THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NO. 0147 OF 2015

(Arising from High Court Anti-Corruption Division Criminal Case No. 123 of 2013)

1. **SERUNKUMA EDIRISA**
2. **MATOVU EDGAR**
3. **MAGOMBE JOSEPH** :::::::::::::::::::::::::::::::::::: **APPELLANTS**
4. **AYEBARE PETER**
5. **SEGUJJA DANNY**
6. **KAUMA IRENE**

VERSUS

UGANDA :::::::::::::::::::::::::::::::::::: **RESPONDENT**

(An appeal from the decision of the High Court of Uganda Anti-Corruption Division before His Lordship Paul K Mugamba, J. (as he then was) delivered on the 28th day of April, 2015 in Criminal Case No. 123 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA

HON. MR. JUSTICE STEPHEN MUSOTA, JA

HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court Anti-Corruption Division in Criminal Case No. 123 of 2013, delivered on the 28th day of April, 2015 by Paul K. Mugamba, J. (as he then was) in which the 1st, 2nd, 3rd, 4th, 5th and 6th appellants were sentenced to various terms of imprisonment, ranging from 7 to 9 years imprisonment, for various counts of offences, namely, theft, conspiracy to commit the felony of theft, unauthorized access to computer systems and electronic fraud.

Brief Background

The 1st, 2nd, 3rd, 4th, 5th and 6th appellants, were jointly indicted and tried with 3 others and, were accused persons 1, 4, 2, 7, 3 and 5, respectively at the trial. The particulars of the indictment against them, as far as are relevant to this appeal were as follows:

Count 2: That Sserunkuma Edrisa (A1), Magombe Joseph Joshua (A2), Matovu Henry Edgar (A4), Irene Kauma (A5), Oketcho Jackchar Jerom (A6), Ayebale Peter (A7), Kulaba Joshua (A8), Nasejje Mary (A9) and others still at large on the 25th day of January, 2013 at MTN offices plot 77 Yusuf Lule Road in the Kampala District, stole Ug. Shs. 3,150,000,000, (three billion one hundred and fifty million Uganda Shillings) the property of MTN Uganda Limited.

Count 3: That Sserunkuma Edrisa (A1), Magombe Joseph Joshua (A2), Segujja Daniel (A3), Matovu Henry Edgar (A4), Irene Kauma (A5), Oketcho Jackchar Jerom (A6), Ayebale Peter (A7), Kulaba Joshua (A8), Nasejje Mary (A9) and others still at large between 1st and 25th January 2013 within the Kampala District, conspired to commit a felony of theft.

Count 4: That Irene Kauma (A5), Oketcho Jackchar Jerom (A6) and Ayebale Peter (A7) between 23rd and 25th January, 2013 at MTN Towers on Plot 77 Yusuf Lule Road in the Kampala District, intentionally accessed MTN Mobile Money Computer system without authority or permission to do so.

Count 5: That Sserunkuma Edrisa (A1), Magombe Joseph Joshua (A2), Segujja Daniel (A3), Matovu Henry Edgar (A4), Ayebale Peter (A7), and others still at large between 23rd and 25th day of January 2013 unlawfully possessed a computer component which is designed primarily to overcome security measures for the protection of data with regard to password and access code of MTN Computer systems.

Count 6: That Sserunkuma Edrisa (A1), Magombe Joseph Joshua (A2), Segujja Daniel (A3), Matovu Henry Edgar (A4), Irene Kauma (A5), Oketcho Jackchar Jerom (A6), Ayebale Peter (A7), Kulaba Joshua (A8) and others still

at large between 23rd and 25th January 2013 at MTN Towers on plot 77 at Yusuf Lule Road in the Kampala District, carried out electronic fraud in that they transferred 3,150,000,000/= from MTN dispute account to MTN Mobile Money Agent lines and thereby defrauded MTN of the said Ug. Shs. 3,150,000,000/=.

At the end of the trial, the learned trial Judge largely accepted the prosecution case and convicted A1, A2, A3, A4, A5 and A7, on some counts as indicted. He, however, acquitted A6, A8 and A9 on all counts. In respect to the convicted persons, the learned trial Judge imposed the following sentences:

In count 2, he sentenced A1, A2, A4 and A5 to 7 years imprisonment each.

In count 3, he sentenced A2, A3, A4 and A5 to 7 years imprisonment each.

In Count 4, he sentenced A5 to 9 years imprisonment.

In Count 5, he sentenced A1, A2, A3, A4 and A7 to 9 years imprisonment each.

In Count 6, he sentenced A1, A2, A3, A4 and A5 to 7 years imprisonment each. The sentences imposed were to run concurrently. The learned trial Judge also ordered for compensation to be made to the complainant using the money which had been confiscated from the convicts during their respective arrests, and which had subsequently been exhibited in Court.

Being dissatisfied with the decision of the learned trial Judge, the appellants lodged this appeal in this Court. The 1st, 2nd and 3rd appellants filed a joint memorandum of appeal while the 4th, 5th and 6th appellants all filed separate memoranda of appeal. The grounds of appeal in the respective memoranda of appeal were formulated as follows:

The 1st, 2nd and 3rd appellants' memorandum of appeal:

"1. **That the Learned Trial Judge erred in law and fact when he convicted the Appellants of the offences of Theft c/s 254 and 261 of the Penal Code Act, Electronic Fraud C/S 19 of the Computer Misuse Act, 2011, Un authorized Access c/s 123 and 20 (1) of the Computer Misuse Act 2011, Conspiracy to commit a felony C/S 390**

of the Penal Code Act without proof of the ingredients of the offences beyond reasonable doubt.

2. **That the Learned Trial Judge erred in law and fact when he wrongly admitted and relied on and based his conviction on the charge and caution statements of the Appellants and their co-accused extracted out of torture hence occasioning a miscarriage of justice.**

3. **That the learned trial Judge erred in law when he gave the Appellants manifestly harsh and illegal sentences given the circumstances of the case."**

The 4th appellant's memorandum of appeal:

"1. **That the Learned trial Judge erred in law and fact when he convicted the Appellant of the offence of Unauthorized Access C/S 12 (3) and 20 (1) of the Computer Misuse Act 2011 without proof of the ingredients of the offence beyond reasonable doubt.**

2. **That the Learned Trial Judge erred in law and fact when he wrongly admitted and relied on and based his conviction on the charge and caution statement of the Appellant and his co-accused extracted out of torture hence occasioning a miscarriage of justice.**

3. **That the Learned Trial Judge erred in law when he gave the Appellant a manifestly harsh and illegal sentence given the circumstances of the case."**

The 5th appellant's memorandum of appeal:

"1. **The Learned Trial Judge erred in law and fact when he failed to analyze and evaluate the evidence on record as a whole, thereby wrongly convicting the Appellant.**

2. **The Learned Trial Judge erred in law and fact when he held that prosecution had proved the commission of the offences whereas not.**

3. **The Learned Trial Judge erred in Law and fact when he convicted the Appellant based solely on the uncorroborated, retracted and repudiated charge and caution statements of his co-accused.**

4. **The Learned Trial Judge erred in Law and Fact when he convicted the Appellant of the offence of conspiracy to commit a felony without any material evidence to support the charge.**

5. **The Learned Trial Judge erred in law and fact when he convicted the Appellant of the offence of unauthorized access without any material evidence to support the charge.**

6. **The Learned Trial Judge erred in law and fact when he convicted the Appellant of the offence of Electronic Fraud, without any material evidence to support the charge.**

7. **The Learned Trial Judge erred in law and fact when he convicted the Appellant of the offence of Theft without any material evidence to support the charge.**

8. **In the Alternative, the Learned Trial Judge erred in Law and fact when he sentenced the Appellant to a term of imprisonment in excess of the maximum penalties prescribed by the law."**

The 6th appellant's memorandum of appeal:

"1. **The Learned Trial Judge erred in law and fact when he failed to analyze and evaluate the evidence on record as a whole, thereby wrongly convicting the Appellant.**

2. **The Learned Trial Judge erred in law and fact when he held that prosecution had proved the commission of the offences whereas not.**

3. **The Learned Trial Judge erred in Law and fact when he convicted the Appellant based solely on the uncorroborated, retracted and repudiated charge and caution statements of his co-accused.**

4. **The Learned Trial Judge erred in Law and Fact when he convicted the Appellant of the offence of conspiracy to commit a felony without any material evidence to support the charge.**

5. **The Learned Trial Judge erred in law and fact when he convicted the Appellant of the offence of unauthorized access without any material evidence to support the charge.**

6. **The Learned Trial Judge erred in law and fact when he convicted the Appellant of the offence of Electronic Fraud, without any material evidence to support the charge.**

7. **The Learned Trial Judge erred in law and fact when he convicted the Appellant of the offence of Theft without any material evidence to support the charge.**

8. **In the Alternative, the Learned Trial Judge erred in Law and fact when he sentenced the Appellant to a term of imprisonment in excess of the maximum penalties prescribed by the law."**

Representation

At the hearing of this appeal, Mr. Ochieng Evans, learned counsel, represented the 1st, 2nd, 3rd and 4th appellants, Mr. Sserunjoji Brian, learned counsel represented the 5th and 6th appellants while Mr. Erizooba Maxim, learned Senior State Attorney assisted by Ms. Namigadde Vicentia Sandra, represented the respondent. Counsel for both parties opted to file written submissions which were accordingly adopted.

1st, 2nd, 3rd and 4th appellants' case.

Although the 4th appellant filed a separate memorandum of appeal, Mr. Ochieng Evans, counsel for the 1st, 2nd, 3rd and 4th appellants opted to argue the grounds as set forth in the 1st, 2nd and 3rd appellant's memorandum of appeal in support of the case for all the four appellants.

On ground 1, counsel faulted the learned trial Judge for convicting the appellants yet the elements of the offences in question had not been proven beyond reasonable doubt. To illustrate the preceding point, counsel discussed the offences in issue as follows:

Regarding the offence of theft, he laid down the following ingredients as discerned from section **254 (1)** of the **Penal Code Act, Cap. 120**:

1) That there was asportation of property capable of being stolen; 2) That there was fraudulent intent without claim of right to permanently deprive the owner of that property, and; 3) That it was the accused persons who committed the crime. Although counsel conceded that the learned trial Judge was alive to the said ingredients of theft, he faulted his findings of fact that money had been stolen from the MTN Mobile system dispute account in the circumstances. To support the foregoing criticism, he argued that there was no evidence to prove that the said money existed on the dispute account in

the first place. In counsel's view, if such money had existed, the prosecution would have adduced evidence to show the total amount of money that was in the said account prior to the alleged theft, how much was left after the alleged theft, and how much was saved through the alleged reversals made to save the money after discovery of the alleged theft, and that failure by the prosecution to lead evidence on this point was indicative of the fact that no money was stolen.

In further support of his submissions on ground 1, counsel faulted the learned trial Judge for finding that the bank deposits which were made by the MTN agents were electronically synchronized with the dispute account, arguing that the said finding was contrary to the testimony of PW2, Peter Ochen that the amount deposited by the MTN agents in the bank is converted into electronic float within the MTN system which is equivalent to the money held by the agents in the bank. It was also PW2's testimony that the dispute account is a clearing account for manual transactions and that when such transactions are cleared, the balance on the said account must be zero as it was only a transit account. Further, that the preceding testimony of PW2, was supported by the testimony of PW20, Michael Collins Mugisha, the MTN Investigating Officer, who had testified that the dispute account should never have money as it was not a deposit account. Counsel contended that the learned trial Judge had effectively created money on the dispute account contrary to the explanations of the prosecution witnesses about the nature of the account in issue and the MTN mobile money systems in general. On a related note, counsel questioned why the bank statement showing the MTN agents' deposits in the bank in relation to the dispute account was not adduced in evidence. He pointed out that PW2 had testified that the amount indicated on the dispute account should always tally with the amount deposited in the bank and wondered why the relevant bank statement was not adduced in evidence to back up PW2's claims.

Furthermore, counsel faulted the learned trial Judge for relying on an extract of the journal report adduced by the prosecution submitting that no weight should have been attached to the impugned journal report, reasons being that: first, the said journal report was a mere extract and not the whole journal report; secondly, the state had not satisfied Court about the

authenticity of the report; and thirdly, that the impugned journal report had been edited with several insertions made to it. For the above reasons, counsel invited this Court to make a finding that the 1st ingredient was not proven beyond reasonable doubt as the prosecution had failed to prove that the money in question had been stolen from MTN.

As to whether there was asportation of the money in question, counsel re-iterated his submissions above, and faulted the learned trial Judge for ignoring key aspects of cross examination that proved that EXH P.15, the journal report extracted by PW20, had been fabricated. To buttress the foregoing submission, he contended that PW20, who introduced the said exhibit testified that he did not print the document from the MTN system but from an external environment where he had edited it by making several insertions and alterations. Counsel also faulted the learned trial Judge for relying on exhibit P.31, which were images from a computer, arguing that those images had not been exhibited in court. He also alluded to the fact that the computer in issue had been used subsequent to the alleged theft and questioned the integrity of the evidence emanating from the computer in issue.

Regarding the participation of the 1st, 2nd, 3rd and 4th appellants in the theft in question, counsel submitted that there was no evidence from any of the prosecution witnesses which positively identified them in relation to the alleged theft.

On count 5, relating to unauthorized access, counsel submitted that the prosecution evidence in this regard was tainted with doubts and gaps which should have been resolved in favour of the appellants. He pointed out that while the prosecution case in respect of this count was that the appellants were in possession of a computer component designed to overcome security measures, that component was never produced at the trial so as to ascertain its colour, make, type, manufacturer, serial number and other relevant particulars. In further support of the preceding submissions, counsel referred to the testimony of PW31, Alanyo Christine, that a one Maureen Asiimwe, who was not produced as a witness, had taken away the computer, and by the time PW31 testified in court, the computer had not been returned. He relied on **Kato Kyambade & another vs. Uganda, Supreme Court**

Criminal Appeal No. 030 of 2014 for the proposition that where the DPP calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the Court is entitled to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution case.

Further, counsel submitted that there were other contradictions which were apparent in the prosecution evidence in that while it was alleged that the username of PW31, whose computer was used to effect the theft in question was **alanyoc (sic)**, PW31 had testified to the contrary that her username was **alachr036 (sic)** which was corroborated by other prosecution witnesses. Counsel, however, never pointed out who had alleged that PW31's username was **alanyoc (sic).** He further faulted the learned trial Judge for relying on the evidence of PW4, Kiyingi Karim a.k.a Robert Sengendo, to prove that there was a key logger which was used by the appellants to execute the theft in issue arguing that the said witness was an accomplice, whose evidence should not have been relied on.

On count 3, which was conspiracy to commit a felony, counsel levied various criticisms against the conviction of the appellants by the learned trial Judge. First that the learned trial Judge erred to convict the appellants of conspiracy to commit a felony as well as the felony itself arising out of the same indictment. He cited **Uganda vs Kilama Dennis and 10 others HCT No. 169/2010** for the proposition that when an unlawful act is committed, conspiracy to commit that unlawful act is deemed to have been terminated. He contended that because theft was allegedly committed, the appellants should not have been charged with conspiracy as well. Counsel submitted in the alternative that there was insufficient evidence on which the learned trial Judge could base himself to convict the appellants of the offence of conspiracy. Thirdly, he faulted the learned trial Judge for the reliance on the confession statements of A2 and A5 to convict the 1st, 2nd, 3rd and 4th appellants arguing that the said confessions had been retracted or repudiated and could not been relied on without independent corroborative evidence. In further support of the preceding arguments, counsel contended that contrary to the findings of the learned trial Judge, retracted or repudiated charge and caution statements of various co-accused, could not,

in law, be taken to be corroborative of each other and required independent evidence to be sustained. He relied on **Andrew Walusimbi and 3 ors vs Uganda, Supreme Court Criminal Appeal No. 28 of 1992** for the proposition that a confession by a co-accused implicating another is evidence of the weakest kind and the court should look for admissible evidence to show that the confession itself is trustworthy especially as regards the co-accused. He then submitted that the conviction on this count, should be quashed as well.

On count 6, relating to electronic fraud, counsel faulted the learned trial Judge for failing to properly evaluate the evidence on the point thereby reaching an erroneous finding of fact that A1, A2, A3 and A4 had held a meeting to plan the electronic fraud. He contended that there was no evidence to support the said finding, besides the appellants' retracted or repudiated confession statements which should not have been admitted in evidence. In further support of his submissions, counsel adopted the submissions made on count two above and maintained that in any case there was no evidence that the Ug. Shs. 3,150,000,000/= which was on the dispute account had been transferred through fraud or at all. Generally on ground 1, counsel complained that the learned trial Judge had erred to only consider the prosecution evidence in isolation of the defence evidence before convicting the appellants. In counsel's view, the learned trial Judge had already set his mind to convict the appellants even before their defences could be heard. He then prayed to this Court to quash the conviction of the appellants and acquit them accordingly.

On ground 2, counsel faulted the learned trial Judge for making a finding against the weight of evidence, that the appellant's confession statements were voluntary and true. He cited various anomalies which rendered the impugned statements inadmissible. First, that the charge and caution statements were recorded between 5 am to 7 am which was improper. Secondly, that the charge and caution statements in relation to the 1st appellant were recorded in an ungazetted detention centre. Thirdly, that the charge and caution statements in relation to the 1st, 2nd, 3rd and 4th appellants were recorded while they were in illegal detention having been in police custody for more than 48 hours from the time they were arrested. In

counsel's view, keeping the appellants in custody beyond 48 hours amounted to torture. Fourth, that there was evidence from DW10, Twesigye Celestine, the Officer in Charge of Murchison Bay where the 1st and 2nd appellants were incarcerated that they had been tortured, which evidence was injudiciously rejected by the learned trial Judge; in relation to the 2nd appellant, counsel submitted that his charge and caution statement was exculpatory as he had denied the charge against him therein. Fifth, that the learned trial Judge had erred in law, when, in admitting the contested charge and caution statements, he shifted the burden of proving their involuntariness on the 1st, 2nd, 3rd and 4th appellants. In support of his submissions counsel relied on **Sekitoleko Yuda Deo & 2 ors vs Uganda, Court of Appeal Criminal Appeal No. 127 of 2012** and **Walugembe Henry & 2 others vs. Uganda, Supreme Court Criminal Appeal No. 39 of 2003** for the proposition that the burden of proving the voluntariness of the confession statements during the trial within a trial lies on the prosecution and not the accused to prove that they were tortured. Sixth, that the charge and confession statement made by the 4th appellant was not a confession at all, he never admitted to stealing the money in question in his confession statement; and finally, in relation to the 4th appellant, counsel pointed out that his statement was recorded in English which he neither spoke nor understood.

In conclusion, counsel reiterated his earlier submissions on this ground and emphasized that the impugned charge and caution statements in respect of the 1st, 2nd, 3rd and 4th appellants were not voluntarily made. He questioned why the prosecution had not adduced medical evidence in respect to the appellants either by PF 24, or other evidence to show the health of the appellants at the material time. He cited **Sewankambo Francis vs Uganda Supreme Court Criminal Appeal No. 33 of 2011**, where the prosecution had failed to adduce evidence of the medical examination of the appellants who had claimed that they were tortured in police custody, and the Court held that in those circumstances, the confession statements obtained while in custody should not have been relied on by the lower courts. Counsel invited this court to find that all the impugned charge and caution statements should not have been relied on.

On ground 3, counsel faulted the learned trial Judge for passing a sentence against the 1st, 2nd, 3rd and 4th appellants which was illegal in several respects. First that, the sentence imposed in respect of count 3 was illegal because he imposed the maximum sentence of 7 years even after purporting to deduct the demand period of 2 years and 2 months. Counsel then speculated that the learned trial Judge would have imposed 9 years imprisonment had he not deducted the remand period which would have been an illegal sentence as the maximum sentence in respect to conspiracy to commit a felony was 7 years. Secondly, that the sentences imposed against the 1st, 2nd, 3rd and 4th appellants were illegal because the learned trial Judge did not arithmetically deduct the period each appellant had spent on remand as stipulated in **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2014.** Thirdly, that the sentence imposed in respect to count 5 exceeded the threshold set out under the Computer Misuse Act, 2011.

Further on ground 3, counsel submitted that the sentences imposed on the 1st, 2nd, 3rd and 4th appellants were manifestly harsh and excessive in the circumstances. He alluded to the sentence of 7 years imposed against the appellants in respect of Count 2 as being excessive given that they were first offenders. Counsel further faulted the learned trial Judge for taking into consideration the following irrelevant and extraneous matters which had not been proven at the trial; that the offence is on the increase; that the community stands to lose confidence in the mobile money system; and that the complainant is stripped of credibility by the alleged theft. He submitted that none of the matters taken into account had been canvassed in evidence as there was no statistical evidence in form of community impact assessment reports or victim impact reports placed before the learned trial judge. He then prayed to this court to find that the sentences imposed by the learned trial Judge were harsh and excessive in the circumstances.

5th and 6th appellants' case.

Mr. Serunjogi Brian, counsel for the 5th and 6th appellants opted to argue the grounds as presented in the 5th and 6th appellants' memoranda of appeal as follows:

Grounds 1, 2, 4 and 5 for the 5th appellant jointly with grounds 1, 2, 3, and 4 for the 6th appellant; ground 6 for the 5th appellant jointly with ground 5 for the 6th appellant; ground 1 for the 5th appellant jointly with ground 6 for the 6th appellant; ground 7 for the 6th appellant separately; ground 3 for the 6th appellant separately; and lastly, ground 7 for the 5th appellant jointly with ground 8 for the 6th appellant.

On grounds 1, 2, 4 and 5 for the 5th appellant and grounds 1, 2, 3, and 4 for the 6th appellant, counsel faulted the learned trial Judge for failing to properly evaluate the evidence adduced regarding the offence of conspiracy to commit a felony. He pointed out that the ingredients of the offence of conspiracy were as follows; i) that there has to be a meeting between the accused persons; ii) that an agreement has to be made in the said meeting; and iii) that the agreement must involve the commission of an offence. Counsel contended that as the only evidence relied on by the learned trial Judge to prove that there was a conspirators meeting attended by the appellants to plan the offences in question was found in their retracted or repudiated confession statements, that evidence was unsatisfactory and ought to have been corroborated by other independent evidence. Furthermore, it was counsel's submission in the alternative, that if court were to rely on the confession of a co-accused, that court had to adequately warn itself about so doing, because, in counsel's view, the requirements of a fair trial as enshrined in **Article 28 of the 1995 Constitution** would be defeated if statements of the co-accused which are not tested for authenticity and truthfulness in cross examination were to be relied on.

Further, counsel faulted the learned trial Judge for failing to satisfy himself that the 5th appellant had been correctly identified at the scene of the conspirators' meeting in issue. He cited the evidence in A2, Magombe Joshua's confession statement, wherein all the alleged conspirators at the meeting in issue were mentioned and pointed out that the 5th appellant's name was not listed. Counsel also referred to the confession statement of A1, Sserunkuma Edrisa, wherein he mentioned that a one Daniel Segujja had attended the conspirators' meeting. He contended that that could not have been a reference to the 5th appellant who was known only as Danny Segujja. In further support of the preceding point, counsel pointed out that A6 at trial

was acquitted on ground of mistaken identity, because he was referred to in one of the confession statements as Oketcho Jackson and yet his name was Oketcho Jacktchar. He then contended that the 5th appellant should have been given the same benefit of doubt.

In relation to the 6th appellant, counsel faulted the learned trial Judge for relying on her confession statement to convict her of the offence of conspiracy to commit the felony of theft. He gave the following reasons for his preceding submissions. First, that the 6th appellant had retracted and repudiated the said confession statement; second, that, even if the learned trial Judge rightly admitted the confession, there was no independent evidence to support the averments in the confession. Counsel then invited this court to find that there was no direct eye witness of the 6th appellant's participation in the conspirators' meeting in issue.

On ground 6, counsel for the 5th appellant submitted that the purported key logger used for unauthorized access to the MTN computers was never found with any of the appellants or at all. He contended that possession was a key element of the offence of unauthorized access, and that possession for that purpose meant physical possession of the device used for the alleged unauthorized access. Counsel further submitted that the computer which had been the subject of the unauthorized access was not admitted in evidence and none of the prosecution witnesses gave evidence about the specifics of the said key logger. He concluded that the 5th appellant should never have been convicted because the key logger was fictitious.

On ground 5, for the 6th appellant, counsel submitted that the learned trial Judge had wrongly convicted the 6th appellant for the offence of unauthorized access when she had not been identified by any of the prosecution witnesses. He pointed out that the prosecution's attempt to place the accused at the scene of crime had failed because PW3, Bernard Bryner Oweyi, and PW20, Mugisha Collins had only testified that they saw a lady wearing a cap having unlawful access to the computer in question. He argued that, the foregoing witnesses' testimonies did not sufficiently identify the 6th appellant. Counsel also invited this Court to find that the 6th appellant's clothes which had been exhibited at the trial, would not be used

to validate the identification made by the prosecution witnesses in the CCTV footage as the said footage was never produced in Court.

On the grounds relating to the count on electronic fraud by the 5th and 6th appellants, counsel faulted the learned trial Judge for failing to properly evaluate the evidence on the point. In relation to the 5th appellant, it was counsel's submission that neither PW3, PW20 nor PW39, who all claimed to have watched a CCTV footage of the fraud in question, mentioned seeing the 5th appellant in the said footage. In further support of his submissions, counsel contended that the prosecution had failed to adduce evidence regarding the source of the money on the MTN dispute account (which was purportedly stolen) or that there was money on the account in the first place.

The overriding contention by counsel was that there was no evidence to show that the money given by the 5th and 6th appellants to the several prosecution witnesses, as alleged was stolen from MTN. He singled out the testimony of PW26 Olweny Abdul Nasur for criticism, and argued that it was riddled with the following contradictions. First that the witness had claimed that he was given tokens by the 5th appellants to transfer to cash but did not substantiate on the said tokens; secondly, that although the witness claimed to have been called by the 5th appellant, he could not remember the number he had used to call him; thirdly, that although the witness claimed that the 5th appellant had given him a bank account number to deposit money, he did not give details of the said account; fourthly that although the witness had testified that he could not speak English, he claimed to have communicated to the 5th appellant in English. Counsel submitted that PW26 was an untruthful witness whose testimony should never have been relied on by the learned trial Judge and prayed that this Court be pleased to acquit the 5th appellant of all charges.

Regarding the conviction of the 6th appellant for electronic fraud, counsel reiterated the above submissions in respect to the 5th appellant and added that it was erroneous for the learned trial Judge to find that the money which the 6th appellant gave to PW12 and PW13 was related to any fraud occasioned on MTN, as there was no evidence to prove this; that the learned trial Judge should not have relied on Ex. P.40 and EX. P.E 41, the messages allegedly sent by the 6th appellant because the exhibits were of questionable

reliability; that there was no proof that the 6th appellant possessed any of the lines which were apparently used to effectuate the electronic fraud in question; and that therefore her conviction for the said offence should be quashed.

On ground 7 for the 6th appellant, counsel submitted that there was no proof that the dispute account in question had the money which was alleged to have been stolen. In support of the preceding submission, counsel pointed out that the evidence of PW2, PW31 and PW20 was that there was only Ug. Shs 3,800,000/= on the account in question, and contended that there was no evidence that that money was appropriated by the 6th appellant or at all. Counsel invited this Court to quash the conviction of the 6th appellant for the theft in question.

Counsel submitted that all the electronic evidence which was relied on in the trial Court was so relied on in breach of the Computer Misuse Act, 2011 and the Electronic Transactions Act, 2011. He, however did not substantiate any further.

On ground 3 for the 5th appellant, it was counsel's submission that the learned trial Judge overlooked the 5th appellant's submission that on the day the alleged offence was committed, he was at case clinic for medical treatment. He contended that he had done so, he would have acquitted the 5th appellant of all charges.

On ground 7 for the 5th appellant and ground 8 for the 6th appellant, counsel submitted that the sentences imposed on the appellants were harsh and excessive in the circumstances of the case. He did not substantiate any further.

Respondent's case.

Mr. Erizooba Maxim, counsel for the respondent supported the findings of the learned trial Judge and the relevant conviction and sentence of the appellants. He then substantiated that on count two relating to theft, the prosecution had proved that money belonging to MTN had been fraudulently withdrawn from its accounts and deposited on 6 agent lines and 138 subscriber lines with an intention to deprive MTN of that money permanently.

He further referred to the testimonies of PW2, PW20 and PW32 which had thoroughly explained how money was removed from the MTN dispute accounts and deposited on several agent and subscriber lines and added that this ingredient of the offence of theft had been sufficiently proven. On the participation of the accused in the theft in question, it was counsel's submission that the same had been proven using both circumstantial evidence and through reliance on the accused's confession statements. He then analyzed the relevant evidence as follows:

The 1st appellant had, in his charge and caution statement (P.EX23) confessed to having committed the offence in question by participating in the relevant planning meetings. The foregoing confession statement had also revealed that the 1st appellant had provided the 4th appellant with a device to insert in the MTN computers. In further support of the preceding submissions, counsel contended that the 1st appellant's confession statement had been properly admitted by the learned trial Judge after conducting a trial within a trial which established that it was voluntary. He also pointed out that 1st appellant's confession statement had been corroborated by the evidence of PW4 who saw the 1st appellant giving a device to the 4th appellant to insert into the MTN computers. Counsel further contended that the prosecution had adduced evidence to show that the 1st appellant participated in the procuration of the device that was subsequently proved to have facilitated the theft in question which pointed to the appellant's participation. Further still, that there was more incriminating evidence against the 1st appellant as PW20 had testified that he recovered money, to the tune of USD 11,500/= from the 1st appellant's sister.

As for the 2nd appellant, counsel submitted that he had confessed to the offence in question in his charge and caution statement (P. Ex. 28) which was properly admitted in evidence following a trial within a trial to prove its voluntariness. He pointed out that the 2nd appellant's confession statement had been corroborated by the charge and caution statements of the other accused persons. Further, that there was evidence of the 2nd appellant's participation in the theft in question because PW19 Ainembabazi Shavin, testified that she had received Ug. Shs. 29,000,000/= from him and that the prosecution had adduced more incriminating evidence to show that the 2nd

appellant had led the police to recovery of Ug. Shs. 19,000,000/= which was part of the money stolen from MTN. In counsel's view the recovery of the aforementioned money lent credence to the finding that the 2nd appellant participated in the alleged theft.

Regarding the 6th appellant, counsel submitted that the prosecution had proved beyond reasonable doubt that she had participated in the offence in question. He referred to the testimony of PW9 Omony Robert, her friend, who testified that she had informed him of a plan to steal passwords of MTN staff in order to steal mobile money. In addition, counsel pointed out that the 6th appellant was recorded in the CCTV footage of the MTN towers on the fateful day and that the clothes she had been observed to wear in the said footage had been exhibited in the trial Court. Further, counsel contended that the foregoing evidence corroborated the confession statement of the 6th appellant where she admitted to committing the offence in question.

Counsel supported the learned trial Judge's findings on count three and further substantiated as follows:

As the indictment in count three related to conspiracy to commit a felony, counsel pointed out that under **section 390 of the Penal Code Act, Cap. 120**, the said offence is committed when two or more persons agree to do or cause to be done an illegal act or a legal act by illegal means and the offence is complete the moment such an agreement is made even though the illegal act itself has not been done. He then contended that the offence of conspiracy has three ingredients as follows: 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 or may constitute the means or one of the means by which the aim is to be accomplished. He then referred to the charge and caution statements of the 1st, 3rd and 6th appellants, where they stated that the appellants regularly met at Centenary Park to plan the offences of theft and electronic fraud on MTN. Further, counsel submitted that the subsequent acts of the 1st appellant in providing the device used to effect the theft, and in the 2nd and 3rd appellants impressing it upon the 6th appellant to assist them in their illegal endeavours indicated that the appellants had a common design to

carry out fraud on the MTN Mobile money system. He then reiterated his support for the learned trial Judge's findings on the point and invited this Court to uphold them.

As for the 5th appellant's participation in the offence of conspiracy to commit a felony as indicted in count 2, counsel submitted that the 1st, 2nd, 3rd, 4th and 6th appellants' confession statements had mentioned his name. In further support of the preceding submissions, he pointed out that although the 5th appellant was referred to as Daniel Segujja in those statements, and not Danny Segujja, as he purports to be officially known, there was evidence by PW20 that he was known by both names. Counsel then invited this Court to reject the claims by counsel for the 5th respondent that there was mistaken identity of the 5th appellant for the above reasons.

As for the 6th appellant, counsel submitted that her confession statement had proved that she attended the meetings at Centenary Park where the conspiracy to commit theft and electronic fraud against MTN was hatched. He invited this Court to uphold her conviction for the offence.

On count 4 of the indictment which was unauthorized access, counsel supported the conviction of the 6th appellant by the learned trial Judge, and submitted that the 6th appellant had confessed to having gained unauthorized access to an MTN Computer in the MTN recreation room. He further pointed out that the CCTV footage which was viewed in the Court room showed the 6th appellant in the MTN recreation room on the fateful day and the clothes she appeared to wear in the said footage were exhibited in Court. In counsel's view, the foregoing evidence showed that she had unauthorized access to the MN computer and was rightly convicted. Counsel, also disagreed with the counsel for the 6th appellant's submission that the CCTV footage in question was wrongly admitted in evidence as it was extracted in contravention of **sections 28 and 29** of the **Computer Misuse Act, 2011**, submitting that there was no reasonable expectation of privacy that necessitated a court order in this matter as the computer belonged to the complainant. He prayed to this Court to maintain the conviction of the 6th appellant on this count.

Regarding count 5 of the indictment, which was unauthorized access, counsel submitted that PW4, had testified that he saw the first appellant hand over a "flash-like device" to the 4th appellant and told him to insert it into the MTN computers. He relied on the **United States v. Morris, 928 F.2D 504 (2nd Cir.1991),** which was a case involving an invasive procedure that prefigured modern port scanning. The second circuit court, in that case held that transmission of an internet worm designed to demonstrate the inadequacies of current security measures on computer networks was sufficient to permit a jury to find unauthorized access. Counsel further submitted that although PW4 was an accomplice, his testimony was subjected to intense cross examination but remained largely unshaken and that the evidence of PW4, taken together with the 1st, 2nd, 3rd, 4th and 6th appellants' confession statements had proved the ingredients of the offence in question beyond reasonable doubt.

As for count 6 of the indictment, which was electronic fraud **c/s 19 (2) of the Computer Misuse Act, 2011**, counsel referred to the evidence of PW2, that there were 7 irregular transactions which were generated in this case. PW2 had substantiated that the transactions were irregular because they involved huge sums of money (Ug. Shs. 450,000,000/=) which would not ordinarily be sent to non-institutional agents; and that the amounts were in respect of money which had been created on MTN's mobile money system without a corresponding bank deposit. Counsel further pointed out that PW2's testimony was corroborated by the testimony of PW20, PW31 and PW32, which was unchallenged in cross examination.

In further support of his submissions on count 6, counsel submitted that the 1st appellant had confirmed in his charge and caution statement (P.EXH23), that he got a device that looked like a flash which could copy information off a computer and that he met with other accomplices including the 2nd, 3rd and 5th appellants to decide who could place the device in the MTN computers. As for the 6th appellant's participation, counsel referred to his submissions under the count of theft. He invited this Court to uphold the conviction of the appellants on this count.

Regarding the grounds relating to the respective appellant's confession statements, counsel referred to **sections 23 and 27 of the Evidence Act,**

Cap.6, which was to the effect that a confession by an accused person, once recorded by a police officer of the rank of or above the rank of assistant Inspector, while the accused person was in police custody may be relied on against that person in court. Further, that **section 27** of the same Act was to the effect that a confession made by an accused person may be relied on against his co-accused.

Counsel supported the findings of the learned trial Judge that the appellant's confession statements had been made voluntarily and in respect of the various appellants substantiated as follows:

In relation to the 1st appellant, counsel pointed out that a trial within a trial had been held and the learned trial Judge had found his confession to be voluntary. He disagreed with the contention by the counsel for the 1st appellant that the 1st appellant had been detained in an ungazetted detention centre called "white house", submitting that counsel's claims were conjectural and spurious. In further support of the foregoing submissions, counsel contended that there was no proof that the 1st appellant was tortured and that the trial Judge had rightly disregarded the 1st appellant's wild allegations in that regard. Further still, counsel submitted that the 1st appellant's confession statement was true as it was detailed and disclosed details that were proven in evidence. He referred to the revelation by the 1st appellant that he exchanged the ill gotten money from the offence in question into US Dollars' worth USD 11,500 and submitted that as the exact amount of money was recovered from the 1st appellant's sister, the confession statement was probably true.

In relation to the 2nd appellant, counsel submitted that this appellant had also revealed details in his statements which were also proven to be true, which in his view supported the finding by the learned trial Judge in the trial within a trial that his confession statement had been made voluntarily.

As for the 3rd appellant's confession statement, counsel supported the finding of the learned trial Judge that it was voluntarily made, arguing that this appellant's assertions that he had been tortured subsequent to recording his confession had not been backed up by any proof. He supported the learned trial Judge's finding that the torture had not been proved by this appellant.

As for the 4th appellant's confession statement, counsel supported the findings of the trial Judge that it was voluntary, and submitted that it must have been true because it was similar to the 1st appellant's confession statement.

Regarding the 6th appellant's confession statement, counsel supported the finding of the learned trial Judge that it was true and submitted that the contents of her statement were similar to those of the 1st, 2nd, 3rd and 4th appellants' confession statements.

All in all, counsel supported the admission of the various confession statements into evidence by the learned trial Judge for the above reasons and prayed to this Court to reach the same finding.

Further, counsel disagreed with the appellant's counsel's submissions that the retracted and repudiated charged and caution statements of the various appellants could not corroborate each other, submitting that the submission was premised on an erroneous interpretation of the law. In support of the foregoing submissions, counsel relied on **section 27** of the **Evidence Act, Cap.6** for the proposition that such statements could be so relied on without corroboration.

On ground 3 for the 5th appellant, counsel submitted that the offences with which the 5th appellant was charged did not require his actual presence at the scene of crime. He reiterated his earlier submissions and maintained that the defence in question would not arise and invited this Court to disregard the alibi raised by the 5th appellant as well.

On the grounds relating to sentencing, counsel conceded that the sentence of 7 years imprisonment which was imposed was the maximum sentence under **section 390** of the **Penal Code Act, Cap. 120**, and therefore the learned trial Judge erred to impose it after purportedly deducting the remand period of 2 years from it.

However, he supported the other offences imposed on the respective appellants pertaining the various counts of the indictment arguing that they were neither harsh nor excessive.

Rejoinder by counsel for the 5th and 6th appellants.

Counsel re-iterated his earlier submissions and added that if there was any money on the MTN dispute account, such money was fictitious and incapable of being stolen. In support of the foregoing submissions, counsel contended that as no account statement was adduced to prove that there was any money on the dispute account, the only conclusion should have been that the money never existed at all.

Resolution of Court.

We have carefully considered the submissions of counsel on either side, studied the Court record and the law and authorities cited to us and those not cited. We are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with our own inferences bearing in mind that this Court did not have the same opportunity as the trial Court had, to hear and see the witnesses testify and observe their demeanour. **See Rule 30 (1) of the Rules of this Court and Kifamunte Henry vs. Uganda Supreme Court Criminal Appeal No. 10 of 1997.**

Although the grounds in the respective appellants' memoranda of appeal are differently worded, it is our considered opinion that they relate to the following three issues:

1) **Whether the 1st, 2nd, 3rd, 4th and 6th appellants' confession statements were properly admitted in evidence by the learned trial Judge.**

2) **Whether there was sufficient evidence adduced by the prosecution in the trial Court to justify the appellants' respective convictions.**

3) **If issue 2 is answered in the affirmative, whether the sentences imposed on the appellants were illegal and/or harsh and excessive in the circumstances.**

We shall proceed to resolve each issue in turn as below;

Issue 1: Whether the 1st, 2nd, 3rd, 4th and 6th appellants' confession statements were properly admitted in evidence by the learned trial Judge.

In resolving this issue, we observe that the learned trial Judge was alive to the law requiring the court to conduct a trial within a trial whenever an accused person retracts and/or repudiates his/her confession on grounds that it was unlawfully recorded. He had this to say concerning the recording of the confession statements in this appeal at page 102 of the supplementary record of appeal (volume 1):

> **"Before I take leave of this case I must comment on a matter the defence related to at the trial. It was a fact that the extra judicial statements had been recorded from suspects who had been in police detention beyond 48 hours without being produced in court. The defence contended that such statements were ipso facto illegal and inadmissible in evidence. I agree the law requires a person held as a suspect like the accused were ought to be produced in court within 48 hours or released. However I do not agree that a statement made by a suspect who has been in detention for over 48 hours is rendered inadmissible by reason of the extended period. The law provided circumstances where a statement will not be admissible and extended detention on its own is not one of them."**

It was the case for the appellants that the confession statements in issue were recorded during a period of illegal detention and should never have been relied on. On the subject, we note that there is no express provision under the **1995 Constitution** or any other law which explicitly provides that statements recorded from suspects in police custody beyond 48 hours are inadmissible. However the following provisions of the 1995 Constitution offer some guidance on the point:

Article 2 of the **1995 Constitution** is relevant and is reproduced below:

> **"2. Supremacy of the Constitution**
>
> 1. **This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.**
>
> 2. **If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall**

prevail, and that other law or custom shall, to the extent of the inconsistency, be void."

Further **Article 23 (4) (b)** of the **1995 Constitution** is to the effect that any person who is arrested or detained upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest. The 1995 Constitution is emphatic that no person shall be detained for more than 48 hours by police on suspicion of committing an offence. It therefore follows that any person detained contrary to **Article 23 (4) (b)** of the **1995 Constitution** shall be deemed to be in illegal detention.

In **Mumbere vs Uganda Supreme Court Criminal Appeal No. 15 of 2014**, the Court stated that:

> **"While a breach of the 48 hours rule should be deprecated, we wish to reiterate our decision in CPL Wasswa and another Vs. Uganda (supra) that a delay in recording a charge and caution statement will not result in the nullification of the statement unless the court finds that the delay was designed to force the appellant to make an involuntary statement."**

In **Andrew Walusimbi & 3 others vs. Uganda, Supreme Court Criminal Appeal No. 28 of 1992,** the court observed that:

> **"The Appellant Walusimbi appealed on grounds that his confession ought not to have been accepted. We agree because he had been in unlawfuly military custody for a very long time."**

In **Ssebushumba Augustine and 2 others vs. Uganda, Court of Appeal Criminal Appeal No. 358 of 2014,** the 2nd appellant had been in custody for 11 days before his confession statement was recorded. The learned trial Judge had found that the confession was true and voluntary and had admitted it into evidence. On appeal, the Court of Appeal observed:

> **"In the appeal before us, the 2nd appellant was arrested on 24th April 2009. However, the charge and caution statement was not recorded until 4th May 2009. This was a delay of eleven days for which no explanation is given. This violated Article 23 (4) (b) of the Consitution. We cannot exclude the possibility that the delay was intended to yield**

confession statements from them. The state cannot be allowed to benefit from the unlawful actions of its officers. It is contrary to the tenets for a right to a fair hearing which is available to all under Article 28 (1)."

The position of the law as derived from the above authorities is that recording a confession statement from a person detained in breach of the 48 hour rule will not result in the nullification of the statement unless the court finds that the delay was designed to force the appellant to make an involuntary statement: **see Mumbere (supra)**.

In the instant case, several of the appellants' charge and caution statements had been extracted while they were in illegal detention as will be shown below:

Regarding the 1st appellant's charge and caution statement where he confessed to participating in the commission of the offences in question. TTDW2, Otim Egideo, the Investigating officer had testified during the relevant trial within a trial, at page 621 of the supplementary record (volume 2), that the 1st appellant was arrested on 29th January, 2013. TTPW1, DSP Charles Mutungi, the police officer who recorded the 1st appellant's confession statement testified at page 595, that the 1st appellant was brought before him on 2nd February, 2013 at Special Investigations Unit whereupon he recorded his charge and caution statement containing a confession. The 1st appellant, had, therefore been in detention for 96 hours, which is beyond the prescribed detention period for suspected criminals. We therefore find that the charge and caution statement recorded from the 1st appellant in the circumstances was so recorded while he was in illegal detention.

Regarding the 2nd appellant's charge and caution statement where he confessed to participating in the commission of the offences in question. TTPW2, Detective Assistant Inspector, Egideo Otim, in the relevant trial within a trial, had testified at page 843 of the supplementary record (volume 2) that the 2nd appellant was arrested on 29th January, 2013 and his confession statement was recorded on 2nd February, 2013. We find, that, he too, just like the 1st appellant was in illegal detention when his confession

statement was recorded having been in police custody for more than 48 hours.

Regarding the 3rd appellant's confession statement, TTPW1, Detective Assistant Inspector of Police, Godi Heavenfalls, had testified during the relevant trial within a trial, at page 883 of the supplementary record (volume 2), that he recorded the relevant confession statement on 3rd February, 2013. TTPW2, Detective Assistant Inspector of Police, Egideo Otim testified in the same trial within a trial at page 894, that the 3rd appellant was arrested on 31st January, 2013. We find that the 3rd appellant had been in illegal detention for more than 48 hours by the time his confession statement was recorded.

Regarding the relevant confession statement by the 4th appellant, TTPW2, Otim Egideo, had testified during the relevant trial within a trial, at page 771 of the supplementary record (volume 2) that the 4th appellant was arrested on 1st February, 2013. It was also the testimony of TTPW1, Detective Assistant Superintendent of Police, Watum Benson, during the same trial that he had recorded the 4th appellant's confession statement on 2nd February, 2013. Accordingly, the said confession statement was recorded when the 4th appellant was not in illegal detention and was admissible and could be relied on.

Regarding the 6th appellant's confession statement, TTPW1, Owao Denis, during the relevant trial within a trial testified at page 660 of the supplementary record (volume 2), that he recorded her confession statement on 26th February, 2013. It was also the evidence of TTPW2, Egideo Otim, during the same trial within a trial that the 6th appellant was arrested earlier on the same day, 26th February, 2013. We, therefore, find that the 6th appellant's statement was recorded when she was in legal detention and was properly admitted into evidence and relied on by the learned trial Judge.

In light of the above analysis, we find that the 1st, 2nd and 3rd appellants' charge and caution statements, which contained their respective confessions to the offences as indicted, were obtained while they were in illegal detention. We observe that the period which the 1st, 2nd and 3rd appellants

were in illegal detention was 48 hours, 24 hours and 24 hours respectively a relatively short period of offending detention. Considering the amount of detail and the similarity of the three confession statements, we shall refrain from nullifying them.

Moreover, the 4th and 6th appellants' charge and caution statements obtained while they were in lawful detention have similar contents to the 1st, 2nd and 3rd appellants' statements and support them. It therefore follows that, subject to any other unsatisfactory features which rendered the reliance on the 1st, 2nd, 3rd, 4th and 6th appellants' confession statements unsafe, the same could be, and were rightly relied on by the learned trial Judge, without much ado.

We shall now revert to the challenges levied against the 4th and 6th appellants' confession statements in the present appeal. It was the case for the 4th and 6th appellants that they had been tortured and/or threatened prior to recording their statements, while it was the respondent's case that the learned trial Judge had properly found that the 4th and 6th appellants had not adduced evidence to prove that their confession statements were involuntary. In order to determine whether the relevant charge and caution statements were voluntary, we shall be guided by the following principles as enunciated in various decided cases:

In a trial within a trial, as in any criminal trial, the onus of proof is on the prosecution to prove that the confession was made voluntarily. The burden is not on the accused to prove that it was caused by any of the factors set out in S. 24 of the Evidence Act. **See: Sekitoleko Yuda & 2 others vs. Uganda Supreme Court Criminal Appeal No. 33 of 2014.**

It is irregular for the same police officer to record alleged confession statements from two suspects charged with the same offence arising from the same incident. The temptation on the part of the policeman to use contents of statement to record a subsequent statement cannot be ruled out. **See: Sewankambo Francis & 2 others vs. Uganda, Supreme Court Criminal Appeal No. 33 of 2001.**

Where there are allegations that the alleged confessions were extracted by torture, it is incumbent upon the prosecution to adduce evidence of medical

examination of the accused persons to prove that they were not tortured. Where there is no evidence of a medical examination and the prosecution gives no explanation, such confession statements should not be admitted in evidence. **See: Sewankambo Francis & 2 others (supra).**

We shall apply the above principles to the present case. We observe that the 6th appellant testified in her examination in chief that her confession statement was not voluntary, as she recorded it after certain threats and promises were made to her. In cross examination during the relevant trial within a trial, at page 680 of the supplementary record (volume 2), the 6th appellant (TTDW1) testified as follows:

> **"STATE: Confirm to this Court that in the boardroom at this point no one had made any promise to you.**
>
> **TTDW1: They had made a promise to me.**
>
> **STATE: Who made the promise?**
>
> **TTDW1: Michael Collins Mugisha promised me that if I accept that I was the one in the video they would not sack my sisters.**
>
> **STATE: So was it Michael Collins or Judith?**
>
> **TTDW1: Judith made a promise, Michael Collins also made a promise.**
>
> **STATE: Confirm that none of the police officers promised you anything.**
>
> **TTDW1: They did Mr Otim promised me that I would go home if I signed the Document.**
>
> **STATE: Have you just remembered that?**
>
> **TTDW1: Yes."**

On his part, the investigating officer, Detective Inspector Otim Egideo, who testified as TTPW2, in the 6th appellant's trial within a trial testified at page 668 of the supplementary record (volume 2) as follows:

> **"STATE: Do u know Irene Kauma?**
>
> **TTW2: Yes I know her.**
>
> **STATE: Had you known her before this case came up?**
>
> **TTW2: No.**

STATE: When did you come to know her?

TTW2: I came to know about Irene on 26th February at about 18:00 hrs.

STATE: How did you get to know her?

TTW2: After watching the CCTV footage at Plot 77 MTN Offices.

STATE: When did you come face to face with Irene?

TTW2: It was on the 26th January, 2013.

STATE: When did you first see her?

TTW2: ON 26th January 2013 at about 5:am (sic). Together with Detective Woman Constable Iguru and others went to their home in Ntinda where we arrested her. We took her to our Unit Special Investigations Unit Kireka where we detained her. At around 10:00 am Detective Woman Corporal Kainza booked out with her back to her place of residence for a search. After the search I insisted that we proceed with her to MTN office Plot 77 Yusuf Lule Road so that we watch the footage in her presence. While at Plot 77 MTN offices they played to us the footage in the presence of Irene, Detective Woman Inspector Apio Grace, Detective Corporal Kainza Beatrice, Mugisha Collins of MTN, the sister of Irene called Ichuma.

STATE: What was the outcome of the viewing of this footage?

TTW2: In the course of viewing the footage the sister immediately shouted that that is my very sister Irene. Irene requested that some of us we get out she remains in the room with woman Inspector Apio, Woman Corporal Kainza. At the end of the session she broke down and started confessing I was present..."

STATE: What happened next?

TTW2: After that we went back to Special Investigations Unit around midday. At SIU I immediately left her with Kainza in the office and I proceded to Detective Inspector Owao's office. I requested him that I had a suspect and I wanted him to assist me obtain a charge and caution statement from her. Owao asked me that what are the charges and I told him that it is a theft case of mobile money worth shs 3 billion from MTN office Plot 77 Yusuf Lule Road on 25th January, 2013. He accepted and I went back to our office and told Detective Corporal Kainza to take the suspect to Detective Inspector Owao for the Charge and Caution statement. I left Owao with first had (sic) information."

On his part, Detective Inspector Owao, the Police officer who recorded the 6th appellant's statement testified that he recorded the said confession statement from the appellant and did not make any inducement or threat. In his ruling at the end of the trial within a trial, the learned trial Judge stated at page 691 as follows:

> **"I have heard the submissions of counsel for the state and considered the evidence as a whole given in the trial within a trial. I find no evidence is available to support the defence claim that in the course of recording the extra judicial statement there was any promise or any inducement at play. Clearly 26th January A5's statement was recorded by Owao. The defence has not brought this out in order to contradict the prosecution evidence. The prosecution evidence shows that the provisions of section 24 of the Evidence Act were complied with. Consequently I find the extra judicial statement admissible in evidence."**

We note that the learned trial Judge misdirected himself when he stated that the defence had not proved that there were threats or inducements made to the 6th appellant thereby effectively shifting the burden of proving the involuntariness of her statement to the defence. We wish to reiterate that the burden of proving the voluntariness of a retracted or repudiated confession statements in a trial within a trial rests on the prosecution and never shifts to the defence to prove involuntariness of such statements. Be that as it may, we find that that misdirection did not occasion a miscarriage of justice. We so find because on the weight of the evidence on record the learned trial Judge was right to reach the conclusion he did in light of the evidence of Detective Inspector Owao Denis and Detective Inspector Egidio Otim, who had testified that the 6th appellant's statement had been voluntarily recorded. For the above reasons, we find that the 6th appellant's confession statement was rightly admitted in evidence and the learned trial Judge was justified to rely on it.

Regarding the confession statement recorded from the 4th appellant, it was this appellant's case that the same was irregular as the police officer who recorded the confession had participated in the investigation of the case against him. Counsel for the respondent disagreed, arguing that it was not fatal for the investigating officer to record the impugned statement in the circumstances because he was not the lead investigating officer. The learned

trial Judge handled the preceding issue in his ruling at page 796 of the supplementary record (volume 2) as follows:

> **"...what is of further interest is the contention by the defence that if it be true (sic) Benson Wathum recorded the extra judicial statement such statement should not be admissible given that Wathum had earlier participated in investigating the case when he searched the house of A5. It was admitted on behalf of the prosecution that he indeed TTPW1 participated in the search however I note that that is the only instance of investigation he is aid (sic) to have taken part in and that it in no way related to A7 himself. Respectfully there is no evidence of a search having any bearing on the charge and caution statement in due process. Consequently the facts recorded in the charge and caution statement on the evidence available cannot be said to have been premised on the outcome of the search of the premises of A5 which TTPW1 participated in..."**

In **Mateo Ochieng vs. Uganda, Supreme Court Criminal Appeal No. 25 of 2000** the Court observed that:

> **"There are a number of cases in which it has been held that it is improper for an investigating officer to record a charge and caution statement. In Njuguna and others vs Regina 1954 EACA 316, the Court of Appeal for Eastern Africa referred to the need to take every reasonable safeguard to ensure the voluntary character of a statement such as the interposition of a disinterested person who has not taken part in the investigations and whose knowledge of the case is properly limited to what the prisoner tells him. The Court concluded,**
>
> **"This Court has said more than once that it is advisable, if not improper, for the police officer who was conducting the investigation of a case to charge a suspect and record his cautioned statement."**

In the present appeal, the police officer who recorded the 4th appellant's confession statement also participated in the search of the 6th appellant's premises. He testified that this was his only role in the matter. Therefore, while it was irregular for the same officer to record the 4th appellant's statement, we are satisfied that the said confession statement was true in light of the amount of detail therein and the limited role played by PW25, Detective Assistant Superintendant of Police Benson Watum in the investigation.

Issue 2: Whether there was sufficient evidence adduced by the prosecution in the trial Court to justify the appellants' respective convictions.

In disposing of this issue, we shall proceed to evaluate the evidence adduced in respect of each offence bearing in mind the relevant ingredients of the respective offences. We shall also consider the respective defences raised by the 6 appellants in question. The first conviction was on count 2 of the indictment which was theft contrary to sections **254 (1) and 261 of the Penal Code Act, Cap.120** and concerned the 1st, 2nd, 3rd and 6th appellants. We observe that the learned trial Judge properly addressed his mind to the ingredients of the offence in question, which are derived from the **Penal Code Act, Cap. 120**, the relevant provisions of which are reproduced below:

> **"254. Definition of theft.**
>
> **(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, is said to steal that thing.**
>
> **(2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if he or she does so with any of the following intents—**
>
> **(a) an intent permanently to deprive the general or special owner of the thing of it;**
>
> **(b)..."**

Section **261 of the Penal Code Act, Cap. 120** is also relevant and provides that:

> **"261. General punishment for theft.**
>
> **Any person who steals anything capable of being stolen commits the felony called theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment not exceeding ten years."**

Before, an accused person is convicted of the offence of theft, the prosecution has to prove the following ingredients beyond reasonable doubt:

"1. **That there was taking or asportation of an item.**

2. **That the item that was taken should have been capable of being stolen.**

3. **That the taking or asportation should have been done fraudulently or with felonious intent. Or that there was an intention to permanently deprive the owner of the thing which was stolen. See: Uganda vs. Ndyabahika Collins Somani & Another. High Court Criminal Session Case No. 272 of 2013.**

4. **That the accused persons participated in the taking or asportation of the item."**

For the four ingredients above. **See: Gwolo James Alias Mugaga vs. Uganda. High Court Criminal Appeal No. 0015 of 2017**

Regarding the 1st ingredient, it was the prosecution case that electronic money, the equivalent of Ug. Shs. 3,500,000,000/= (Three and a half billion shillings) was taken by fraudsters from the MTN internal mobile money system and deposited on certain mobile money agents' numbers. The evidence on the point was brought out by PW2, Peter Ochen, Senior Manager Treasury MTN Uganda who testified at page 35 of the supplementary record (volume 2) that:

"STATE: I will take you to the events of 25th January, 2013, what happened on that day that has eventually brought you to court?

PW2: ON 25th January, 2013 12:30 pm to 1:30 pm I was scheduled to have a tele conference hall that is specifically meeting through telephone connection and while on teleconferencing at around 1:10 pm within MTN we have an hourly flash report and the report mainly contains manual transactions done in a day up to that particular hour. This report is shared between around 10 people and the reason for this is to check and ensure that the transactions going in are correct transactions. So the flash report that came in while I was still on the conference call around 7:10 pm I opened it while I was still on the conference call because some colleagues of mine were making there (sic) submissions so I had a chance to scroll through to check and while I was scrolling through I saw a list of transactions. My Lord if you will allow me I will display this transactions which I saw and I immediately(sic) when I saw them 1: they were irregular, 2: I had

STATE: Explain why did they appear irregular to you?

PW2: They were irregular to me because of the amount that were involved and as the person in charge of supervision of the mobile money finance section all the transactions of that magnitude must first come through authorization at my best (sic) but I did not see the documents coming through.

STATE: You are talking about the amount involved what was the amount Involved?

PW2: It was 450 million for each transaction and they were 7 transactions. My lord the second thing that made it suspicious to me was the description of the entries that were captured. All my team have specific description for the manual entries that are processed on a daily basis. And description like SFO was never one of them the third suspicion was to the agents that were involved were irregular in terms of the amount they requested. To the best of my knowledge the agents who have requested more than 200 millions (sic) in particular have always been super agents. These are agents who act as whole sale agents they buy flot (sic) in banks and then retail it out to smaller agents and these are very few agents most are banks. Immediately in terms of reaction after drawing my conclusion."

We also observe that according to PEX. 21, the money in question was taken from the MTN internal Dispute Account and deposited on the following MTN Mobile money agent accounts in 7 transactions; Ari Telecom and Phone Accessories Ltd (3 transactions of ug. Shs. 450,000,000/= each); Ari Telecom and Phone Accessories Ltd Commission (ug. Shs. 450,000,000/=); Tyra Enterprises Limited Rubaga (ug. Shs. 450,000,000/=); Wesley Investments Ltd Rhino Camp Arua (ug. Shs. 450,000,000/=) and Rukungiri District Employees Coop Sacco Rukungiri (ug. Shs. 450,000,000/=). In the result, we find that there was taking of money from the MTN internal dispute account, which money was deposited on the above agent lines. The said deposit was unauthorized and fraudulent, as per the testimony of PW2, above.

We wish to add that it is trite law that money is property that is capable of being stolen, and, in our judgment, this applies, as much, to electronic money, as it does to traditional money which we carry around in physical tender. We, therefore find that ingredients 1, 2 and 3 of theft were proven beyond reasonable doubt for the reasons given above.

The 4th ingredient relates to the participation of the concerned appellants in the theft. We observe that the 6th appellant's confession statement implicates the 1st, 2nd, 3rd appellants as well as herself. In her charge and caution (confession) statement, the 6th appellant revealed that she had met with Edirisa Matovu, Daniel Seguja, Pius Seguya, Ediga Matovu and Joshua Magombe at Centenary Park to plan the commission of the offence in question. She further stated that, prior to committing the offences in question, they had identified the MTN agent lines on which the stolen money would be deposited. We shall quote extensively from her charge and caution (confession) statement from page 267 of the supplementary record (volume 1) where she stated that:

> **"...I went with them in their car up to Garden City where they told me to get out of the car and meet a lame man at the entrance. Shortly later, a lame man came and got me at the entrance and took me to the MTN offices i.e he gave me access inside MTN offices because he had the Bio metric access. That was my first time meeting the man who was wearing a red and cream stripped shirt. Together with him we went to up to 3rd floor (sic) where he left. He told me to continue up to 4th floor where he would join me. Later he joined me on 4th floor where he used cords (sic) to open a door. He took me to a computer. I logged on to the computer using the passwords 1) alanyo 2) 208100 (not sure). When I logged on the mobile money system opened. I got the instruction paper they had given me and followed the instructions. First instruction was open journal, second was place where you intend to pick the money from, third was the final destination where the money was to be picked. Fourth was reason for moving the money which they had not put. They rang me ask (sic) what was the problem. I told them that the 4th reason was missing. Edrisa told me on phone that the 4th step was CFO. The fifth was authorization. So when I checked for the authorization money went to the six lines, each was supposed to receive 450,000,000/= but I made a mistake and sent 900,000,000/= on one of the lines so the line did not received (sic) the money instantly as others did. I do not know which line this was. So which means the money went to only five lines, meaning only 3,000,000,000/= was transferred from MTN Mobile money pool to the argent (sic) lines. Immediately after the lame man told me to follow him, we took a lift to the ground floor. We went out, he remained at MTN premises as I went to Garden City basement where got (sic) the Edrisas who complained to me that I made them get a loss. The (sic) did not promise me any commission but told me that we shall**

talk about it when we meet again at 0800 hrs at Centenary Park. They went to the field to withdraw the money. At 0800hrs I went to Centenary Park but only met Ediga Matovu and Pius Seguya who gave me 5,000,000/= @ say they did not wholly succeed in the deal as MTN blocked part of the money. They promised that we meet the following day i.e Saturday morning I go and execute another journal. At about 0400hrs on Saturday 26/01/2013 I was arrested from my home."

We note that the 6th appellant retracted her confession statement on grounds that the police officers had obtained it from her after making certain threats and premises to her. However, we have already made a finding earlier on in the judgment, in support of the trial Judge's finding that the 6th appellant's confession statement was voluntary and true. Therefore, the 6th appellant's confession statement could be relied on against the other appellants who were her co-accused at the trial.

Section 27 of the **Evidence Act, Cap. 6** is instructive on whether a co-accused's confession statement could be relied on against the co-accused and the other accused, that section is quoted below:

"27. Consideration of proved confession affecting person making it and others jointly under trial for same offence.

When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself or herself and some other of those persons is proved, the court may take into consideration such confession as against that other person as well as against the person who makes the confession."

In **Festo Androa Asenua & another vs Uganda, Supreme Court Criminal Appeal No. 001 of 1998,** the 1st appellant and the 2nd appellant were accused 1 (A1) and accused 2 (A2) during the trial. The 2nd appellant made a confession which implicated the 1st appellant. Counsel for the 1st appellant submitted during the appeal that the confession should not have been relied on against the 1st appellant. The Supreme Court observed that:

"As regards the first argument by learned counsel for the appellant, we would refer to the provisions of section 28 of the Evidence Act which reads-

"When more persons than one are being tried jointly for the offence, and a confession made by one of such persons affecting

himself and some other of such persons is proved, the Court may take into consideration such confession as against such person as well as against the person who makes the confession."

We think that by virtue of the provisions quoted above and as we consider that exh. P2 is a confession, the learned trial Judge and the Court of Appeal would have been justified in taking exh. P2 into account as evidence against the first appellant as well as against A2, the maker."

In the **Andrew Walusimbi case (supra)**, the court while analyzing the provisions of the Evidence Act, relating to confessions stated that:

"Bearing all these considerations in mind, we take the view that the Legislature aimed at setting forth a pragmatic view of this topic, and chose appropriate words, leaving it to the Judge's judicial discretion whether the statement was to be excluded or admitted in evidence. The essence of the section is not simply whether the statement is apparently true. Attention should be paid to the manner in which the statement was made; whether the circumstances made it likely that an untrue confession would be made, or whether the statement was voluntarily made and gave some grounds for believing it to be true. But even if admissible the usual safeguards should still be observed. The rules concerning corroboration and confessions of co-accused are still to be acted upon. There is moreover, the general rule, that a Judge may reject evidence if it has been unfairly obtained; KENYARITHI s/o MWANGI v. R (1956) 23 EACA 422."

In view of the above authority, a co-accused's confession statement may be relied upon as against the maker and his/her other co-accused in the joint trial. He further make a finding that the 6th appellant's confession statement was corroborated by the following prosecution evidence:

The testimony of PW3, Bernard Bryner Oweyi, a technician with KK Security which was responsible for securing the premises at MTN Towers, which revealed that the witness had retrieved CCTV video footage from the MTN Towers on the fateful day in which he saw two people, a gentleman and a lady walking into the 4th floor of MTN towers from where they could be seen accessing the computers therein.

The evidence of PW20, Michael Collins Mugisha, an Investigative officer with MTN who participated in the investigations of the offences in question who testified at page 379 of the supplementary record (volume 2), as follows:

> **"On the 25th January, 2013 at around 1 o'clock I was called by the general manager Business Risk Management at MTN Madam Judith Namugenyi she told me that there had been a fraud on that day of 25th January, 2013 and that shs 3,150,000,000/= had been moved from the MTN Dispute account to several mobile money agent lines and that the circumstances under which the mobile money had been moved was fraudulent, she asked me to read the email she had sent to me and follow her to plot 77 Yusuf Lule Road for a meeting with the other management team."**

After reaching the MTN office, PW20 narrates the following at page 380 of the supplementary record (volume 2):

> **"While in the board room Samuel Gitta, the information System Manager played the CCTV footage that is the Closed Circuit Television footage of the fourth floor, Plot 77 Yusuf Lule Road and this was the recreation room, the footage indicated 2 people and that was Jerome Jackchar and Irene Kawuma, they entered the room Irene following Jerome the two went and sat on the computers that were in that room, Irene to the left from where she was seating and went to a fourth computer that was in between and I could see on the footage she was talking on phone after opening the computer and looked to have been with a piece of paper on the table and the time of the CCTV footage she was putting on a multi coloured blouse with a dark kind of overcoat, she was also putting on a dark MTN cap with an MTN logo which could be seen clearly on the footage. The lower part she was putting on a dark pair of trousers."**

We observe that the 6th appellant was well known to PW20, as a former employee of MTN, where the witness had previously worked and the above evidence of PW20, was in essence, identification evidence. In **Abdulla Nabulere vs Uganda, Court of Appeal Criminal Appeal No. 9 of 1978**, the court observed that:

> **"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence disputes, the judge should warn himself and the assessors of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The reason for the**

special caution is that there is a possibility that a mistaken witness can be a convincing one and that even a number of such witnesses can all be mistaken. The judge should then examine closely the circumstances in which the identification came be made, particularly, the length of time the accused was under observation, the distance, the light, the familiarity of the witness with the accused. All these factors go to the quality of the identification evidence. If the quality is good, the danger of a mistaken identity is reduced but the poorer the quality, the greater the danger.

In our judgment, when the quality of identification is good, as for example, when the identification is made after a long period of observation or in satisfactory conditions by a person who knew the accused well before, a court can safely convict even though there is no 'other evidence to support to identification evidence; provided the court adequately warns itself of the special need for caution. If a more stringent rule were to be imposed by the courts, for example if corroboration were required in every case of identification, affronts to justice would frequently occur and the maintenance of law and order greatly hampered.

When, however, in the judgment of the trial court, the quality of identification is poor, as for example, when it depends solely on a fleeting glance or on a long observation wade in difficult conditions; if for instance the witness did not know the second accused before and saw him for the first time in the dark or badly lit room, the situation is very different. In such a case the court should look for 'other evidence' which goes to support the correctness of identification before convicting on that evidence alone. The 'other evidence' required may be corroboration in the legal sense; but it need not be so if the effect of the other evidence available is to make the trial court sure that there is no mistaken identification. A good example is the case of Wasajja v. Uganda (1975) EA 181. The coincidence of a person previously identified behaving strangely by putting up a fabricated alibi of his movements at the time the offence was committed or telling lies in some material aspect of his evidence can, in a proper case, amount to 'other evidence' sufficient to support a conviction."

We observe that PW20 was familiar with the 6th appellant and in the circumstances correctly identified her from the CCTV footage. The evidence of PW20 corroborated the evidence of PW3, who testified that he watched the video from the CCTV footage, and saw a gentleman and a lady at the 4th

floor of the MTN Towers operating computers at the time the fraudulent transfer of money from the MTN dispute account happened. And that that lady was the 6th appellant. The foregoing evidence, in turn, corroborates the information in the 6th appellant's charge and caution statement.

We further note that In **Mateo Ochieng case (supra),** it was observed that details in a statement are relevant to the question whether or not the statement was true. We, are of the view that the amount of detail in the 6th appellant's statement showed that her statement was true. Moreover, the statements of the 1st, 2nd, 3rd and 4th appellants, bear similar facts to the 6th appellant's as is shown below:

In his confession statement at pages 272 to 282 of the supplementary record (volume one), the 1st appellant said that he was part of a team which included Sseguja Daniel (5th appellant), Matovu Edgar (2nd appellant), Kawuma Irene (6th appellant), Joshua Magombe (3rd appellant) and one Seguya Pius which participated in a scheme to steal money from MTN Uganda. He revealed that he had procured the 4th appellant to plant a flash like device into the computers at the MTN Head Office to steal passwords which would facilitate the job. The 4th appellant planted the device on 24th January, 2013 and thereafter returned it to the 1st appellant who took it to a meeting with his team (all members of the team were there except Ssegujja Daniel) at Centenary Park.

He further said that Ssegujja Daniel later joined the team with several MTN Mobile money agent lines on which the stolen money had been transferred, the said lines were split among the team and the members thereafter split. The 1st appellant said that at around 10:00 a.m on 25th January, 2013 he received Uganda Shs. 450,000,000/= on his agent line which he distributed to several customer lines and later withdrawn from the customer lines.

As for the 2nd appellant, he stated in his confession statement at pages 289 to 292 that:

In January 2013, he was approached by Irene Kawuma (6th appellant) who told him that she would deposit money on certain MTN Mobile Agent lines which she would give to him. The 6th appellant was well known to him as a

work mate at MTN Uganda. She said that she would send on the said line between Shs. 300 Million to Shs. 400 Million.

The 2nd appellant then embarked on withdrawing the money and said that he had withdrawn up to Shs. 55,100,000/= by the time the line was suspended. He then looked for the 6th appellant and gave her Shs. 5,000,000/= and kept the balance at his home. On 30th January, 2013 he was arrested and taken to Kisugu Police Station in connection with theft of money from the MTN Mobile money system.

As for the 3rd appellant, he had the following to say in his confession statement:

In early January, 2013, he was approached by Daniel Sseguja (the 5th appellant), who was his former work mate at MTN in connection to carrying out the offences in question. He met the 5th appellant who took him to meet the 1st appellant and upon meeting him, the trio then hatched a plan to obtain MTN agent lines, registered personal numbers and login to the MTN Internal Network.

Subsequently at around 7.00 pm on 24th January, 2013, the 3rd appellant met at Centenary Park with others (who also included the 1st, 2nd, 6th appellants and one Pius) and made further preparations concerning the illegal mission. During the meeting it was agreed that they were to have agent lines on which the stolen money would be deposited, that the 6th appellant would transfer the money from the MTN system and that they would all contribute Shs. 6,000,000/= to the 6th appellant.

When the money had been transferred from the MTN system, he received the first batch of Shs. 450,000,000/=. Thereafter, he withdrew some of the money until the agent lines were blocked. He was subsequently arrested on 31st January 2013.

The 4th appellant, in his confession statement at pages 283 to 292, gave the following account:

He was approached by one Ssegendo with a proposition that the 4th appellant plants a flash like device in one of the computers at MTN Head Office. He got this device from Ssengendo on 23rd January, 2013 and received a Shs.

150,000/= down payment ahead of the task at hand. He was told to plant the device in a computer used by one Christine, a staff of MTN Uganda who sat on the 9th Floor which he did on the 24th of January, 2013. He further revealed that he retrieved the said device from the MTN Computers on the next day, the 25th of January, 2013 which he handed over to Ssengendo later the same day. Ssengendo was in the company of the 4th appellant at the time of the said handover.

The above notwithstanding, the 6 appellants said the following in their respective defences:

The 1st appellant, gave evidence on oath, denying any participation in the offences as indicted. He testified that on the 25th day of January, 2013, the date when the offences in question were committed, he had gone to his village in Butambala for a get together function, and returned on the following day, the 26th of January, 2013.

The 2nd appellant, also made a sworn statement where he denied participating in the offences in question. He said that on the 25th day of January, 2013, when the offences in question were committed, he had escorted his father to a function in Seeta where they stayed until midnight.

The 3rd appellant, also made a sworn statement, wherein he denied any participation in the commission of the offences in question. He said that he was at home from 23rd to 25th January, 2013 and cannot have committed the said offences.

The 4th appellant, testifying as DW5, in his sworn statement, denied participating in the offences in question. He admitted that he was a cleaner at the MTN Towers but insisted that the cleaners were never allowed to touch any of the property belonging to MTN.

On his part, the 5th appellant, said in his sworn statement that on the 25th day of January, 2013, the day on which the offences in question were committed he was sick. He further said that he went to Case Clinic for medical treatment where after he went back home and rested. He maintained that he could not have participated in the offences in question by virtue of being indisposed.

The 6th appellant (DW4) made a sworn statement, at page 1662 of the supplementary record (volume 1) denying the offences charged in the following terms:

> **"DW4: My lord I have never stolen any money from MTN Uganda between the 1st and 26th January 2013. My lord I did not know the co accused in court except for Joshua Magombe who is an old friend of mine. I have never accessed any MTN building between 1st and 26th January 2013. I don't have any access rights to any of the MTN buildings and I have never accessed any MTN computers. I had no computer rights between the 1st and 26th January because I had already left MTN November 2012. I have never been in any meeting at Centenary Park with the co accused I also have no training no knowledge and no expertise on the mobile money systems. I was just a data entrant at MTN public access. I don't know any logging device. I am not guilty of the charges."**

We have reappraised the prosecution evidence as well as the defence evidence. In our view, the information in the various confession statements was noticeably too similar to be a coincidence which leads us to the conclusion that the facts contained therein were true. The facts revealed in the respective confession statements point to the involvement of the 1st, 2nd, 3rd, 4th, 5th and 6th appellants in the offences in question. We are of the view that they participated under the doctrine of common intention. The law governing the doctrine of common intention is to be found in **Section 20 of the Penal Code Act, Cap. 120** which is quoted below:

> **"20. Joint offenders in prosecution of common purpose.**
> **When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of that purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of that purpose, each of them is deemed to have committed the offence."**

In **Ismail Kisegerwa and another versus Uganda, Court of Appeal Criminal Appeal No. 6 of 1978,** court observed as follows:

> **"In order to make the doctrine of common intention applicable it must be shown that the accused had shared with the actual perpetrator of the crime a common intention to pursue a specific unlawful purpose which**

led to the commission of the offence. If it can be shown that the accused persons shared with one another a common intention to pursue a specific unlawful purpose, and in the prosecution of that unlawful purpose an offence was committed, the doctrine of common intention would apply irrespective of whether the offence committed was murder or manslaughter. It is now settled that an unlawful common intention does not imply a pre—arranged plan — see P —vs— Okute [1941] 8 E.A.C.A. at p.80. Common intention may be inferred from the presence of the accused persons, their actions and the omission of any of them to dissociate himself from the assault. See R —vs— Tabulayenka (supra). It can develop in the course of events though it might not have been present from the start, See Wanjiro Wamiro —vs—R [1955] 22 E.A.C.A. 521 at p.52 quoted with approval in Mungai's case. It is immaterial whether the original common intention was lawful so long as an unlawful purpose develops in the course of events. It is also irrelevant whether the two participated in the commission of the offence."

The 1st, 2nd, 3rd, and 6th appellant's confession statements reveal that those appellants had a meeting at Centenary Park where they schemed to carry out the offence in question. This proves that the 1st, 2nd, 3rd, and 6th appellants formed a common intention to carry out the theft in question. Accordingly, we find that count 2, on theft was proven against the 1, 2, 3rd, and 6th appellants beyond reasonable doubt and their respective convictions on that count are upheld.

Regarding the 4th appellant's participation in the offence comprised in count 2, it was the prosecution case that the money in question was transferred with the aid of an electronic device, referred to as a flash by some prosecution witnesses, and a key logger by others which was planted by the 4th appellant. We also observe that PW4 Kiyingi Kharim, testified at page 154 of the supplementary record (volume 2) that he had accompanied the 4th appellant to a meeting with the 1st appellant, who had, at that meeting, handed him a flash disk with instructions to plant it in one of the MTN Computers. Therefore, it could be deduced from the prosecution evidence that the flash/ key logger was the crime weapon. However, we observe that device was never produced in evidence before the trial Court. Notwithstanding the foregoing observation, we note that the 4th appellant said in his relevant confession statement that he had received a flash disk

from the 1st appellant; planted it in PW31's computer and returned it to the 1st appellant after downloading some information on it. In our view, the 4th appellant's confession implicated him in the commission of the offence as charged in count 2 despite the flash in question not having been exhibited in the trial Court. We therefore uphold his conviction for theft.

Regarding count 3, the particulars of which were that Sserunkuma Edrisa (A1), Magombe Joseph Joshua (A2), Segujja Daniel (A3), Matovu Henry Edgar (A4), Irene Kauma (A5), Oketcho Jackchar Jerom (A6), Ayebale Peter (A7), Kulaba Joshua (A8), Nasejje Mary (A9) and others still at large between 1st and 25th January 2013 within the Kampala District, conspired to commit a felony of theft.

The learned trial Judge handled the offence in count 3 at page 98 of the supplementary record (volume 1) as follows:

> **"Consequently the confessions of A1, A2 and A5 provide sufficient evidence that A1, A2, A3, A4 and A5 attended the meeting where they conspired one together with others to commit the felony of theft. The gentleman assessors in their opinion advised me to find A6 and A7 guilty in addition to the five and to acquit A8 and A9. While I partially agree with the verdict of the assessors, I respectfully find that not only A8 and A9 should be acquitted in count 3 but A6 and A7. There is no evidence of conspiracy against them on record. I convict A1, A2, A3, A4 and 5 in count 3."**

We observe that the 1st, 2nd, 3rd, 5th and 6th appellants were convicted for conspiracy to commit theft while the 4th appellant was acquitted. It was counsel for the appellants' submission that the respective appellants should not have been convicted for conspiracy to commit a felony of theft as that offence terminated when the offence of theft was committed, he cited **Uganda vs Kilama Dennis & 10 others, High Court Criminal Session Case No. 169 of 2010**, in support of his submissions. In that case, Paul Mugamba, J. (as he then was) observed that:

> **"According to Black's Law Dictionary 8th edition conspiracy is an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective and action or conduct that furthers the agreement. Needless to say conspiracy is a**

separate offence from the crime that is the object of the conspiracy so that it ends when the unlawful act has been committed."

Section 390 of the **Penal Code Act, Cap. 120**, which relates to criminal conspiracy provides as follows:

> **"390. Conspiracy to commit felony.**
>
> **Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Uganda would be a felony and which is an offence under the laws in force in the place where it is proposed to be done, commits a felony and is liable, if no other punishment is provided, to imprisonment for seven years, or if the greatest punishment to which a person convicted of the felony in question is liable is less than imprisonment for seven years, then to such lesser punishment."**

The learned authors of the **Halsbury's Laws of England, volume 11 (2006 re-issue), at page 64**, stated that:

> **"There are statutory and common law offences of conspiracy. The essence of the offences of both statutory and common law conspiracy is the fact of combination by agreement. The agreement may be express or implied, or in part express and in part implied. The conspiracy arises and the offence is committed as soon as the agreement is made; and the offence continues to be committed so long as the combination persists, that is until the conspiratorial agreement is terminated by completion of its performance or by abandonment or frustration or however it may be."**

Although the **Kilama Dennis & 10 others case (supra)**, being a High Court decision is not binding on this Court, and is of only persuasive value, we are of the opinion that it presents a fair position. It would be unnecessary to punish an accused person for an agreement to carry out an offence, as well as the offence itself, especially as the agreement constitutes the mens rea for commission of the offence in question. We are further persuaded by the observations of the learned authors of the **Halsbury's Laws of England** (supra), that the conspirators' agreement, which is the basis for the offence of conspiracy is terminated by completion of its performance, that is, when the offence itself is committed. Accordingly, we agree with the submissions of the appellants' counsel on this point, and find that the learned trial Judge should not have convicted the appellants for the offence of

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

Regarding Count 4, the particulars of which were that the 4th and 6th appellant, between 23rd and 25th January, 2013 at MTN Towers on Plot 77 Yusuf Lule Road in the Kampala District, intentionally accessed MTN Mobile Money Computer system without authority or permission to do so.

The learned trial Judge handled count 4 in his judgment at page 98 of the supplementary record (volume 1) as follows:

> **"Count 4 unauthorized access contrary to section 12 (1) and 20 (1) of the Computer Misuse Act. This charge is preferred against A5, A6 and A7. Section 12 (1) states that a person who intentionally accesses or intercepts any program or data without authority or permission to do so, commits an offence. Section 2 of the Act interpretes (sic) data as electronic representation of information in any form. The same section interpretes (sic) "program" or "computer program" to mean data representing instructions or statements that, when executed in a computer, causes the computer to perform a function. "Function" is also interpreted in section 2 to include logic, control, arithmentic, deletion, storage, retrieval and communication or telecommunication to, from or within the computer. It is gainful to get the interpretation of access within the same section 2. It means gaining entry to any electronic system."**

He then continued at page 99 that:

> **"As regard A5 she made a confession in her charge and caution statement that she was on a mission to gain access to the MTN Mobile money electronic system and she did. Evidence was tendered by the prosecution to that A5 was at the Recreation Centre at about the same time as the time of the fraudulent journal transactions of 25th July 2013 which happened between 10:21:25 am and 10:27:20 am. Exhibit P21 fortifies this position. The assessors advised me to find all the accused guilty. For the reasons I have given I do not agree with that opinion. I find A6 and A7 not guilty and acquit them in count 4. I find A5 guilty and convict her accordingly."**

We note that only the 6th appellant was convicted on count 4. We have already found elsewhere in this judgment that the 6th appellant had accessed

the computers at 4th floor of MTN Towers and we need not repeat that analysis here. For those reasons, we have no reason to fault the learned trial Judge for the findings he reached, and consequently we uphold the conviction of the 6th appellant on count 4.

Regarding count 5, the 1st, 2nd, 3rd, 4th and 5th appellants were convicted on particulars that, they, and others still at large between 23rd and 25th day of January 2013, had unlawfully possessed a computer component which is designed primarily to overcome security measures for the protection of data with regard to password and access code of MTN Computer systems. The learned trial Judge stated in his judgment at page 100 of the supplementary record (volume 1) as follows:

> **"It is the evidence of PW4 that he procured A7 to carry out an errand on computers. PW4 had no knowledge of what A7 actually did. In his charge and caution statement A7 admitted to having received a flash in order to get information from a computer. In his confession A7 admits that he was paid for his efforts. Obviously if he had done something that was in the course of employment he would most likely not be paid for it. A7 was not taking instructions from his employer. He took instructions from a stranger. A7's confession is corroborated by that of A1 and the testimony of PW4. What he did was an unlawful act and this is what S.12 (3) of the Computer Misuse Act is about. I find him guilty of the offence. A1, A2, A3 and A4 connived and agreed to send someone to insert a device in an MTN mobile money computer. The computer belonged to Christine Alenyo. In the process Alenyo's financial administrator access rights were captured on that device. The confession of A1 and that of A2 show (sic) that these four accused did meet to make the preparations. They know that what A7 was being asked to do was wrong and irregular."**

The learned trial Judge then cited **section 19** of the **Penal Code Act, Cap. 120** regarding aiding and abetting and continued at page 101 of the supplementary record (volume 1) that:

> **"It must be borne in mind however that in order for one to be guilty of aiding and abetting one must be proved to have been consciously participating in what was done and should have facts that constitute the offence. The four accused convened and took a decision. There is evidence also payment was made to A7 through their intermediary. Consequently A1, A2, A3 and A4 admitted the offence in count 5 and are guilty as A7. The assessors in their joint opinion advised me to convict**

Mobile money Internal Dispute Account to several MTN Mobile Agents' mobile lines and we need not repeat that analysis here. We also made a finding that the 1st, 2nd, 3rd and 5th appellants had held and/or attended a meeting at Centenary Park in connection with planning the commission of the offences in question. We based our findings on the 1st, 2nd, 3rd and 6th appellant's confession statements which revealed that the 1st, 2nd, 3rd, 5th and 6th appellants met at Centenary Park to plan the commission of the offences in question. In the premises, we are unable to fault the findings of the learned trial Judge regarding count 6 of the relevant indictment. We, therefore, uphold the 1st, 2nd, 3rd, 5th and 6th appellants' conviction for electronic fraud.

All in all, we have resolved issue 2 as follows:

On count 2,

There was sufficient evidence to support the conviction in count 2 against the 1st, 2nd, 3rd, 4th, 5th and 6th appellants. We, therefore, uphold their convictions.

On count 4,

There was sufficient evidence to support the 6th appellant's conviction on count 4. We, therefore uphold, the said conviction against her.

On count 3,

We made a finding that it was unnecessary to convict the appellants for the offence of conspiracy to commit the felony of theft as well as the theft itself. We therefore quash the relevant convictions and set aside the sentences in this count.

On count 5,

There was insufficient evidence to support the 1st, 2nd, 3rd, 4th and 5th appellants' conviction on count 5. We therefore quash, the said conviction against them.

On count 6,

A1 an A7 on count 5 but to acquit A2, A3 and A4. For the reasons I have given I respectfully disagree with their verdict. I find A1, A2, A3, A4 and A7 all guilty of the offence in count 5."

The offence in count 5 is criminalized under section **12 (3) of the Computer Misuse Act, 2011** which provides that:

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

The prosecution had to show that any or all of the 6 appellants either unlawfully possessed or unlawfully procured for use a device contrary to the above mentioned provisions. We observe that there was evidence that the 1st appellant and the 4th appellant had a device, which was described as a flash-disk like device, however, there was no evidence to show that they unlawfully possessed or procured the flash disk in issue. In our view, that was fatal to the prosecution's case under count 5 and we are unable to agree with the learned trial Judge's findings on the point. We, therefore, quash the conviction of the 1st, 2nd, 3rd, 4th and 5th appellants by the learned trial Judge on count 5.

In count 6, all the 6 appellants were indicted for electronic fraud contrary to Section 19 of the Computer Misuse Act. The learned trial Judge, after analyzing the relevant law stated at page 102 of the supplementary record (volume 1) that:

> **"A1, A2, A3, A4 and A5 met and agreed to carry out the fraudulent transactions central to this indictment. The project was well calculated in inception and cunningly execute. Certainly it has all the hallmarks of digital predators. The gentlemen assessors advised me that no evidence exists to convict A3 this charge, I respectfully disagree with that opinion. I find A1, A2, A3, A4 and A5 guilty on count 6 and convict them."**

We note that only the 1st, 2nd, 3rd, 5th and 6th appellants were convicted for the offence in count 6. We have already made a finding elsewhere in this judgment that the 6th appellant, fraudulently, and without any authority, logged into MTN computers and moved electronic money from the MTN

There was sufficient evidence to support the 1st, 2nd, 3rd, 5th and 6th appellants' conviction on count 6. We, therefore, uphold their conviction on this count.

Issue 3: If issue 2 is answered in the affirmative, whether the offences imposed on the appellants were illegal and/or harsh and excessive in the circumstances.

It is trite that sentencing is at the discretion of the trial Court and the circumstances under which an appellate Court will interfere with such discretion are now settled.

In **Kyalimpa Edward vs. Uganda, Supreme Court Criminal Appeal No.10 of 1995** the Supreme Court held that:

> **"An appropriate sentence is a matter for the discretion of the sentencing judge. Each case presents its own facts upon which a judge exercises his discretion. It is the practice that as an appellate court, this court will not normally interfere with the discretion of the sentencing judge unless the sentence is illegal or unless court is satisfied that the sentence imposed by the trial judge was manifestly so excessive as to amount to an injustice."**

In **Kiwalabye vs. Uganda, Supreme Court Criminal Appeal No.143 of 2001** it was held:

> **"The appellate court is not to interfere with sentence imposed by a trial court which has exercised its discretion on sentences unless the exercise of the discretion is such that the trial court ignores to consider an important matter or circumstances which ought to be considered when passing the sentence."**

We observe that issue 2 was substantially answered in the affirmative with the appellants' convictions in count 2, 4, and 6 being upheld. The learned trial Judge imposed the following sentences at pages 112 to 114 of the supplementary record (volume 1):

In respect to count 2, which is theft, the learned trial Judge sentenced the 1st, 2nd, 3rd and 6th appellants, each to a term of imprisonment for 7 years. It was the submission of counsel for the 1st, 2nd, 3rd and 4th appellants, that the learned trial Judge having taken into consideration the 2 years which the

convicts had spent on trial remand could not sentence them to 7 years because that would imply that he would have sentenced them to 9 years, despite the mitigating factors in their favour. We accept those submissions. We observe the following mitigating factors in the appellants' favour: that they were first offenders; the offences they committed did not involve personal violence; and their youthful age. On the other hand, the following aggravating factors were raised against them: that the offence was committed in a premeditated and sophisticated manner and involved the loss of a huge amount of money. In the circumstances, we believe that a sentence of 7 years would be harsh and excessive. We would substitute it with a sentence of 5 years imprisonment for each appellant. Therefore, the 1st, 2nd, 3rd, and 6th appellants are, each, sentenced to a term of imprisonment for 5 years in count 2.

In count 4, which was unauthorized access, the learned trial Judge sentenced the 6th appellant to 9 years imprisonment with his reasons appearing at page 113 of the supplementary record (volume 1):

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

We have no reason to interfere with the sentence imposed by the learned trial Judge as it was passed pursuant to his discretion, and he took into consideration, the mitigating factors as well as the aggravating factors. The sentence was neither harsh nor excessive given that the maximum sentence in respect of that offence is life imprisonment. We, therefore, uphold the conviction and sentence imposed in count 4 against the 6th appellant.

In count 6, the learned trial Judge sentenced the 1st, 2nd, 3rd, 5th and 6th appellants, each, to a term of 7 years imprisonment. He reasoned at page 114 of the supplementary record (volume 1) that:

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

The punishment in respect of electronic fraud is stipulated under section **19 (1)** of the **Computer Misuse Act, 2011** which provides that:

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

In the circumstances, we shall not interfere with the sentence imposed by the learned trial Judge, as it was neither illegal nor harsh and/or excessive. We therefore uphold the conviction and sentence in respect of count 6.

In the result, we make the following orders.

On count 2,

The 1st, 2nd, 3rd, 4th, 5th and 6th appellants' conviction for theft contrary to sections 254 (1) and 261 of the Penal Code Act, Cap. 120 is upheld, and each, is hereby sentenced to a term of 5 years imprisonment.

On count 3,

The convictions and sentences of 7 years, each, for the 1st, 2nd, 3rd, 4th and 6th appellants for conspiracy to commit the felony of theft c/s 390 of the Penal Code Act, Cap. 120 are quashed and set aside, respectively.

On count 4,

The 6th appellant's conviction and sentence of 9 years imprisonment on count 4 is upheld.

On count 5,

The 1st, 2nd, 3rd, 4th and 5th appellants' conviction for unauthorized access contrary to sections 12 (3) and 20 (1) of the Computer Misuse Act, 2011 in count 5 is quashed, and the sentence in respect thereof is accordingly set aside.

On count 6,

The 1st, 2nd, 3rd, 5th and 6th appellants' convictions and sentences of 7 years for electronic fraud contrary to section 19 (1) of the Computer Misuse Act, 2011 in count 6 are upheld.

The above sentences are to run concurrently from the 28th April, 2015, the date when the appellants were convicted. The bail granted to the appellants hereby lapses and they are to be handed over to the prison authorities to serve their sentences.

We so order.

Dated at Kampala this ..... day of ..... 2019.

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Elizabeth Musoke
JUSTICE OF APPEAL

.....

Stephen Musota
JUSTICE OF APPEAL

.....

Percy Night Tuhaise
JUSTICE OF APPEAL