THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE, CJ; KISAAKYE, ARACH-AMOKO, MWANGUSYA, MUGAMBA, JJSC]

CRIMINAL APPEAL NO. 010 OF 2016

BAINGANA JOHN PAUL.....APPELLANT

VERSUS

UGANDA.....RESPONDENT

(An appeal from the judgment of the Court of Appeal at Kampala before Kakuru, Kasule and Buteera JJA dated 25th May, 2016 in Criminal Appeal No.008 of 2010.)

JUDGMENT OF THE COURT

This is a third appeal. The appellant, Baingana John Paul, was convicted by the Chief Magistrate's Court at Buganda Road for the offences of obtaining money by false pretences, contrary to section 305 of the Penal Code Act and Conspiracy to defraud, contrary to section 309 of the same Act. On conviction he was sentenced to payment of a fine of shs. 3, 000,000/= or in default to serve 4 years imprisonment. The said money was to be paid to orphans. In addition he was to pay Shs. 50, 000,000/= as compensation to the complainants (the orphans). The appellant appealed to the High Court against the convictions and sentence. The High Court upheld the conviction for the offence of obtaining money by false pretences

and the sentence passed. The first appellate court however struck out the charge of Conspiracy and quashed the conviction in that offence.

The appellant further appealed to the Court of Appeal against conviction but the appeal was dismissed. The Court of Appeal upheld the conviction and ordered the appellant to serve 4 years imprisonment and to pay compensation of Shs. 50, 000,000/= with interest at 21 percent per annum as from the date of sentence, 2nd September 2008, till payment in full. Court ordered for full payment of the sum and interest on it to be effected within 7 days if it was not to be recovered as a civil debt.

The appellant was dissatisfied by orders of the Court of Appeal and brought a third appeal to this Court.

Background to the case

The background to the case as found by the courts below briefly is as follows: On the night of 31st December 2000 at about midnight, Joseph and Grace Bizzu were involved in a motor vehicle accident in Jinja. A vehicle belonging to Uganda Electricity Board (UEB) knocked the motor cycle they were riding on. Grace died shortly after the accident while Joseph Bizzu died eight months later after being hospitalized. Before the said Joseph Bizzu died he appointed a Mr. Mark Moore to take care of his 4 children, namely Rita Atim, Phiona Kia, Jonathan Oloro and Sarah Ageno. Moore complied and even paid the deceased's hospital bills. He proceeded to instruct M/s

Kasirye, Byaruhanga Advocates as the plaintiffs' next friend to initiate a civil suit against Uganda Electricity Board (UEB) for the deaths caused. An out of court settlement was agreed between the parties and their lawyers. At the time the plaintiffs' lawyers were M/s Kasirye, Byaruhanga Advocates while the defendant's lawyers were M/s Kateera, Kagumire Advocates. During the process of settlement, the defendant's lawyers received a notice of change of advocates from M/s Tumwesigye, Baingana & Co. Advocates indicating that they were representing the plaintiffs, the children aforenamed, and that Mr Okuku was the new next friend. The defendant's lawyers obliged and invited the said new lawyers to discuss the settlement wherein the parties agreed on shs 75,854,140/= in full and final settlement. The appellant herein received the cheque of the entire amount from M/s Kateera, Kagumire Advocates. On the same day of payment, Mr. Rutisya of M/s Kasirye, Byaruhanga Advocates wrote to the defendant's lawyers claiming that the law firm still represented the plaintiffs and proposing a settlement as earlier discussed. Mr. Rutisya was surprised to learn that the matter had already been settled with other lawyers when he had not received any notice of change of advocates. The appellant on being confronted by Mr. Kasirye of M/s Kasirye, Byaruhanga Advocates paid M/s Kasirye, Byaruhanga Advocates and their client Mr. Moore slightly over 10 million shillings as legal fees and for refund of monies spent on the late Joseph Bizzu's hospital bills.

The appellant went on to withdraw the entire settlement amount of shs. 75,854,140/= from the bank. He stated that after withdrawing

the money he paid Mr. Okuku shs. 64,000,000/= for onward transmission to the orphaned children. The orphaned children and their care takers denied receipt of that money. They denied also that Mr. Okuku was their relative or representative. Police intervened. They arrested and prosecuted the appellant as well as Mr. Okuku for obtaining money by false pretences, theft and conspiracy as earlier stated.

In the Memorandum of Appeal before this Court, the appellant raised five grounds as follows:

1. **The learned Justices of Court of Appeal erred in law in revoking the sentence of payment of a fine of Ug. Shs. 3,000,000 (Three million only) or imprisonment to a term of four (04) years imprisonment which the Appellant had already served by payment of a fine.**

2. **The Learned Justices of Court of Appeal erred in law in subjecting the amount payable as compensation to interest of 21%, and/or without being heard; and that it was payable within seven (07) days.**

3. **The Learned Justices of Court of Appeal erred in law when they subjected the Appellant to an illegal sentence, of a purported default sentence of four (04) years.**

4. **The Learned Justices of Court of Appeal erred in law when they failed to modify and adapt Section 45 of the Criminal Procedure Code Act to bring it in conformity with the Constitution and S. 10 of the Judicature Act thereby striking out grounds 3, 4, 5, 6, 7 and 8 of the Memorandum of Appeal.**

5. **The learned Justices of Court of Appeal erred in law when they struck out grounds of appeal on matters of law and fact that had been successfully argued at the hearing.**

Representation

Mr. Mbabazi Muhammad and Mr. Birungi Wycliffe were counsel for the appellant while Ms. Jacquiline Okwir, Senior State Attorney, represented the state. Both parties filed written submissions which they highlighted before this court at the hearing.

Submissions by learned Counsel

On ground 1, the appellant in his submissions faulted the Court of Appeal for holding that there was no evidence that the appellant paid the fine of shs. 3,000,000/= or failed to compensate the complainants as ordered by the Chief Magistrate's Court. He referred to page 4 of the record of appeal which to him was evidence of payment of the shs. 3,000,000/= as ordered by Court. Counsel stated that this contradicted the findings of the Court of Appeal. He insisted that the

sentence of imprisonment was terminated upon payment of the fine. He asked court to take judicial notice of the fact that anybody convicted and sentenced to payment of a fine can only be released from custody upon payment of the fine.

It was further submitted for the appellant that the Court of Appeal did not follow the proper procedure in revoking and varying the sentence of the lower Court.

On ground 2, it was submitted for the appellant that the lower court when passing the sentence did not subject the compensation order to any interest.

It was also submitted that in **Civil Suit No. 626 of 2007, Rita Atim, Phiona Kia, Jonathan Oloro [by and through their next friend Grace Nyanga] and Sarah Ageno V Martin Okuku and John Paul Baingana**, Hon. Justice Yasin Nyanzi settled the issue of compensation and that the order of compensation if upheld would be subjecting the appellant to double payment. Counsel stated that the issue of compensation was overtaken by the decree in Civil Suit No. 626 of 2007 (supra). The other issue complained of by the appellant was in respect to the order limiting the payment of the compensation to be made within 7 days of the date of the order, which according to the appellant was an illegal order since according to the appellant such order of payment of a fine can only be effected after the period for presenting an appeal has elapsed or if one is presented, after it has been determined. He relied on Section 199(2) of the Magistrate's Courts Act.

On ground 3, it was the appellant's contention that he had been subjected to an illegal sentence of 4 years imprisonment stating that it was based on a purported default which the appellant contends did not exist. The appellant contended that he had paid the fine of shs. 3,000,000/= and therefore he had already served the sentence passed by the Chief Magistrate's Court.

The 4th ground seeks to fault the learned justices of Appeal for failing to modify and adapt Section 45 of the Criminal Procedure Code Act to bring it in conformity with the Constitution and Section 10 of the Judicature Act. The appellant faults the learned justices for striking out grounds 3, 4, 5, 6, 7 and 8 of the memorandum of appeal which related to mixed law and fact and for the justices relying on Section 45 of the Criminal Procedure Code Act to strike out the said grounds contrary to Rule 66 (2) of the Judicature (Court of Appeal Rules) Direction.

It was the appellant's further submission that Section 45 of the Criminal Procedure Code Act applied to a final appellate court which the Court of Appeal was not. Counsel submitted that Section 45 of the said Act being an Act enacted in 1950 should have been interpreted *mutatis mutandis* with the provisions of the Constitution, which provides for modification of laws. He cited Article 292 of the Constitution.

Counsel argued that failure of the justices of the Court of Appeal to comply with Rule 66 (2) of the Rules of that court and failure to modify S.45 of the Criminal Procedure Code Act to conform with

Article 292 of the Constitution resulted in failure to analyze or re-evaluate the evidence on record and that this resulted in total failure of justice or occasioned a miscarriage of justice. It was the appellant's submission that this appeal is one of the very rare circumstances in which this Court ought to be persuaded to re-evaluate the evidence. He relied on the authority of **Bogere Moses and another V Uganda; C.A No. 010 of 1997 S.C.**

The appellant asked court to allow the appeal, set aside the conviction and quash the sentence and all orders of the Court of Appeal.

In response, the respondent opposed the appeal and supported the confirmation of the appellant's conviction and sentence by the justices of the Court of Appeal.

On grounds 1 and 3, the respondent submitted that the justices of the Court of Appeal did not err in law in deciding that the appellant serves a sentence of four years imprisonment because the appellant had not satisfied the sentence of the fine in default of which he was to serve the sentence of four years imprisonment. The respondent contested the authenticity of the receipt of payment of the fine which was proffered by the appellant because it was not certified by the court. Counsel further argued that the justices of the Court of Appeal as well as the High Court in arriving at their decisions stated that they did not find any evidence on record indicating that the said fine had ever been paid. It was contended by the respondent that the said fine was never paid and that the complainants were never

compensated. Counsel added that the Court of Appeal justices were justified under Rule 6(2) of the Judicature (Court of Appeal Rules) Directions to sentence the appellant to 4 years imprisonment as a default sentence.

It was the respondent's further submission that the appellant's contention that the sentence imposed by the Court of Appeal was illegal was misconceived because the sentence passed was in accordance with S.305 of the Penal Code Act which provides sentence for the offence of obtaining money by false pretences. He argued that the section provides for a sentence which does not exceed five years imprisonment. He contended that the sentence meted out was in accordance with the law.

On ground 2, the respondent submitted that the Court of Appeal was justified in passing the order for payment of interest at 21% on the compensation within 7 days of the order because as a court it has authority and jurisdiction to exercise such power to vary a sentence. The respondent added that before the justices ordered for compensation to be paid with such interest, they considered the fact that a long period had elapsed without the appellant paying the compensation to the complainants and that as such the value of the sum of shs. 50,000,000= had depreciated. He submitted that the Court of Appeal had used its power under S.11 of the Judicature Act to cure that injustice by ordering payment of interest on the compensation.

Regarding application of S.199 (2) of the Magistrate's Courts Act to the matter at hand, the respondent submitted that the section applies to fines paid as compensation to victims and not compensation per se.

Concerning grounds 4 and 5, the respondent submitted that the justices of the Court of Appeal did not err in law when they struck out grounds 3, 4, 5, 6, 7 and 8 of the appellant's memorandum of appeal based on Section 45 of the Criminal Procedure Code Act. He added that the Criminal Procedure Code Act is a parent law that gave the appellant the right to appeal to the Court of Appeal and the Judicature (Court of Appeal Rules) Directions are merely subsidiary rules that prescribe the procedure relating to appeals in the Court of Appeal. He stated that the Court of Appeal based its decision on the right law and did not err when it struck out the said grounds because they were based on facts.

Furthermore it was submitted for the respondent that the Court of Appeal considered all the evidence and the law relating to the appellant's case. Counsel stated that they agreed with the concurrent findings of fact of the appellate judge and the trial magistrate concerning the entire case in light of the evidence on record and found the findings reasonable and supportable by the available evidence.

In view of the submissions highlighted, the respondent prayed for the appeal to be dismissed and for the conviction and sentence to be confirmed.

In rejoinder the appellant's submissions were a reiteration of his main submissions in support of the appeal.

Consideration of the grounds by Court

From their submissions, the appellants argued each ground of appeal separately. The Respondent combined grounds 1 and 3, then 4 and 5 and finally argued ground 2.
We shall resolve grounds 1, 2 and 3 together, and ultimately grounds 4 and 5 together.

Grounds 1, 2 and 3

The appellant, in grounds 1and 3, faults the justices of the Court of Appeal for revoking the sentence of payment of a fine of Shs. 3,000,000/= or imprisonment for 4 years, saying that the Appellant had already satisfied the sentence by payment of a fine. It was argued also that the said sentence of 4 years imprisonment meted out as a default sentence was an illegal sentence.

The complaint in ground 2 states that the learned justices of the Court of Appeal erred in law in subjecting the amount payable as compensation to an interest of 21%, without an opportunity of being heard; and that the compensation was payable within seven (07) days.

We observe that while sentencing the appellant the trial magistrate stated as follows:

"***A2 (Baingana) considering his role in the whole scam shall pay a fine of 3m/= or serve 4 years imprisonment. Sentence to run concurrent. In addition, the following orders are made.***

1. ***If the fines are paid, 3m/= shall be paid to the orphans (S.199 MCA) refers.***
2. ***In addition to that A2 (Baingana) will compensation of 50,000,000,000/= to the complaints. (sic)***
3. ....."

By way of observation the sentence passed by the trial magistrate was pronounced as an alternative sentence. So the order that the sentences were to run concurrently was contradictory. This confusion was caused by the manner in which the magistrate pronounced the sentence. Two sentences ought to have been used to pronounce the two counts the appellant was convicted of.

The High Court as a first appellate Court rectified the above anomaly when Justice Lugayizi made the following order when answering the question as to whether the lower Court's remedies were appropriate:-

"The answer to the above question is as follows: in so far as the lower court passed an omnibus sentence and orders against the appellant in respect of counts 1 and 3 of the charge the remedies were inappropriate. Therefore this Court must set them aside and it is so ordered. The following is now the appellant's punishment under count

1: (a) the appellant will pay a fine of shs. 3 million shillings, which will go to the orphaned children and in default thereof he will serve a term of 4 years imprisonment; and (b) the appellant will also pay a sum of 50 million shillings as compensation for the orphaned children."

Secondly section 180(d) of the Magistrates Courts Act states that the period of imprisonment ordered by the court in respect of the non-payment of any sum of money adjudged to be paid by a convict or in respect of the default of a sufficient distress to satisfy any sum shall be such a term as in the option of the court will satisfy the justice of the case, but shall not exceed in any case the maximum fixed by the scale provided under the provision. The highest amount fixed in the scale is that exceeding six currency points the maximum period of which is twelve months. The value of a currency point referred to in section 180(d) is twenty thousand shillings as provided in the Law Revision (Fines and Other Financial Amounts in Criminal Matters Penalties) Act, 2008, Act 14/2008.

Then under section180 (e) it is provided that the imprisonment which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.

It is incumbent on sentencing courts to carefully pronounce sentences in a way that avoids ambiguity for ease of enforcement of the sentence and in case of imposition of a fine courts should take into consideration the scale provided under section180 (d) of the Magistrates Courts Act for a proper default sentence. None of the courts below considered the illegality of the four years imprisonment

in default of a fine of Shs. 3.000.000/= and it is the duty of this court not only to point out the illegality of the sentence where it exists but also to give guidance on how sentencing courts should manage the process of sentencing when the option of imposing a fine instead of imprisonment is exercised.

The justices of the Court of Appeal in dismissing the appeal held:

"... In this case the appellant since his conviction and sentence by the Chief Magistrate's Court Buganda Road on 2nd September 2009, has neither paid the fine nor served the sentence imposed by that Court. As already stated, there is no evidence that the execution of the sentence was ever stayed.

.....

The appellant was given an option to pay a fine which he declined to take. It is now more than 8 years and 3 months since his conviction. We find that the option of a fine would now no longer serve the purpose for which it was intended and we hereby invoke section 11 of the Judicature Act and revoke it.

We make the following orders;-

1. ***The appellant commences to serve the sentence of 4 (four) years imprisonment.***
2. ***The appellant is also to pay compensation of shs. 50,000,000/= (fifty million shillings) with interest at 21 percent per annum as from the date of sentence of 2nd September 2008 till payment in full.***

3. ***All the money is to be paid to the Registrar of this Court who shall pass it on to the orphans/beneficiaries through their lawyers, Messrs Kasirye and Byaruhanga Co. Advocates, to whom a copy of this Judgment is to be served by the Court Registrar.***
4. ***Should the appellant fail to pay in full within 7 (seven) days from the date of this Judgment the said compensation sum of shs 50,000,000/= (fifty million shillings) with interest thereon, maybe recovered as a civil debt by the Registrar of this Court and or M/s Kasirye and Byaruhanga Co. Advocates, the advocates of the beneficiaries."***

The justices of the Court of Appeal referred to Section 11 of the Judicature Act.

Section 11 provides:

"For the purpose of hearing and determining an appeal, Court of Appeal shall have all the powers, authority and jurisdiction vested under any written law in the Court from the exercise of the original jurisdiction of which the appeal originally emanated."

The Court of Appeal has power to vary a sentence imposed by the lower Court by reducing or increasing it. Section 34(2)(b) of the Criminal Procedure Code Act relates to this situation, where with or without altering the finding the appellate court may reduce or

increase the sentence by imposing any sentence provided by law for the offence. The issue here is whether the Court of Appeal followed the correct procedure before passing the sentence and orders it did against the appellant.

The appellant in his submissions relied on the authority of **Busiku Thomas V Uganda, C.A No. 33 of 2011 [SC]** as well as **JJW v Republic, Criminal Appeal No. 11 of 2011 [2013] KLR.** He argued that the Court of Appeal did not follow the proper procedure in revoking and varying the sentence of the lower Court.

It was the appellant's submission that the issue of enhancement of the sentence was never raised by the Prosecution or by the justices to enable the appellant respond appropriately. He asked court to rely on the decisions cited and to set aside the sentence passed by the Court of Appeal.

In **Busiku Thomas V Uganda (supra)** in the majority Judgment, court found that neither the state nor the Court of Appeal warned the appellant before the hearing that the sentence would be enhanced. For that reason it was held that the Court of Appeal had not followed the proper procedure before enhancing the sentence. Therefore that sentence was declared unlawful and set aside by this court. In our view, that case is distinguishable from the instant case. In the instant case the Court of Appeal looking at the sentence passed by the trial magistrate in light of the failure by the appellant to pay the fine for more than 8 years and 3 months specifically revoked the option of

the fine and enforced the default sentence. That decision does not amount to enhancement of sentence. The maximum sentence for the charge of obtaining money by false pretences is 5 years. Suffice it to say the Court of Appeal maintained the default sentence.

The justices of the Court of Appeal in revoking the trial magistrate's sentence/orders based their decision on the fact that they were unable to find sufficient proof that the appellant had paid the said fine. The respondent supported the Court of Appeal decision and submitted that the fact that both the High Court and the Court of Appeal were unable to find proof of payment of the fine went to show that it was not paid. The appellant referred Court to page 4 of the record of appeal which we observe is a photocopied document of a purported hand written receipt allegedly issued by the cashier of the Chief Magistrate's Court acknowledging receipt of shs. 3,000,000/= from the appellant. Upon perusal of the original file from the Chief Magistrate's Court, we note that a similar photocopied document exists on that file. Counsel for the appellant suggested that the reason why the appellant didn't have the original copy of the said receipt was because at the time of payment the appellant was in detention and never made the payment himself. He further suggested that the only way the appellant was able to leave the cells was after the said receipt was presented to the prisons officers. He said this meant that the fine was paid.

The proof that this court, like the Court of Appeal, required to put this issue to rest would have been the original copy of the receipt. That is nowhere to be found.

This burden however cannot be laid on the appellant alone. The cashier at the Chief Magistrate's Court should have issued an acceptable official receipt to be received as a Court document. This acknowledgment of payment issued by the cashier was not found acceptable by court and is the source of all this confusion and doubt.

We note that there is a letter on court record from the Chief Registrar, then, Gadenya Paul Wolimbwa, on this issue where he wrote to the Chief Magistrate Buganda Road on the 11th of August 2016 to verify payment of the fine. He blamed the Casher for not issuing a proper receipt to the appellant and said that in his findings he was convinced the appellant would not have been allowed to go home by the Chief Magistrate if he had not paid the fine first.

The appellant was sentenced on the 2nd of September 2008. As a mode of practice in our Court systems once an accused person is sentenced, an order is issued referring the convict to prison to serve his or her sentence and the prisoner is then locked up by the prisons officials. If it is a sentence of payment of a fine, once the fine is paid, proof of payment is produced before the Prisons officers following which the prisoner is released. The appellant claims that is what happened.

The evidence on record shows the cashier acknowledged receipt of payment of the fine. The cashier did not issue a receipt in the form of one customarily issued. Nevertheless the prisoner was released upon presenting proof of payment to his custodians. It is our finding therefore that the appellant served his sentence by payment of a fine and there was no default to necessitate the default sentence passed by the Court of Appeal.

Next we consider the compensation order made by the Court of Appeal for payment of interest at 21 percent per annum effective from the date of sentence, 2nd September 2008, till payment in full and within 7 days. It is argued that for the Court of Appeal to have made such order enhancing the order for compensation at its own instigation was done in error and was unjust.

The appellate powers granted to appellate courts under S.11 of the Judicature Act do not override the trial court's sentencing discretion. The powers are to be exercised advisedly and for good cause. It is not a carte blanche and on several occasions this court has clearly stated so. In **Kamya Johnson Wavamunno vs Uganda, Criminal Appeal No. 16 of 2000** it was reiterated that an appellate court will not interfere with the sentence of a trial court unless there has been a failure to exercise discretion or failure to take into account a material consideration or where an error in principle was made by the trial court.

We are unable to find such circumstances to warrant the interference by the Court of Appeal. We therefore set aside the sentence and

orders passed by the Court of Appeal and we restore the sentence and orders passed by the trial magistrate.

We take into account the Judgment in **Civil Suit No. 626 of 2007, Rita Atim, Phiona Kia, Jonathan Oloro [by and through their next friend Grace Nyanga] and Sarah Ageno V Martin Okuku and John Paul Baingana** which was deliverd on the 9th of February 2016. This was after hearing of the appeal before the Court of Appeal.

In that judgment, Justice Yasin Nyanzi heard the matter and pronounced himself on the remedies available to the parties. It was owing to his finding and conclusion that from paragraph 42 to 43 he stated as follows:

"42. In regard with the issue of UG Shs 50m, as awarded by the Chief magistrate Court this Court orders and confirms that 50m was just compensatory to the plaintiffs' considering the 2nd defendant's role in the whole scam and it is not connected to the actual balance of Ug shs 36,290,140/= dishonestly taken.

42. The defendant should over and above the Ug Shs 50m pay the balance of Ug Shs 36,290,140/= which was dishonestly taken by him to the beneficiaries so that they can enjoy their court proceeds.

43. Costs of the suit have also been awarded to the plaintiffs' Interest of 8% is also awarded on Ug. Shs 36,290,140/= from date of filing to payment in full. I so order."

The issue of compensation is well canvassed in the above findings and is in line with the conclusion of this court. We uphold the said orders as the position in as far as compensating the complainants is concerned.

Grounds 1, 2 and 3 are answered in the affirmative.

Grounds 4 and 5

The appellant faults the justices of Appeal for striking out grounds 3, 4, 5, 6, 7 and 8 of the memorandum of appeal which related to mixed law and fact and for the justices relying on Section 45 of the Criminal Procedure Code Act to strike out the said grounds when, according to him, Rule 66 (2) of the Judicature (Court of Appeal Rules) Direction envisages that.

The appellant asked court to be persuaded to re-evaluate the evidence. The respondent opposed the submission and supported the grounds being struck off.

Grounds 3, 4, 5, 6, 7 and 8 as on the memorandum of appeal before the Court of Appeal were as follows:

3. *The Learned Appellate Judge erred in <u>law and fact</u> when he upheld and confirmed the Trial magistrate's decision to convict the Appellant of a fine of Ug. Shs 3,000,000/= (Three million shillings only) or 4 years imprisonment and Ug. Shs.*

50,000,000/= (Fifty million shillings only) as compensation to the said Complainant.

4. *The Learned Appellate Judge erred in law and fact when he found that the Appellant participated in the meeting of A2 and other persons.*

5. *The Learned Appellate Judge erred in law and fact to hold that the Appellant, at the time of taking instructions to handle the civil suit, was aware that Okuku Martin would not represent and cater for the interests of the beneficiaries.*

6. *The Learned Appellate Judge erred in law and fact to uphold the finding of the Trial Magistrate that the Appellant gave Okuku Martin Shs. 32,000,000/= Thirty two million shilling sonly) and took the rest when Okuku acknowledged receipt of Shs. 62,000,000/= (sixty two million shillings only) as per Exh. P.21.*

7. *The Learned Appellate Judge erred in law and fact to uphold the decision of the Trial Magistrate that the Prosecution had proved all the ingredients of the offence against the Appellant beyond reasonable doubt.*

8. *The Learned Appellate Judge erred in law and fact when he misdirected himself when he found that there was mis joinder of the charges and a mistrial but went ahead to confirm the conviction of the Appellant.*

Section 45(1) of the Criminal Procedure Code Act (Cap 116) provides:

> **'Second appeals.**
>
> **Either party to an appeal from a magistrate's court may appeal against the decision of the High Court in its appellate jurisdiction to the Court of Appeal on a matter of law, not including severity of sentence, but not on a matter of fact or of mixed fact and law.'**

Rule 66(2) of the Judicature (Court of Appeal) Rules provides:

> **'The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided.'**

Appellant's counsel refers to the Judicature (Court of Appeal) Rules as the law that should have governed the Court of Appeal and hence entertained issues of mixed law and fact rather than the Criminal Procedure Code Act. We are in agreement with counsel for the respondent in her submission as to the Criminal Procedure Code Act being the parent law that conferred upon the appellant the right to

appeal in the first instance. The Judicature (Court of Appeal) Rules is the subsidiary law that merely prescribes the procedure relating to appeals in the Court of Appeal.

The appellant ought to have followed procedure and the law which he should be well aware of.

Grounds 4, 5, 6, 7 and 8 raise issues of fact and are offensive to Section 45 of the Criminal Procedure Code Act. Ground 3 is on sentence but was however set out in a general form not specifying the instances when one can, on a second appeal, appeal against sentence to wit, the legality or lawfulness of the sentence. The Court of Appeal was justified in its decision to strike out the said grounds and we uphold their decision.

Grounds 4 and 5 are answered in the negative.

Verdict

Consequently, grounds of appeal 1, 2 and 3 succeed. Grounds 4 and 5 fail. Thus this appeal partially succeeds. The sentence and the orders of the Court of Appeal are set aside.

Dated at Kampala this ..28th.... day of ....June..... 2019

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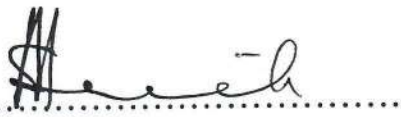
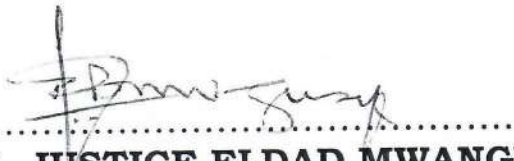
HON. CHIEF JUSTICE BART KATUREEBE,
JUSTICE OF THE SUPREME COURT

HON. LADY JUSTICE DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT



HON. LADY JUSTICE STELLA ARACH-AMOKO,
JUSTICE OF THE SUPREME COURT



HON. JUSTICE ELDAD MWANGUSYA,
JUSTICE OF THE SUPREME COURT

HON. JUSTICE PAUL. K MUGAMBA,
JUSTICE OF THE SUPREME COURT