

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CRIMINAL DIVISION)**

**CRIMINAL APPEAL No. 63 OF 2020**  
**(Arising from Nakawa Chief Magistrate's Court Criminal Case No. 448 of 2016)**

**THIERRY BARAKA**  
**MUGISHA**

.....

**APPELLANT**

**vs**

**UGANDA**

.....

**RESPONDENT**

**BEFORE: HON MR. JUSTICE MICHAEL ELUBU**  
**JUDGMENT**

The appellant Thierry Baraka Mugisha filed this appeal against the judgment of HW **Ereemye Jumire James Mawanda** delivered on the 20<sup>th</sup> of March 2018 and the sentence handed down by HW **Dr. Singiza Douglas K** delivered on the 30<sup>th</sup> of November 2020.

**Background**

The Appellant (**A2**) and two others, Buhengezi Francis alias Kalemera and Kambale Mali Ya Bwana, were charged on two counts: 1) Obtaining Money by False Pretence c/s 305 of **the Penal Code Act** Cap. 120 and 2) Conspiracy to Commit A Felony c/s 390 of **the Penal Code Act** Cap. 120.

In the first Count of obtaining money by false pretence, it was alleged that Buhengezi Francis alias Kalemera, Thierry Barraka Mugisha (Appellant), Kamabale Mali Ya Bwana and others still at large, between the 31<sup>st</sup> August 2016 and 2<sup>nd</sup> September 2016, within the City Centre in Kampala, with intent to defraud obtained 345,000 US Dollars

from Yahaya Osman Mohammed, the Director of Eyat Investments Ltd by falsely pretending that they were selling to him 145 kgs of gold whereas not.

In the second count of conspiracy to commit a felony (Count 6 on the Charge sheet), it was alleged that Buhengezi Francis alias Kalempera, Thierry Barraka Mugisha (Appellant), Kambale Mali Ya Bwana and others still at large between 31<sup>st</sup> August 2016 and 2<sup>nd</sup> September 2016 within the city centre in Kampala conspired to commit a felony to wit obtaining money by false pretence.

The Appellant and his Co-accused entered pleaded not guilty to the charges.

On 20<sup>th</sup> March 2018, HW Ereemye Jumire James Mawanda convicted the Appellant. He was sentenced on the 30<sup>th</sup> November 2020 by HW Dr. Singiza Douglas to 5 years imprisonment on the first count of Obtaining Money By False Pretences and 6 years imprisonment on the sixth count of Conspiracy to commit a felony. The sentences were to run concurrently. The Appellant was also ordered to compensate the Complainant with the sum of USD \$ 345,000.

Aggrieved by the conviction and sentence, the Appellant appealed to this Court against both the conviction and sentence.

### **Grounds of Appeal**

1. The Trial Court erred in law and fact in not taking account of the gross falsehoods, contradictions and inconsistencies in the prosecution evidence which it ought to have wholly rejected
2. The Trial Court erred in law and fact and failed to properly evaluate the evidence adduced when it convicted the Appellant as charged without any credible evidence whereas the evidence adduced is full of falsehoods, gross contradictions and inconsistencies
3. The Trial Court erred in law and fact as regards the sentences of imprisonment it imposed on the Appellant in so far as:
  - a. The Sentences are different from that of A1, a co-accused.
  - b. The sentences are manifestly excessive

4. The Trial Court erred in law and fact when it ordered the Appellant to pay compensation of United States Dollars \$345,000 to the Complainant.

## **Representation**

The Appellant was represented by Alex Candia while the Respondent was represented by Njuki Mariam, SA.

The Respondent opposed this Appeal and argued the grounds in the manner followed by Counsel for the Appellant.

## **Submissions**

The parties filed written submissions which will not be reproduced here. I will nevertheless refer to them when resolving the grounds of appeal.

## **Determination**

The evidence adduced was as follows:

**PW 1 Yahaya Muhammad Ousmane**, the complainant. He stated that he knew all the accused persons Patrick Mugisha (A1), Thierry Mugisha A2, and Kambale A3. That he met the appellant and a group of people, Congolese and one Ugandan, on the 21<sup>st</sup> of August 2016 at 11:00 am at The Grand Imperial Hotel. The appellant said he was a gold supplier from Congo and the Ugandan, Adamawa, was a clearing agent with a gold smelting company. Their second meeting was at 8:00 am on the 27<sup>th</sup> of August 2016 at The Serena Hotel. That day the appellant came with one Gaga and A1, Patrick Mugisha, the clearing agent. He told PW 1 that they were his partners. That Patrick Mugisha informed PW 1 he was an import and Export agent for Damco. He had business and identification Cards showing that he was an import and export agent working for Damco. They negotiated the price and told Mugisha they would do due diligence on Damco. That on the third day, the 29<sup>th</sup> of August 2016, they had another meeting where a request was made to visit the office of Patrick Mugisha in Damco. Patrick Mugisha told them that he was already at his office and gave them directions. PW1 and his partner Khalid Simbwa (PW2) went to Damco where they met Patrick Mugisha who

stated that they should all proceed to their Ntinda Branch where the smelting of gold is done. At around noon on the same day - 29<sup>th</sup> August 2016, Patrick Mugisha led them to his office in Ntinda. There they found 3 people, including the appellant, who claimed to be gold suppliers. Patrick Mugisha showed them samples of gold nuggets and thereafter they negotiated the price.

That Patrick Mugisha stated that he would go to Entebbe for a report on the analysis of the sample of gold the sellers had presented. Mugisha sent the analysis report to PW1 the next day. That they then agreed to meet on the 31<sup>st</sup> day of August 2016 at the office of PW1's lawyer (Birungi Wycliffe – PW3). That day, Patrick Mugisha came to the lawyer's office with Thierry (the Appellant) and Paul (who was representing Gaga). It was agreed that Patrick Mugisha would be the representative for both sellers (Thierry – the appellant and Gaga). He would at the same time work as the Damco clearing agent to pay dues and royalties. PW1 then instructed his lawyer to draft the sale and purchase agreement for the gold bars. The sale was for 65kgs and 85kgs of gold. That Patrick Mugisha stated that they were not sure about the actual weight but it should be 146kgs. That they all agreed that upon signing of the agreement, \$129,000 would be paid for the purpose of royalty fees on each agreement. Thereafter both PW1 and Patrick signed the agreement, PW1 instructed Mr. Birungi (PW3) to release \$129,000 to Patrick Mugisha. That receipt of this money is reflected in the agreement itself. That it was also agreed that Patrick would collect the rest of the money after it was withdrawn from the bank. The gold remained in the custody of the owners Thierry, Paul and Gaga. That they agreed to leave the consignment with the representative, Patrick Mugisha.

On the 3<sup>rd</sup> of September 2016, Patrick Mugisha collected and acknowledged receipt of \$50,000, in cash, from the office of PW1's lawyer (PW3). On the 5<sup>th</sup> of September Patrick collected and acknowledged receipt of \$13,000. The money was part payment meant for clearing but he also wanted to give some of this money to Thierry (the Appellant) who had problems. On the 7<sup>th</sup> and 8<sup>th</sup> of September, Patrick received and acknowledged receipt of \$60,000 and \$65,000 respectively. The money was picked from PW3's office. Two days later (11<sup>th</sup> of September 2016), the appellant informed PW 1 that he wanted to clear to his hotel dues and PW1 gave him \$1,500.

Later, Patrick told PW1 that he was ready with the paper work. He asked PW1 to instruct his partner to go with him to Entebbe so that they could deliver the 146kgs of gold to Emirates. Khalid Simbwa, Thierry, Paul and Gaga were to come along. When PW 1 rang the Appellant, he was told they were printing visas before check in. when

PW 1 rang a second time, the appellant told him that they had run into security problems. That PW1 called his partner, Khalid (PW2), and instructed him to go to the counter. That Patrick Mugisha also came to the counter holding a brown envelope, which he gave to PW2, telling him that those were the documents although one missing one would be sent by Whatsapp. PW1 realised something was wrong and Patrick Mugisha was arrested.

That while Patrick Mugisha was in detention, the Appellant rang PW1 and told him that although the deal went sour he was coming from Kinshasa to fix it. The appellant and one Nelson went to Birungi's (PW 3) office where the appellant said he had 55kgs of gold to cover the money PW1 had for them. That while the Appellant and the others were in Mr. Birungi's office, the police came in to arrest them. PW1 told the police that they should let the Appellant and his friend go until the gold was recovered. Nelson and the Appellant stated that they preferred to meet at the offices of their own lawyer - Paul Wanyoto. They went to Wanyoto's office in a car driven by Kambale where one Musa Ssabasajja presented himself as a partner in consolidated services. That they asked for 57kgs of gold but Nelson and the Appellant declined saying they should sign a new agreement and pay royalty fees to consolidated services through their lawyer Paul Wanyoto, in the presence of PW1's lawyer, Birungi. Paul Wanyoto drafted the agreement which they signed and left Wanyoto's office. It was agreed that they leave the 57kgs of gold, as collateral, at the office of PW3 and ship the 86kgs to Dubai. The Appellant, Nelson, Paul Wanyoto and PW1 went to the Nile Refinery to test the gold. They carried 1kg. PW1 operated the testing machine and was satisfied with the test result. They then went back to Paul Wanyoto's office to conclude the agreement. That Nelson was present but Kambale and the appellant were not. They gave the key to the gold box to someone and left the box with their lawyer Paul Wanyoto. When they rang the Appellant he said he was in hospital and could not come so they rescheduled the testing at Paul Wanyoto's office.

When PW1 went to the parking area, he noticed a car with tinted glasses and he became suspicious. When PW1 entered his car, the other car sped off but he followed and blocked its exit. PW1 was surprised to find the Appellant and Kambale in that car. The police was called at which point Kambale and the Appellant were arrested. That in all PW1 paid a sum of \$485,000. This figure is documented. There was also \$37,000 which is not recorded in any document.

**PW2 Simbwa Khalid** stated that he knew the complainant Yahaya because they are in the same company called Eyat Investments. PW2 was one of the people who managed the company. That he knew Patrick Mugisha and the Appellant. That in 2016, a man called Brian told PW2 that he knew someone with gold. PW 2 then met Brian and the Appellant at Grand Imperial Hotel. The two said they had 65kgs of gold for sale. That they also had an agent called Adamawa. It was agreed that Brian and the appellant be paid money to turn the gold into Bars/Blocks. That Adamawa was paid about \$2000 but following a disagreement between the sellers and Adamawa, he was taken off the job. Later Brian and the appellant came to Grand Imperial Hotel with Gaga. They had 85kgs of gold for sale. PW2 was with Yahaya (PW2) at that meeting. The next meeting was at Serena Hotel where Gaga introduced Patrick Mugisha who had a business card from Damco. Gaga said Patrick would be their agent. They held another meeting at the Serena with Patrick, Yahaya, Paul, Gaga and the Appellant. That it was in August when they agreed that taxes for the 85kgs and 65kgs of gold would be paid by Mugisha who would also clear the gold to go to Dubai. Mugisha made arrangements for them go to Ntinda to see where he works and they were satisfied.

That on 2<sup>nd</sup> September 2016, they gave Francis (Patrick Mugisha), Thierry and the others \$129,000 for clearing. Francis (A1) acknowledged receipt. On the 31<sup>st</sup> of August 2016, Patrick was paid another \$120,000 which PW2 handed him in the office of PW3. On 3<sup>rd</sup> of September 2016, Patrick given \$50,000. On the 5<sup>th</sup> of September 2016, another \$13,500 was given to Patrick and Thierry (the appellant). That Patrick was the one who received these monies on behalf of the others. On 7<sup>th</sup> September 2016, \$60,000 was paid. Then again on the 8<sup>th</sup> of September 2016, Patrick received \$65,000 on behalf of his friends.

There was also a total of \$47,500 paid in instalments to the appellant, in the presence of PW 2, but never documented. This money was to clear the Appellant's hotel accommodation. That the total amount of documented money received was \$437,500. In all, the grand total was \$485,500. Two days later, Patrick rang PW2 requesting they go and pick up the collateral and take it to the airport to be added to the entire consignment. Francis came with a police officer in a van. Moving together, they picked Thierry (the appellant) and drove to Entebbe in one car. They met the vehicle with the officer disappeared at Customs. When PW2 got to Entebbe he rang Patrick asking where Gaga, Paul and Thierry were. He also asked Patrick for the consignment documents and Patrick told him that they would be sending them. PW2 disagreed and

notified Yahaya. He stated tracing for the documents in vain. Then Patrick disappeared. PW2 then rang the Appellant who did not answer. Later the matter was reported to the police at Kireka. Patrick was disembarked from a plane fleeing. The Appellant and Kambale were arrested from the office of PW3. It was the evidence of PW2 that he was not deeply involved in the second transaction. Later, PW1 rang PW2 and told him that A3 and Appellant were trying to defraud him of more money and requested PW2 to get police and have them arrested.

**PW3 Birungi Wycliff** is an Advocate with Birungi & Co. Advocates. He said that he knew all the accused persons. That towards the end of August 2016 Yahaya Mohammed and Khalid Simbwa came to his office on Bhatia House. That they had a transaction which they wanted PW3 help execute. Later they came in with A1 - Francis Buhengezi whom PW1 wanted to purchase gold from. That another person was introduced as Patrick Mugisha working as a Director with DAMCO logistics. PW3 got the details and particulars of all persons involved in the transaction. They were: Yahaya (PW1), Khalid Simbwa (PW2) and Francis Buhengezi. Francis Buhengezi informed PW3 that he was selling 85kgs of gold. That Buhengezi wanted a down payment of \$120,000 meant to facilitate the process of paying government dues, taxes and royalty fees. It would also go towards clearing the gold to be exported to Dubai where they would carry out fresh tests. That the parties agreed that the transaction would be concluded the next day. On the 31<sup>st</sup> day of August 2016, they all returned to the office of PW3 and read through the agreement. \$120,000 was paid, in cash, by PW1 to Francis Buhengezi. That Khalid and Yahaya took pictures of A1 counting this money. The agreement was dated the 31<sup>st</sup> of August 2016 and those that signed were A1 (Francis Buhengezi), Khalid (PW2) and Patrick Mugisha. That the other party was Tamkin Trading and Company incorporated in Dubai in which Yahaya Osman was a director. That Yahaya Ousman Mohamedi and Khalid Simbwa signed as representatives of Tamkin. Patrick Mugisha signed on behalf of DAMCO Logistics. After a while, on the 02<sup>nd</sup> of September 2016, Yahaya and Khalid asked PW3 to make a second sale agreement where Thierry Baraka Mugisha and another person called Phillip Pat Shamba were parties. PW 1 and PW 2 came with Baraka to the office of PW 3 where an agreement for the sale of 63 kgs of gold by Baraka Thierry and Phillip Pat Shamba was made. The Buyer was Tamkin General Trading LLC represented by Yahaya Mohammed. It was agreed that Baraka would be paid money to handle taxes and royalties to clear the export of the gold to Dubai. Baraka (Appellant) called A1 Buhengezi who it was stated would handle the clearance and payment of Government dues and Buhengezi would receive funds from the purchaser

for that purpose. All the parties read through the draft agreement and signed. That \$129,000 was paid to the Appellant who passed it to A1 to clear the goods. The agreement was dated 02<sup>nd</sup> of September 2016 between Baraka Thierry and Phillip Pat Shamba, c/o Damco Logistics, on the one hand and, Tamkin General Trading on the other hand. Yahaya Osman and Khalid Simbwa signed for Tamkin. The price was \$23,000 per Kg. an additional \$19,500 was paid to Patrick Mugisha for clearance and export requirement of gold to UAE. It was paid at the signing of the agreement.

That the purchaser continued to make payments for which PW3 would prepare acknowledgements. PW3 produced an acknowledgement dated 03<sup>rd</sup> September 2016 for \$50,000 paid by Yahaya of Tamkin LLC General Trading to Patrick Mugisha (A1). There is another acknowledgement, of the 5<sup>th</sup> of September 2016, for \$13,500 from Khalid Simbwa to Damco Logistics paid to Patrick Mugisha. There is an acknowledgment for US\$60,000 dated 07<sup>th</sup> September 2016 between Tamkin General Trading LLC and Patrick Mugisha of Damco, Thierry Baraka and Phillip. Another acknowledgment is dated the 08<sup>th</sup> September 2016 between Patrick Mugisha of Damco Logistics and Khalid Simbwa for Tamkin LLC as part of the sale agreement with Baraka and Phillip as sellers. That during the period leading up to the 08<sup>th</sup> of September 2016, Patrick Mugisha informed PW3's clients that they were processing export requirements as per the agreement and came for more money. He also told PW3 that Thierry Baraka, Phillip, Yahaya Ousman and Simbwa would travel the next day - 09<sup>th</sup> of September 2016. On that 9<sup>th</sup> September 2016, Yahaya and Simbwa went to Entebbe Airport meaning to travel to Dubai with Patrick Mugisha, Thierry Baraka and Phillip. That when he was at the airport, Yahaya called PW3 and informed him that A1 had told him one document was incomplete but Yahaya and Khalid should proceed as the process of completing the document continues. Yahaya also stated that A1 told him that he would send the document on his WhatsApp. PW3 advised Yahaya not to travel until he had all the necessary documents. That after a few minutes, Yahaya called PW3 again and told him that A1's phone was off and unavailable. Later on Yahaya, called PW3 and stated that he had seen A1 within the airport near the cargo section. That when PW 1 approached A1 he stated that he was waiting for something to ensure that all the documents were cleared for the gold. Later on Yahaya called PW3 and informed him that A1 had disappeared. PW3 advised Yahaya to get back to Kampala.

At a later stage, Yahaya asked PW3 asking him to accompany him to see another lawyer in Nakasero. Before this, Yahaya had told PW3 that he was going to meet some people first before coming to the office of PW3. Then PW 1 came to PW3's office with the Appellant (A2) and Kambale Mali Ya Bwana. PW3 was disturbed when he saw A2 and

A3 again because they had been the same people who had defrauded them. PW3 called security from CPS without notifying PW1. PW3 further alerted the guards at the office premises not to allow the Appellant and his colleague to leave.

That when the security came, they tried to arrest these people from his office but the client told him not to rush and requested PW 3 to have the Appellant and A3 released. The following day, PW3 and his group went to a lawyer called Wanyoto who was acting for the Appellant and his colleagues. PW3 met Wanyoto who told him that he was waiting for his client, the Appellant, who had the gold. PW3 was also introduced to Moses who was to handle the transactions. While at Wanyoto's office, the Appellant, A2 and a third man arrived holding a box. That Counsel Wanyoto and Yahaya took photographs of Thierry, Bwambale and Moses holding the box. That Wanyoto had already drafted an agreement for US\$ 8,000 and the money was handed to Moses as the clearing agent. After counting the gold Bars, the Appellant put the gold back in the box and left it at Wanyoto's office. The box was locked and the Appellant kept the Keys since he was the owner of the gold. That PW3 and his clients left the premises. PW3 warned PW1 that he did not like the transaction due to the earlier incident. Later PW3 learnt that PW1 had been defrauded of more money by the Appellant, Bwambale and Moses the clearing agent.

**Magezi James** was **PW10** and stated that he knew the three accused persons A1, A2 (the Appellant) and A3. That this case was reported to SID on the 29<sup>th</sup> of September 2016 by Birungi and Co Advocates on behalf of Tamkin Company Ltd, where Ousman Yahaya, Khalid Simbwa and Eyat Ltd are Directors. That there were agreements where the accused persons had received \$425,000 for the purchase of gold. That the parties to those agreements were Tamkin Investment on one side and Mugisha Patrick (the clearing agent) and Thierry as the seller on the other. PW10 asked AIP Twahirwe to take Yahaya's statement, he also assigned D/AIP Kawanga to extract charge and caution statements. That A1 was brought to SIU Kireka for interrogation from Entebbe Airport. That A1's passport had the name Buhengezi Francis yet he was known as Patrick Mugisha. PW10 conducted a search at A1's premises in Kiwatule where he recovered an original logbook in the names of Kalempera Francis. PW10 saw the agreements and the acknowledgments of the money paid. That when A1 was arrested the Appellant and A3 went on the run. The Appellant and A3 were arrested by Sekamatte a police officer at Central Police Station. That the Metallic box which the 57 bars of supposed gold which had been left with the advocate was taken to Entebbe Geological experts who carried out a test revealing that none of the 57 bars was gold.

**PW14 Katungi Alex** was a police officer attached to CID. That on the 4<sup>th</sup> of October 2016 he received a call from one Sekamatte Willington and AIP Magezi asking him to help the complainant in Police file No. GEF 133/2016. PW 14 met the complainant, Khalid, at the Central Police Station and together with Sekamatte, all three drove to Lumumba Avenue. In the parking area, they met Yahaya Ousman who briefed them that he and Khalid had been conned of US\$300,000 and reported the matter to SIU Kireka. Yahaya led them to the office of an Advocate, one Wanyoto, where they found A3 and the Appellant. PW14 arrested A3 and the Appellant after confirming their identity from Yahaya. The two were taken to Central Police Station with a box whose contents PW14 did not know and handed over, with the box, to Magezi PW 10.

In defence, **Buhengezi Francis A1**, testified as **DW1** and stated that he is a clearing agent with consolidated services. That he knew the complainant first as an individual but later as a company. Sometime in 2016, he received a call from Gaga who stated that he got his number from one Didi. That Gaga needed to make consultation on imports and exports. DW1 directed them to Nakawa where he was. He came with another person called Dollar. When DW1 inquired about the nature of the goods he was told that they would inform him later. The next day he was taken to Serena hotel and met with 4 men and Yahaya Mohammed and Khalid Ssimbwa. These two told DW1 they were business partners with Didi and Gaga Dollar. They informed DW1 that they wanted him to explain the procedure of exporting minerals.

They met again the next day at a place on William Street. DW1 was given directions by Simbwa and Gaga. He was taken to a lawyer's office and asked to explain to the lawyer the procedure for exporting gold. Two days later, Simbwa and Gaga called DW1 asking for the procedure to get a certificate of origin and an export permit. That DW1 explained the process. DW1 stated that he has never received any money nor has he received gold. That he has never signed any documents. DW 1 states he does not know any person called Patrick Mugisha or Buhengezi Francis.

That he was arrested by security operatives while he was on his way to Hong Kong for normal business. They brought him to Kireka SIU. On their way to Kireka, they branched off at shell lugogo, where they met Yahaya and Emma. That Yahaya said DW1 had taken 5kgs of gold from him. It was the evidence of DW1 that he does not deal in gold. He said he worked for many firms like Spedag, Damco and Transami. DW1 stated he had never done business with the complainant, Yahaya, Simbwa, Eyat or Tamkin Investments.

The appellant, **Thierry Baraka Mugisha (DW3)**, stated that he knew Yahaya.

That he was once in a bar when he received a call from Congo and spoke in Kiswahili and French. That one Brian approached him and inquired whether he was Congolese. They exchanged contacts. At 5.00 pm the next day Brian called the appellant whom he met with 5 other people including Gaga, Phillip and Ali. These people informed DW3 that they had been to the north of Congo doing business. These people confirmed that DW 3 had a passport. They informed DW3 that they had a business partner in Congo who was sick and required another person with a Congolese passport to stand in for him since the people he had gone to see were Ugandans. That the deal was about minerals for which DW3 would be paid a commission of \$7000.

The next day, Brian asked the appellant to meet him at Grand Imperial Hotel with another set of people from Dubai. At the hotel, was a white man with Brian, Gaga and some other people. Brian said the white man was Abraham Aziz who was his partner from Dubai and the owner of the minerals from Congo. DW3 was informed that they needed help to transfer the mineral. That the next day where he would be introduced to a Sudanese and others.

The following day Brian they went to Grand imperial and met Yahaya, Khalid, Abraham Azizi and others. When the meeting ended, DW3 was informed that when Khalid was ready, he would be notified about the travel. After 2 days, DW3 met Brian, Yahaya, Gaga, Abraham Azizi and others at Grand imperial. He was told by Yahaya that the goods were ready and that they were arranging a ticket for DW3 who would stay in Dubai for 2 days.

On the date of the flight, Brian gave Gaga \$1,500 and instructed him to go with DW3 to the Emirates Office and pay for his ticket. DW3 was then told to go and prepare. They agreed to meet at the Entebbe airport by midday. Later DW 3 was told that he and the clearing agent had no seats on the flight but arrangements were under way to get him a seat. DW3 waited in vain before he returned home and later left for Congo.

When DW3 returned to Uganda a few days later, Brian told DW3 that the first shipment was successful and they needed to do a second one. He asked DW3 to call Yahaya for meeting. They met in the lawyer's office, where Yahaya said he was sorry about the first shipment but he needed help with a second issue. That Yahaya gave DW3 a contact to call. DW3 did not sign any document with Birungi (PW3).

4 days later, Yahaya told DW3 to meet him at a blue building on Lumumba Avenue where Nelson knew. At about 11:00 am, DW3 was picked from shell-Bunga and taken to Buziga where he was told that gold smelting was done. At this place he, remained at

the reception. That Yahaya asked DW3 if he had ever seen gold and he answered that the only gold he had seen was in chains but not physical gold. He was shown gold which was parked in boxes and put into Yahaya's vehicle.

Later still, DW3 had errands from Congo requiring him to ask for the prices of cars and spare parts. He requested A3 to come and drive him. It was then that Yahaya called. DW3 then asked A3 to drive him to where Yahaya was. On arrival A3 remained at the reception when Yahaya took DW3 to meet one Wanyoto whom DW3 had seen at the smelting point. DW3 was told that they were waiting for Nelson to finalise with the papers. A short while later, A3 was pushed into the office where Khalid pointed at them and they were both beaten and arrested. As they left the office, the police told DW3 to carry a black box like the one exhibited in court. The next day, the police drove them to Entebbe with Yahaya following the police car.

### **Grounds of Appeal.**

The burden of proof against an accused person is with the prosecution. The onus is on the prosecution, as it is in all criminal cases, except in a few statutory offences, to prove the guilt of the accused beyond any reasonable doubt. [See **Ojegan Ignatius vs. Uganda Cr. App. No. 25 of 1995 (unreported)**]

### **Grounds 1 & 2**

1. The Trial Court erred in law and fact in not taking account of the gross falsehoods, contradictions and inconsistencies in the prosecution evidence which it ought to have wholly rejected
2. The Trial Court erred in law and fact and failed to properly evaluate the evidence adduced when it convicted the Appellant as charged without any credible evidence whereas the evidence adduced is full of falsehoods, gross contradictions and inconsistencies

These two grounds will be considered jointly.

## **Case for the Appellant.**

On **Ground One**, it was submitted that the whole prosecution case is founded on deliberate falsehoods, gross contradictions and inconsistencies and ought to have been rejected in whole.

That the evidence of PW 1 is at one point that he gave the Appellant \$1500, then he said that he did not give the Appellant a single coin, and later that he gave the appellant \$6,000. That in another part of his evidence he stated the Appellant received \$13,000 to give to the Nile Refinery. That these different versions of evidence are contradictory.

It was also the contention that there were contradictions between the evidence of PW 1 and PW2. That PW 2 had said he was present when the appellant received an undocumented \$47,500. That the appellant was also paid \$129,000. Then PW2 revealed he could not tell how much money was given to the Appellant because all the advance payments would be made through Patrick Mugisha (A1).

It is then argued that the above pieces of evidence are at odds with the testimony of PW 3 who said that on the 2<sup>nd</sup> of September 2016, the Appellant received \$129,500 from Yahaya. However PW1 does not have this in his evidence thus making PW3's evidence false.

That the above contradictions establish that there was actually no payment made to the Appellant.

With regards to other payments made, PW1 had stated that Musa Ssabasajja received \$100,000. That he was paid \$50,000, then \$30,000 and finally \$13,000 making a total of \$93,000. In yet another part of his testimony, PW 1 testified that \$150,000 was advanced to Musa Ssabasajja. That these are contradictions and lies.

When testifying about undocumented payments, PW1 said it all came to \$37,000 while PW2 gives the sum as \$47,500. Counsel argues that if indeed PW1 and PW2 were buying gold for a Dubai Company as alleged, then they could not have made undocumented payments. They therefore lied about those payments.

Finally the total sum of money varies depending on whether it is PW1 or PW2 testifying. They, respectively, gave \$485,000 or \$437,500 as the figure. They also gave

inconsistent figures to the police as the amount of money taken. The figures given were \$347,000; and then the \$345,000 and finally the figure of \$485,500 stated by PW2 in Court. That this demonstrates that it is not known how much money was taken. If indeed PW 1 and PW 2 had made these payments, they would know how much money was taken. The implication is that they have never made such payments.

The respondent's arguments in reply are made in accordance to payments made to each appellant in turn.

In specific reply to the challenge against payments allegedly made to the Appellant (A2), it was submitted that the evidence shows that what Counsel for the Appellant referred to as payments were made by PW1 to A1 Patrick Mugisha and not the Appellant. That the testimony of PW2 is consistent with that of PW1 with regard to the payments made to the Appellant. That PW1 stated the total amount of money received by the Appellant was \$47,000 which PW1 paid in the presence of PW2. That there was also no contradiction arising from the evidence of PW3. His testimony refers to what he was told to pay out. That PW3's testimony is clarified by that of PW1 who stated that it was agreed between A1 and himself that US \$129,500 should be paid and that was the amount reflected in the agreement that was tendered in court. That it was never the evidence of PW3 that this money was paid to the Appellant, rather that the Appellant was present when this payment was made. It was also the contention that PW10's testimony may not be accurate, but his role in this case is that of an investigating officer and he only relayed information that had been given to him by the complainants or the accused persons.

This is a first Appeal.

The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses (See **Kifamunte Henry vs Uganda Supreme Court Criminal Appeal No. 10 of 1997**).

Before going on to determine these two grounds this court is reminded that the general position on inconsistencies and contradictions was restated in **Serapio Tinkamalirwe Vs Uganda Supreme Court Criminal Appeal No. 27 of 1989**, where the Court held that:

It is not every inconsistency that will result in a witness' testimony being rejected. It is only grave inconsistencies, unless satisfactorily explained which will usually, but not necessarily, result in the evidence of a witness being rejected. Minor inconsistencies will not usually have that effect unless the Court thinks they point to deliberate untruthfulness (See also the Court of Appeal decision in **Twehangane Alfred vs Uganda Criminal Appeal No. 139 of 2001**).

The courts are also guided on what weight or effect should be attached to a contradiction. In **Uganda vs Kavuma Ismail High Court Criminal Case No. 0819 of 2016**, as cited by Counsel for the Respondent, the Court noted that:

The gravity of the contradiction will depend on the centrality of the matter it relates to in the determination of key issues in the case. What constitutes a major contradiction will vary from case to case. The question always is whether or not the contradictory elements are material i.e. "essential" to the determination of the case. Material aspects of evidence vary from crime to crime but generally in a criminal trial, materiality is determined on basis of the relative importance between the point being offered by the contradictory evidence and its consequence to the determination of any of the elements necessary to be proved. It will be considered minor where it relates only on a factual issue that is not central or that is only collateral to the outcome of the case.

Where a court determines a witness has told a deliberate lie is material was explained in **Khatijabai Jiwa Hasham Vs Zenab d/o Chandu Nansi [1957] E.A 38** at page 49,

The judge's failure to appreciate that the Respondent told a deliberate untruth on a material point or if he did appreciate it, his failure to attach any importance of it, must detract from the favourable view which he took of the Respondent's credibility.

Count 1 was obtaining money by false pretences. The offence is provided for under Section 305 of **Penal Code Act** which states,

Any person who by any false pretence, 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 elements in this offence can be isolated as,

- a. The making of a false pretence
- b. The intention to defraud
- c. Obtaining or inducing the delivery of anything capable of being stolen (theft)
- d. That the accused is liable

A false pretence is defined in Section 304 of the Act which says,

Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false or does not believe to be true, is a false pretence

The allegation is that the Appellant with others, between 31<sup>st</sup> August 2016 and 2<sup>nd</sup> September 2016 within the City Centre in Kampala, fraudulently obtained \$345,000 from Yahaya Osman Mohammed a Director of Eyat Investments Ltd, by falsely pretending that they were selling him 145 kgs of gold.

In his evidence, the appellant denies the charges. On the first transaction, he states that it was Brian, Philip, Gaga and Ali whom he met at a bar in Kabalagala who requested him to stand in for a sick colleague. The extent of his involvement was when he was asked for help to transfer gold. He was however left behind on the day the gold was taken to Dubai because his ticket had issues. Following that occasion, the appellant returned to Congo.

For the second transaction Brian asked the appellant to call PW 1. When he did, PW1 apologised to the appellant for the deal not going well. That the appellant saw gold put in the vehicle of PW 1 at a smelting point in Buziga. After this the appellant had to

return to Congo for a while. On return, the appellant was called by PW 1 and PW 2 who caused his arrest.

From the record, it was the evidence of **PW1** that Thierry (the appellant) came with a group of people to Grand Imperial Hotel, and presented himself as a gold supplier from Congo. That in late August, as PW 1 did due diligence on Damco, he went to an office in Ntinda, where he found the appellant who said he was one of the gold suppliers.

PW1 also stated that while Patrick was under arrest, Thierry, the appellant, rang him and said the deal went sour but he was coming from Kinshasa to fix it. Indeed Thierry came with Nelson to Birungi's office to fix the deal. He said he had 55kgs of gold to cover the money PW1 had for them.

There is also the evidence of PW 2 that the appellant and Brian met him in the Grand Imperial Hotel, and informed him that they had 65kgs of gold for sale. The second time is after the sellers had had disagreements amongst themselves, Brian and the appellant again met PW2 who was this time in the company of PW 1 and told them that they had 85kgs of gold.

It is the evidence of PW 3, the advocate who drafted the sale agreement, that on the 31<sup>st</sup> of August 2016 \$120,000 was paid to A1 for 85 kgs of gold.

That there was a second agreement, where the appellant was the principal seller. That on the 2<sup>nd</sup> of September 2016, PW 1 asked PW 3 to make another agreement where the appellant and one Patrick Shamba were selling 63 kgs of gold. It was agreed that the gold would be sold at \$23,000 per kg. That the appellant would first be paid \$129,000 to clear taxes and royalties. That the appellant then called A1, who as a clearing agent would clear the goods. That indeed when A1 came in, the money was paid to the Appellant who passed it on to the A1.

The appellant cited four arguments to dispute a false pretence was proved in this case. Firstly that PW1 made an agreement with the Appellant which was not tendered in evidence; the exhibited sale agreements **DExh1, PExch4 and PExch5** produced in the lower court to show misrepresentation were not made with Yahaya as the buyer, but with Tamkin General Trading LLC; that no agreement for the sale of 145kgs of gold was ever tendered in evidence and lastly that the evidence is contradictory.

The basis of the first ground of appeal is that the evidence is contradictory. The Appellant argued that there was no evidence produced or agreements tendered to show the sale of 145kgs of gold between PW 1 and himself. As such there was no false representation.

Firstly, it is not true that a representation should only be in writing as argued. It is clear from the definition of a representation given in Section 304 of the **Penal Code Act** that representations may also be in word or conduct. In this case, the evidence adduced and not disputed by the appellant, is that he and others informed PW1, PW 2 and PW3 that they were gold suppliers. This was the basis of all the unfolding events. Therefore before anything was reduced into writing, a representation had already been made by the Appellant to the complainant that he was a gold dealer.

The other reason advanced by the Appellant is that the buyer in the agreements **Dexch1, Pexch 4 and Pexch 5** is Tamkin General Trading LLC and therefore the Trial Court was wrong to find that representation was made to Yahaya Osman because under company law, a company is different from its shareholders and Directors. Whereas it is true that the buyer in the agreement is Tamkin General Trading LLC, with respect, it is incorrect to state that the Trial Court could not have found that a representation was made to Yahaya Osman.

It is trite law that the personality which the law attributes to a corporation or company is a fiction. A company is not a living person. It acts through living persons (See **Tesco Supermarkets Ltd v Natrass [1972] AC 153**). In the agreements cited **PExch4** and **Pexch5**, Yahaya Osman signed as the purchaser for and on behalf of M/S Tamkin General Trading LLC. He was the living person through whom Tamkin was executing the agreements. Therefore the trial court was right to find that a representation was made to Yahaya Osman.

From the record, the evidence shows that Patrick Mugisha, one Paul who was a representative of Gaga and the Appellant were all present in the office of PW 3, the advocate Birungi, when it was agreed that Patrick Mugisha would represent both sellers Thierry, the appellant, and Gaga. He would also work as the DAMCO clearing agent and therefore pay all the dues including royalty fees. Purchase agreements for gold bars, **Pexch 4**, was drafted in respect to the first transaction. **Pexch 5** was made later. In both

agreements, the subject matter was the delivery of gold to the complainants **PW1 & PW2** in accordance with the representations that they were suppliers of gold.

The other key question here is whether the representations made by the Appellant to the complainants was false?

The issue is whether the Appellant delivered gold to the complainants following the conclusion of these two agreements. The submissions made on the discrepancies in number of kilos are, in my view, not material here. It is not go the root of this matter which is whether money was received for the supply of whatever number of kilos of gold. For the court to consider it major it would have to be demonstrated that the discrepancies show a deliberate effort to mislead. I find that was not the case here. The point is was a supply of gold made following the payments?

In the first transaction, it is clear that no gold was handed over to PW 1 and PW 2 by the Appellant and his accomplices. PW1 told the trial court that no consignment of gold was recovered. This is the same position given by PW2 and PW3. It was therefore established that the representations made by the Appellant and his co-accused to the complainants were false.

In the second transaction still no gold was delivered to the complainants as represented. The evidence is that the police recovered a box the appellant and the others had. The defence given by the appellant that he found that box with PW 1 and PW2 is untenable because it was the gold allegedly in this box that was the basis of the second transaction. When the content of the box was taken to Entebbe for analysis, the results showed that it was not gold. In this transaction as well, the representations made by the Appellant to the complainants were false and intended to defraud the Complainants.

Next, this court will consider whether the Appellant obtain money? It is alleged, the Appellant and his co accused obtained USD \$345,000 from Yahaya Osman the director of Eyat Investments Ltd.

Just as was discussed for the amount of gold, the key issue here is whether the complainants handed over USD \$345,000 US Dollars to the Appellant and the others.

The gist of the argument for the Appellant was that he did not receive a single coin, and therefore the element of obtaining money by false pretences was not proved. This argument is unsustainable.

The prosecution relied on agreements and acknowledgments for payments tendered as PExh 6a, b, c, and d. The acknowledgments are dated 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> September 2016 and show that \$50,000, \$13,500, \$60,000 and \$65,000 was received respectively.

There are also the agreements tendered as PExh 4 and PExh5. Paragraph 3 of PExh 4, which stated that \$120,000 shall be paid at the signing of this Agreement. PW1 testified it was agreed that upon signing \$129,000 would be paid on each agreement for the purpose of royalty fees. After the complaints had signed, \$129,500 was released to Patrick Mugisha. There is an acknowledgment of the receipt of this money in the agreement. It is true, there is a discrepancy in the amounts stated in PExh 4 (120000) and \$129,000 in the testimony of PW1. This disparity however does not negate the fact that the complainants paid the Appellant's agent, Patrick Mugisha, money.

Paragraph 1 of PExh 5 provided that after the signing the agreement, the buyer would pay the seller USD \$129,500 which was done.

The argument made for the appellant was that he did not receive any money and cannot therefore be convicted of obtaining money by false pretence. This submission cannot stand. Even if the Appellant did not get a single coin as submitted, the Patrick Mugisha and Musa Sabasajja received monies from PW1, PW2 and PW3 on his behalf as his agents of the Appellant as one of the gold sellers.

The principle of agency has been applied in the offence of obtaining property by false pretences. In **R Vs Harden [1962]1 ALLER 286** at **page 291**, the Court noted:

To support the charge, the obtaining relied on must be an obtaining of the property in the thing charged, and not merely possession or control of it; and when this principle is applied to a cheque, it means that the accused obtains the cheque when the victim makes actual delivery of it to him, or makes constructive delivery by handing the cheque to an agent duly appointed by the accused to receive it on his behalf

The principle outlined above applies with full force here. When an agent duly receives then a constructive delivery has been made to the principle as well. Therefore the argument is this case that the appellant did not receive any money because none was paid to him directly cannot stand. In the instant case, it was agreed that all monies would be paid to the clearing agents Patrick Mugisha (A1) and Musa Ssabasajja, who received it on behalf of the gold Suppliers. The moment A1 and Musa Ssabasajja received monies meant for ‘clearing taxes and royalty fees’, then a constructive delivery had been made to the Appellant and the other gold dealers. Also the argument as to what portion was received by the Accused persons does not go to touch the substance of the offence of obtaining money by false pretence.

But that was not all, aside from this principle and the agreements, the prosecution also produced PExh7, photographs showing the presence of the appellant when the money was paid. These photos were not disputed.

All the contradictions highlighted here are minor and none essential considering the nature of the offence in count 1. They do not negate the conclusion that the appellant received money through his agents.

Clearly, the above therefore proves the element of obtaining by false pretence. I find that the Appellant was rightly convicted of the offence of obtaining money by false pretence.

Next is the offence of conspiracy. It was alleged in count 6 that Buhengezi Francis alias Kalemera, Thierry Barraka Mugisha (Appellant), Kambale Mali Ya Bwana and others still at large between 31<sup>st</sup> August 2016 and 2<sup>nd</sup> September 2016 within the city centre in Kampala conspired together to commit a felony to wit obtaining money by false pretence.

The Appellant argued that he was wrongfully convicted because A3 was acquitted in **Criminal Appeal No. 42 of 2019 Kambale Mali Ya Bwana vs Uganda**. Secondly that he did not sign the agreements tendered as **PExch 4 & 5**.

It is true that criminal liability is personal and where there are several accused persons charged with the same offence on charge sheet, each must be proved, to the required standard, against each accused person.

Although A3 was acquitted in Criminal Appeal No. 42 of 2019, in the case of the appellant, it did not affect his conviction for the offence of conspiracy.

In **Angodua Kevin vs Uganda Criminal Appeal No. 0013 of 2016** the Court held that the offence of conspiracy has three elements: (1) an agreement, (2) which must be between two or more persons by whom the agreement is effected and (3) a criminal objective which may be either the ultimate aim of the agreement or may constitute the means or one of the means by which the aim is to be accomplished.

The acquittal of **A3** does not refute the proof of the elements of the offence against the appellant. Conspiracy is proved where there is evidence of an agreement between two or more persons. There were three accused persons here. It was clear they are alleged to have acted with others at large. Therefore the mere fact that A1 was acquitted does not prove inadequacy of evidence of conspiracy especially when the participation of the appellant and the others has been established. In any event the other co-accused (A1) was never acquitted nor were the others at large apprehended. The conviction on Conspiracy therefore stands.

Therefore Grounds 1 and 2 of the Appeal fail.

### **Ground 3**

**In Ground 3, the Appellant complained that the sentences imposed on him are different from those imposed on A1 and that the same are manifestly excessive.**

In **Livingstone Kakooza Vs Uganda Supreme Court Criminal Appeal No. 17 of 1993** the Supreme Court held that:

An appellate court will only alter a sentence imposed by the trial court if it is evident it acted on a wrong principle or overlooked some material factor, or if the sentence is manifestly excessive in view of the circumstances of the case. Sentences imposed in previous cases of similar nature, while not being precedents, do afford material for consideration.

While sentencing the Appellant, the sentencing Chief Magistrate stated the following:

The history of this case is as complex as are the different sentences that were passed by the 2 different Chief Magistrate. In my view, if I gave a different sentence from that given by the last Chief Magistrate, I would add more challenges to the case than the hands of justice would require. In my view I agree that uniformity in sentence though appropriate may in some cases be tempered with especially if one of the co-accused has either jumped bail or where evidence show greater responsibility in execution of the offences. In this regard the 1<sup>st</sup> Chief Magistrate had his reasons to give a sentence he chose and this Court has no reason or power to question. Likewise, the 2<sup>nd</sup> Chief Magistrate had her reason in giving a sentence that was different from the one given by the 1<sup>st</sup> Chief Magistrate while sentencing A3. On studying the sentence given on record, I am inclined to sentence A2 as follows

Count 1: The Accused is sentenced to 5 years imprisonment. I am convinced that the 2<sup>nd</sup> Magistrate's sentence was within the range of the Constitution (Sentencing) guidelines given for Courts of Judicature (Practice) Directions. These guidelines give between 6 months to 5 years as the starting range.

Count 6: Again in order not to bring greater disparity and considering the nature of the offence and the extent of the proven participation, I am inclined to give A2 six (6) years imprisonment.

According to **Section 305** of the **Penal Code Act**, a person charged of obtaining goods by false pretence is liable to imprisonment for five years while under **Section 390** of the Penal Code Act, a person charged with conspiracy to commit a felony is liable to imprisonment for seven years if no other punishment is provided.

The trial magistrate cannot be faulted on these orders and rightfully and correctly exercised his discretion.

Ground 3 fails and is dismissed.

#### Ground 4

The Trial Court erred in law and fact when it ordered the Appellant to pay compensation of United States Dollars 345,000 to the Complainant.

On Ground 4, the Appellant challenged the Compensation Order issued by the Trial Magistrate on the ground that the alleged gold transactions are illegal since it is Tamkin General Trading LLC which was the buyer and that no evidence of the Appellant receiving \$345,000 was adduced.

The question regarding receipt of money has been resolved in Grounds 1 and 2 above.

Sections 69 (1) and 140 (4) of the **Mining Act 2003** have no bearing to this case. They are relevant where an actual mineral (gold) has been supplied. There was no genuine gold delivered here.

The primary consideration is **Article 126 (2)** of the Constitution which provides for Courts to award compensation to victims of wrong. Then Section 197 (1) of the **Magistrates Court Act** empowers the Magistrates Court to order compensation where it appears from the evidence that someone suffered material loss or personal injury as a result of the offence committed. As has been outlined above, it is evident that the Companies have suffered loss as a result of the commission of these offences.

This court shall therefore not interfere with the compensation order made.

In the result, this appeal stands dismissed.

The sentences and orders of the lower court are confirmed.

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**Michael Elubu**

**Judge**

**8.6.2022**