and I heard him introduce himself He didn’t introduce himself to myself but he introduced himself as Mr. Sanda Pande ”He was shouting and his body language was in negative. He was shouting and gearing and shaking his head, that sort of thing. He was complaining about the service, the first thing, threatening to close the account.

J

In conclusion on this, I find that the evidence of PW5 and PW 6 clearly indicate that he benefited from this fraud. These facts are inconsistent with conduct of an innocent man. He had opportunity to question the fraudulent transactions since he admitted that the company had no account in Eco bank,

I also take note of the fact that PW5 identified Mr. David Balondemu as the second gentlemen who came to Eco bank to follow up on payments made to the “pseudo” account. He stated that “7 got to know of Mr. Balondemu; a few months later there was another transaction involving another company called Smart Telecom. Mr. Balondemu was a signatory to the account and he came to withdraw

money but since we had had issues before with Sure Telecom, we held onto the transaction, we did not actually credit the account. He introduced himself to my colleague the customer service officer at the Branch.... Monica and even gave a business card. ”

Therefore I find that the prosecution has proved this offence beyond reasonable doubt and I convict him on count 6 contrary to section 323 (b) (i) of the PCA

Looking at COUNT 1; OBTAINING MONEY BY FALSE PRETENCES C/S

305 OF THE PENAL CODE ACT which provides that: Any person who by any false pretense, 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 a felony and is liable to imprisonment for five years.

The ingredients of the offense of obtaining money by false pretenses are:

1. A person with intent to defraud,
2. Under false pretenses,
3. Obtains from another something capable of being stolen.

PW1 and PW2 testified that false VAT claims made with forged documents from the UCC were used to obtain UGX 970 million. PW7 and PW9 affirmed the documents from UCC were false due to major inconsistencies and readily observable errors.

The account indicated on the false VAT claims was the “pseudo” account in Eco Bank belonging to Sure Telecom. PW4 testified that A1 acting under forged documents as “Wante Patrick” and his accomplice Abdul Mukama opened the account in Eco Bank and run it as directors for Sure Telecom. It was also proved that three substantial transfers were made to this account from the URA and since then the account has been dormant.

PW5 stated that the first two transfers were withdrawn over the bank counter by A1. A third transfer of UGX 217 million from the Eco Bank account to Sure Telecom’s Tropical Bank account was delayed and caused A2 to come to the bank with A1 to demand an immediate transfer of the money.

PW5 further stated that A2 was introduced as the boss of AI and exerted much influence despite not being a signatory on the account. PW6 testified that the day before the third transfer of UGX 317 million from the URA was effected, A2 signed checks far in excess of the current balance of Sure Telecom (Exhibits 30, 31, 32, and 33). PW7 a director of Finance at UCC testified that A2 came to the UCC two or three times to speak to his boss and to pick up invoices, though he had no way of knowing if they were the false invoices in question.

This is evidence of opportunity of A2 to obtain the money that was fraudulently credited to “pseudo” in ECO bank. Exhibits 17 and 18 show that money from the Eco Bank account was transferred to A2’s personal bank account. I note for a fact that the prosecution did not present evidence implicating A2 directly in either the forged UCC invoices, the VAT tax claims at the URA, or establishing the bank account at Eco Bank. A2 received some fraudulently obtained funds, he is also incriminated by AI and is identified by PW5 and going to Eco bank to follow up on the third payment. A2 claimed that this criminal case was a frame up. He gave a detailed account of what transpired with Sure Telecom Company where he was a director.

He stated that ... ”All the funds of the company were authorized by the Principle signatory. The principle Signatory was Brigadier Matayo Kyaligonza and he was the final person to authorize payments from the accounts.....No it was either two but with a principle signatory. When this matter came to the board, we decided first and foremost to find out with URA what was happening and we assigned another Tax consultant with Sajin and an auditor to follow up with this matter. What we wanted to establish as a company then was to know how all this matter came about and also to find out why money left URA with that magnitude without URA involvement. In fact we wanted to know why should URA release that type of money to an account which was not known to the company. Our interest as a company because we were due for launching we wanted to see how this matter arose. In fact to some extent the company had agreed with URA to pay that money but URA had imposed a lot of penalties in the company. My interest was to protect the business I started because I am the founding director of sure telecom. I had initially also invested a lot of money into the company, about a billion shillings. And I wouldn’t love a company to have to be dented because when we employed Mpooya we never authorized him to do anything like that. I had initial

investment as one billion but the stake was 7 million dollars. I received the money on my standard Chartered account and he just notified me that I sent the money to your account....No I did not because I did not even get a remittance form so I could not know. I ONLY CHECKED BY ATM and I saw 10 million and that was it.

A2 stated that the company was working with the police to investigate Al's

fraudulent acts but that.....Now this matter took a U-turn when we had a conflict of shares in the company and that was a time when the investors \wanted to sell the company to a company called Selsie. It is a third operator telecom, mobile operator in South Africa, and also to Agakhan foundation at a value of 50 million dollars. Now they gave a condition that if they are coming in invest in the company they don't want any black director. That was made clear so Mountain hills who were holding 90% shares that time decided to start the process of dealing,

Now when the mountain hills started on the process of acquiring almost 100% shares that is when this issue took a U-tum and some of us were not willing to sell our shares at that time. And I think it was slightly after this saga had started so they used this platform and engaged one lawyer called Muwema and wrote them a dossier on how I should be removed from the company because Brigadier Matayo had accepted to sell his 5% shares and me I said no I started the company and I want to continue being a director in the company. So in my view and I still believe that these are triumphed up charges because they forced me out of the company and they forced me to sell my shares at a giveaway price.

Now about the same time I think about July, in 2011 when this matter went on from April, they first engaged us with an offer of about a million dollar each shareholder me and Matayo they were paying us 2million dollars. Then Matayo accepted a I million dollar me I refused because I told them that the 90% was not fully paid for. We had to negotiate the 90% shares because it was supposed to be paid for through an investment of about 150million dollars.

Now the investors wanted to cover that and take over those shares unpaid. When we failed to agree and when I refused because I sat on my guns that I needed 7 million dollars if I am to go out of the company, later on I told them that okay if you can't pay me 7million then I will go with half of

the money and that is where I stopped. So this is the time when they engaged Muwema and Muwema used his platform of URA and even in his letter to the Directors he proposed to them that if they paid him 300,000 dollars which was equivalent to 800million that he would throw me out of the company. Because that time they also had a matter with Sure Telecom in commercial court of this nature.

The plot was hatched in his communication Muwema said that if he received 300,000 dollars he would pay partly URA legal team, that is I have the document with me I can share it with court and I also put this document to the notice of the commissioner general as well. So Muwema said that if he is paid that much he would ensure that the matter in the commercial court which was about a claim of 5.5billion they would enter a Judgement and then the matter would be left to Sande and then URA. So that is evidenced with deposit they paid him initially to start on the matter and then from there the consent judgement was entered then from there they turned this whole thing on me.

He identified the court decree., which he stated was ...”By consent of both parties represented by Muwema Fred the counsel for the plaintiff and Mr. Ali Sekatawa the counsel for the defendant, it is here mutually agreed that the suit be settled amicably for the following terms; The defendants assessment against the plaintiff dated 6th June 2011 in the sum of five billion five hundred million Uganda shillings be vacated. The plaintiff abandons its claim for the general damage and extemporary damages that each party shall bear its own cost. Then it is signed by Muwema and then the legal service director Uganda Revenue Authority on the 26th of September, 2011.Immediately after the consent, the consent came immediately I left the company. When I left the company URA moved and they attached my accounts with standard chartered bank 2 accounts and they seized or they took 3.2billion. They also went to all my accounts and closed them with Orient Bank and Tropical Bank.....No they never summoned me, I was just surprised with agency notice and then the claims that I have never been paying tax for period of time but I was never summoned to answer to any charges.

He identified a letter from URA. He stated that ...”This is a letter that was written to me by the commissioner general Allan Kagina on the 16th September 2011 addressed to me Sunday Pande Ndimwibo, Uganda Youths and Association Plot 112 Masaka Road Kabuusu Rubaga Division in Kampala. He read it out to court. He explained that ...”It means that this was full conspiracy which was hatched by Muwema as I indicated in the document which I also have and this was full

planned because Muwema said that if he receives the three hundred thousand he would endeavour with that case with URA. it means that this was total conspiracy because first and foremost I was not party to this because URA. on this document they issued a third party notice to my accounts and they took my money and later they opened up charges against me. The criminal charges which I am not aware of They collected 3.2billion from my accounts.It was collected from Standard chartered Bank account on the 16th day the very day actually this agency notice was addressed.

I filed a case in court because money was taken from my account under the circumstance on the 16th of September 2011 under circumstances that I did not know. The very day they wrote to me, the very day they sent me agency notice is the very day I signed my shares off the company. So I took the matter for judicial review in commercial court and money was actually taken off my account the very day. So everything happened like it was a rocket of fire. So based on that I got shocked and then I said I don't have any liabilities with URA why should they take my money. When I filed the matter with Commercial court, they opened up criminal charges against me. They opened up charges against me in September one week after I had filed the case in commercial court. I was summoned in Buganda Road but first I was summoned at URA and then secondly I was also summoned at Buganda Road Court. The charges then were that I defrauded URA 900million.The case at Kibuli was about causing financial loss to the company Sure Telecom. I kept on going to Kibuli for I think three weeks and then afterwards I was told that the file was taken over by URA but the investigations were on at Kibuli. So from Kibuli I was summoned at URA and then at URA I was given summons to Buganda Road to appear for criminal charges.

It is me who had refused to sell shares in the company that is one. Number two it is me who had money then because URA had planned it that way with Muwema and I don't have reasons why other directors were not charged yet this matter was for Sure Telecom. But I believe and as I know that this was conspiracy to take my money and the charges were actually to intimidate me so that I abandon the funds.

My lord as I stated this is conspiracy which was fronted to throw me out of the company and they did, conspiracy to take my money which they did, so I am requesting court that I am acquitted because I have never committed these offences and also court to order that they refund my money because it was never stolen money.They have closed my accounts for a period of three years I have never

operated an account they are still under siege. So that is what I am requesting court to do for me.

I found A2's account to be convincing but unbelievable. I cannot reconcile A2's account with the evidence of PW5 and PW6 who implicate him in the fraud. I see no reason why these independent witnesses should have lied to the court. They were consistent, reliable and very believable. A2 was represented by two very competent Advocates but they never cross examination any of the prosecution witnesses as the important issues raised in their defence.

Therefore I find that the Prosecution has adduced sufficient evidence linking A2 to the crime. The evidence of PW5 and PW6 is of high evidential value and adds credibility to A1's testimony that A2 was the master mind behind the fraud. Though I believe A2 account of events that lead to the hostile takeover of Sure Telecom company, if he had ran a clean ship, he would not have fallen victim to the long arm of the law. Infact if A2 had never appeared at ECO bank throwing tantrums over the delayed payment, it would have difficult to implicate him in the fraud. Furthermore he had opportunity to question the illegal transfers payments made to the account in Tropical bank where he was a signatory. I accordingly find him guilty of obtaining money by false pretence contrary to section 305 of the Penal Code Act and convict him on count one.

I will now look at **COUNT 5: PROCURING ANOTHER TO DO AN ACT WHICH WOULD CONSTITUTE AN OFFENSE C/S 19(2) PCA.** It states that: Any person who procures another to do or omit to do any act of such a nature that if he or she had done the act or made the omission the act or omission would have constituted an offence on his or her part, is guilty of an offence of the same kind and is liable to the same punishment as if he or she had done the act or made the omission; and he or she may be charged with doing the act or making the omission.

A2 is alleged to have procured A1 to open an account at Eco Bank in order to receive the fraudulently obtained UGX 970 million from the URA. Transfers from the Eco Bank account to the personal account of A1 in the amount of UGX 10 million (Exhibit 32) have been found to prove that A1 was working for A2. A1 testified that A2 ordered and controlled his criminal conduct.

I am of the opinion that the evidence on record is enough to prove beyond reasonable doubt that there was a close relationship between A1 and A2 and even PW5 identified him as having come to

the bank. Therefore there is a highly probability that it was A2 who procured A1 to commit the offences of obtaining money by false pretence based on the reasons explained in the judgment.

I strongly believe that A2 and others within the company, officials of URA and UCC were all involved in the conspiracy with A1 to defraud the tax payers of the stipulated money. I disagree with the Assessors that A2 should be acquitted especially since he was positively identified by PW5 in Eco bank following up of the third payment from URA.

Therefore I find that the prosecution has proved beyond reasonable doubt that A2 was involved in the conspiracy and thus is convicted of obtaining money by false pretence and I convict him contrary to section 305 of the PCA

ELIZABETH JANE ALIVIDZA

JUDGE

1/9/2014