

UGANDA / JUDGMENT

Kagulire & Another v Uganda (Criminal Appeal 75 of 2022) [2023] UGHCCRD 182 (21 July 2023)

[2023] UGHCCRD 182

COURT

HC: Criminal Division (Uganda)

BEFORE

Mutonyi, J

CASE / FILE NUMBER

Criminal Appeal 75 of 2022

Source: ulii.org · Research copy typeset by Esheria. Not court-issued or certified.

| $\mathbf{1}$ | THE REPUBLIC OF UGANDA. | |

|-----|-----|

| Z | IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA. | || $\overline{3}$ | HCT-00-CR-CN-0075-2022 | || $\overline{4}$ | (ARISING from Buganda Road Standards – Utilities and Wildlife Court, Crim.
Case | || S | No.0085/2020) | |

| 6 | 1. KAGULIRE IBRAHIM | |

| $\overline{7}$ | 2. BINGI MAXIE: | || 8 | **VERSUS** | || $\overline{9}$ | UGANDA: | |

| 10 | JUDGEMENT OF HON. LADY JUSTICE. MARGARET MUTONYI JHC. | |

| 11 | 1. Kagulire Ibrahim and Bingi Maxie herein after referred to as the 1 st and 2
nd | |

| 12 | Appellant respectively filed this appeal against the judgment and sentence of Her | |

| 13 | Worship Kamasanyu Gladys Musenze, Chief Magistrate, at Buganda Road Chief | |

| 14 | Magistrates Court Kampala, delivered on 8 th June 2022. | |

15	2. The appellants represented themselves in this Appeal while the Respondent was	
16	represented by Ms. Caroline Marion Acio a Chief State Attorney from the office of	
17	the DPP. Both parties filed written submissions that have been referred to where	
18	necessary while writing of this judgement.	

| 19 | 3. The grounds of Appeal were as follows: | |

20	1. The learned trial Chief Magistrate erred in law and fact by admitting and	
21	relying on the prosecution electronic evidence and exhibits that were	
22	obtained contrary to the law.	

23\$	2. The learned trial Chief Magistrate erred in law and fact by convicting the	
\$\\overline{24}\$	appellant for the offence of Access with intent to Commit or Facilitate the	
25	Commission of a Further Offence contrary to section 13 (1) (b) and (4) of	
26	the Computer Misuse Act, 2011 when it had not been proved beyond	
27	reasonable doubt.	

28	3. The learned trial Chief Magistrate erred in law and fact by holding that all	
29	the ingredients for Abetment of Unauthorized use of Computer Service	
30	Contrary to Section 21 (1) and 15 (c) of the Computer Misuse Act, had been	
31	proved beyond reasonable doubt.	

| | \$\\mathbf{1}\$ | |

| | |

- 4. The learned trial Chief Magistrate erred in law and fact by holding that all 32 the ingredients for Abetment of Unauthorized use of Computer Service 33 Contrary to Section 21 (1) and 19 (1) of the Computer Misuse Act, had been 34 proved beyond reasonable doubt whereas not. 35
- 5. The learned trial Chief Magistrate erred in law and fact by convicting the 36 Appellant when the prosecution evidence had not passed the 37 **Circumstantial Evidence Test**. 38
- 6. The learned trial Chief Magistrate erred in law and fact when she imposed 39 a manifestly harsh and excessive sentence on the appellant leading to a 40 failure of iustice. 41
- 7. The learned trial Chief Magistrate erred in law and fact by failing to 42 arithmetically deduct the period the Appellants had spent on remand from 43 the final sentences imposed. 44

- 4. Prayers on Appeal 45

The appellants prayed that this honorable court be pleased to allow the appeal, 46 quash the convictions, set aside the sentences imposed and discharge the 47 appellants forthwith. 48

However, if this court be constrained to uphold the convictions, they prayed that 49 the sentences be set aside and more lenient and appropriate sentences be imposed 50 and that the period the appellant spent on remand be arithmetically deducted from 51 the final sentences. 52

5. The brief background of the case. 53

The \$1^{st}\$ and \$2^{nd}\$ Appellant and a one (Musaazi Dennis) were on \$17^{th}\$ day of 54 December 2020 charged with 3 counts under the Computer Misuse Act, to wit; 55 count 1; Access with the intent to commit or facilitate the commission of a further 56 offence C/S 13 (1) (b) and (4), (7) of the Computer Misuse Act, count 2; Abetment 57 of Unauthorized Use of Computer Services C/S 21 (1) and 15 (c) of the Computer 58 Misuse Act and count 3; Abetment of Unauthorized Use of Computer Services C/S 59 21 (1) and 19 (1) and (2) of the Computer Misuse Act. 60 It was alleged that the appellants herein and another who was acquitted, between 61 the months of June 2019 and January 2020 knowingly and unlawfully caused a 62 computer device to wit sim cards to intercept international calls to be charged as 63 local calls on the MTN Network, facilitated the commission of the said offence and 64

knowingly and unlawfully facilitated the commission of Electronic Fraud with the intention of securing an unfair or unlawful gain on the MTN Network. 65

6. To prove their case, the prosecution led the evidence of 2 witnesses to wit; PW1, 66 Umar Kigongo, manager subscriber fraud with MTN and PW2, D/AIP Byamugisha 67

Jackson attached to Uganda Communications Commission (UCC). The accused were 68 69 put on their defense and thereafter, the court ruled that they had a case to answer. 70

- All the Accused persons led sworn evidence; DW1 Kagulire Ibrahim, DW2; Musaazi 71
- Denis who also called a witness DW3, Najengo Jane who is his mom and finally DW4 72
- Bingi Maxie. 73
- A2 /DW2 Musaazi Denis was acquitted of all the charges and accordingly released 74 while A1/ 1st Appellant and 2nd Appellant /A3 were convicted and sentenced to 75

serve 3 years and 8 months in prison on each count to run concurrently. 76

- The Appellants were dissatisfied with the entire judgment and sentence as per the 77
- grounds of appeal hence this appeal. 78

7 Role of first Appellate court. 79

- It is trite law that the duty of the first Appellate court is to look at the proceedings 80 and evidence on record and reappraise it afresh subjecting it to exhaustive scrutiny. 81 It is at liberty to draw its own inferences of fact and arrive at its own independent 82 conclusions as to whether it should maintain the decision of the lower court or 83 there is need to vary it and or overturn it all together.
- 84 The Appellate court combs the record right from the time of plea taking, taking and 85 recording of evidence, evaluation of evidence, application of the law to the 86 evidence and or facts, judgment, sentencing process and the final sentence given. 87 This role of the first Appellate court was well stated in the cases of Pandya V R 88 [1957] E. A 33 and has been followed in the plethora of cases. It basically 89 reevaluates the evidence bearing in mind that it did not witness the demeanor of 90
- the witnesses. 91

8. Analysis of the Case 92

As first appellate court, let me proceed to analyze the evidence afresh. 93

From the evidence on record, PW1 informed the lower court that he was the 94 Manager Subscriber Fraud at MTN Uganda and that he got involved in this case 95 following a directive from his CEO to locate people doing fraud by by-passing 96 customer traffic/calls. That the said persons were by-passing international traffic 97

through an illegitimate GSM Machine which causes the international calls coming 98 through it to reflect as local numbers and that as a result, government loses on the 99 tax that would be charged and MTN loses its shares. That this loss was being 100 facilitated by the use of the very many sim cards on the illegitimate GSM machine. 101 That his role in this was to provide intelligence information on where the numbers 102 were and the gadgets in which they were being operated while reporting to UCC. 103 He accordingly provided the necessary information which allegedly led the team to 104 a rented room in Lubya-Masafu where the illegitimate GSM machine was. That they 105 were led by a mast indicating Lubya and eventually, the coordinates led them to 106 this room which was on a rented building with several other rooms. That they 107 knocked on this specific room and A1 and A2 were inside, one of them opened the 108 room and the two were in fear. 109

When they entered the room, they found a GSM machine, and a computer which 110 operates the GSM machine which was connected to the internet. There was also 111 an external signal dish wired inside and connected to the GSM machine and 112 hundreds of sim cards. Some cards were blocked by the company while others were \$113\$ active, that some were scattered in the room while others were in the machine. 114 That at the time of the raid, the GSM machine was active. 115

That they questioned A1 and A2 and while at it, A3 called one of the accused who 116 refused to pick the call but one of his colleagues asked him to pick the call and ask 117 the caller to come which he did. That A3 came driving a red car which he parked 118 about 100 meters away and moved towards the room. 119

However, before he could reach the room, he realized there was a problem and 120 decided to run away. That he had sim cards in a polythene bag which he placed on 121 the wall of someone's fence and jumped over in attempt to disappear. That the SFC 122 officers pursued him and arrested him bringing him back with the sim cards which 123 were 50 in number. 124

On the sim cards in the room, he noted that they were coming from stolen phones 125 as they indicated that they had been used elsewhere. That the computer in the 126 room also had a software that showed which sim cards had been blocked. He noted 127 that they got to know that A1 and A2 operated the machine while A3 supplied the 128 sim cards. That on the fateful day, A3 delivered MTN sim cards. 129

4 $\mathcal{N}$

In Cross-examination, he stated that they found A1 and A2 in the room operating 131 the machine and their photos were taken while there. He further intimated that 132 the GSM machines were brought into the country by white people who then give 133 them to nationals to operate and intercept traffic and that usually, these nationals 134 don't know where the machines come from but only do as instructed. 135

On cross-examination by A3, he insisted that they had found A3 with sim cards and 136 he even led them to the fence where he had hidden them. He further confirmed 137 that he had spoken with A3 before his arrest. That the sim cards were got from 138 stolen phones which were all congregated at Salama road. He also stated that he 139 first blocked A3's sim card then unblocked it again to enable him continue with his 140 transactions. He emphasized that his job did not include searching the accused's 141 car but rather, it was to give intelligence information which eventually led to the 142 arrest of the accused persons. 143

PW2; The Deputy Assistant Inspector of Police attached to UCC told court that 144 around September 2019, he received a complaint from the CEO MTN Uganda 145 Limited which complaint had emanated from a meeting between the president of 146 Uganda and the various Telecom Companies wherein the President expressed 147 concern over MTN's avoidance of taxes with regards to international calls. 148 Accordingly, they deployed investigation tools and established that around 149 Masanafu-Lubya in Rubaga Division, there was an equipment unserialised which 150 had made about 25000 calls and those calls were not charged and they also 151 established that the sim cards used in the equipment were being reported in 152 different police stations as being stolen, robbed or obtained after committing other 153 crimes. 154

That using the coordinates identifying equipment around Masanafu, a team of 155 officers from MTN, UCC and officers from State House where the complaints were 156 originating moved to Masanafu and they identified a room that was closed. That 157 while they were debating as to who could be the person involved, someone whom 158 they later identified as A1/st Appellant emerged from the said room and when he 159 saw them, he attempted to close the door but they forced it open. When they 160 entered the room, they found another person whom they identified as Dennis (A2) 161 and the equipment they had been tracing to wit; a gateway which was identified 162

5

by MTN officials. The equipment was connected to a Lenovo laptop and other 163 external equipment to make it work.

A1 told them that they were receiving international phone calls and converting 164 them to local and also that he was employed by a one Jonathan who was not at the 165 166 scene and they did not trace for him.

That with the help of A1, they found several used sim cards most of which were for 167 168 MTN and a few of Airtel and Africel and while at it, A1's phone started ringing. They 169 allowed him to communicate to the caller and told him to bring more cards. A few 170 minutes later, A3 drove into the security ring around the premises and when he 171 noticed the presence of security personnel, he jumped out of the vehicle and ran 172 away leaving the vehicle rolling. That PW2 remained with A1 and A2 while the rest 173 of the team pursued A3 and arrested him bringing him back to the scene. That they 174 recovered from him sim cards and the phone he was using to communicate with 175 A1. 176

From the said room, they recovered a gateway machine, a laptop, used sim cards, 177 IP link (Internet Protocol Link) antenna, UPS, 2 phones, a flash, memory cards and 178 other items. That on searching A2 they recovered a match box with used sim cards 179 and a vehicle No. UAT 403Y red in color. All the items were taken to UCC for further 180 management by the investigating officer one Sgt Etrima Ignatius who unfortunately 181 died in November 2020 before the hearing of this case. This witness properly 182 identified all the recovered items before court including the two phones, except 183 the vehicle which he stated to have been returned to A3. He also tendered in court 184 a national ID in the names of A1 which was allegedly found in the house. 185

The accused persons did not object to tendering of the exhibits before court. 186 However they denied any knowledge of the same. 187

Whereas he submitted that he had taken photos of the accused persons while at 188 the scene and also recorded videos of them while they explained how they were 189 operating the machine, the same were not tendered in the lower court. 190

In cross-examination, he confirmed that he recovered the gateway machine from 191 the room at Lubya and that whatever he recovered, he submitted before court that 192 day. He also stated that he had arrested all the accused persons on 14th January 193 2020 and that A2 informed him that A1 had hired him to cook at the premises.

The case was re-opened for PW2 to tender in the search certificate which was 195 allegedly signed by the area LC1 chairman, PW2 and A1 but it was never tendered 196 in court. 197

DEFENCE CASE. 198

Kagulire Ibrahim A1/ 1st Appellant now who was 22 years of age gave sworn 199 evidence and basically, his defense was that; he was doing pottery to raise fees for 200 his studies and that on the fateful day, his brother Jonathan Sewava called his 201 mother on phone and asked for DW1 to go to his home in Masanafu as he had 202 raised for him tuition. That unfortunately, his brother was not at home and directed 203 him to wait on the verandah as he had no keys. He had with him a backpack which 204 contained his Techno phone, a National ID, ATM card and ear phones among other 205 personal items. At about 11 am however, 6 men arrived at the house and forced 206 the door open. That they started going around the entire house which was a single 207 room only separated with a curtain. That they asked questions he could not answer 208 and as a result they started beating him. PW2 emerged with certain papers from 209 behind the curtain which he forced him to sign. They asked him for his Landlord's 210 number but he did not know it. The whole time they were filming everything. That 211 shortly after A2 was brought to him and he looked drunk. He was asked if he knew 212 DW1 to which he denied stating that they did not know each other. They were then 213 taken into a super custom in which they found A3. That he was left at Old Kampala 214 police station and he doesn't know where A3 was taken. That later he was brought 215 to court and after remanded to prison where he was at the time of his testimony. 216

In cross-examination he stated that he was a Senior 4 leaver from Miranian High 217 School in Kigogwa and that Sewava Jonathan who is the actual owner of the room 218 which was seized is his elder brother and not his employer. 219

DW2, MUSAAZI DENNIS gave a sworn testimony wherein he denied all the charges 220 as false. His testimony was that he was a sick man still receiving medication from 221 Mulago hospital for head injuries he had sustained when he got involved in a motor 222 accident on 27th July 2019. That because his home was far away in Nakaseke and 223 his mother could not afford to transport him for each treatment, they opted that 224 he stays with his aunt one Nantayi Margaret a resident of Masanafu as he continues 225 with his medication from Mulago. That as part of his therapy, his aunt used to walk 226 him around the village every day to get some fresh air and also familiarize his brain 227

with the environment and when he was able to find his way around, she started 228 allowing him to take the walks alone. On the fateful day, he had taken a walk alone 229 when he heard someone crying, he went around the fence to respond to the call 230 and saw several people

gathered, he informed them that he was new in the place 231 and they pounced on him and started beating him. They then took him to a room 232 where he found A1 whom he did not know. A1 didn't know him either, they were 233 together taken to a vehicle where they found A3 and together they were all taken 234 to Jinja Road police station where he was left. 235

He stated that a few days later, he was approached by an official from UCC who 236 told all three of them that he was going to help them and asked them to accept all 237 the charges against them. He also informed them that if they denied the charges, 238 they would be charged with other offences including murder. When they got to 239 court and admitted the charges, they were instead sent to prison. 240

In cross-examination, he stated that he had proof that he was a student and also 242 his medical documents. That even at the time of his arrest and incarceration, he 243 continued to receive medication from Murchison Bay Hospital. He called one 244 witness DW3, his mother to corroborate his evidence. 245

DW3, NAJENGO JANE, told court that his son was a student at Semuto Fort Jesus 246 School when he got involved in a motor accident and went into a comma and spent 247 3 months in Mulago hospital. That DW2 was discharged but instructed to continue 248 reporting to the hospital for routine checkups and further treatments and since she 249 did not have money to facilitate the process she opted to leave the patient with his 250 aunt in Masanafu. She tendered in court a list of people and monies collected from 251 her village mates to help in the treatment of DW2, DW2's medical reports and 252 school reports and Identity cards. 253

After DW2's evidence court was prompted to grant him bail to enable him continue 254 with the trial while receiving the much needed medical attention from home and 255 he was later acquitted of all charges on grounds that he had proved that he was a 256 student and that he had gotten involved in an accident on 27th June 2019 which got 257 him hospitalized in Mulago Hospital, and that whereas the prosecution witnesses 258 stated that he was found in the room with A1, his participation in the facilitation of 259 the crime was not proved beyond reasonable doubt. 260

261 DW4 BINGI MAXIE, also gave sworn evidence and basically his case was that, he 262 was a business man selling clothes at Boston, Salama Road. And that on the fateful 263 day, he had a car he was selling which had on a sticker with his telephone number 264 on it. That on 13/01/2019, the day before his arrest, he had received a call from 265 someone who purportedly wanted to buy his vehicle and they agreed to meet the 266 following day. That the person guided him to where they were supposed to meet 267 and when he got there, 2 men arrested him, took everything out of his pockets and 268 put him in a super custom vehicle from where they beat him. That later 2 men were 269 added into the vehicle with him and driven to Wandegeya police where he was 270 detained incommunicado for several days. 271

That he was given documents to sign on promises that he was to be released only 272 to be taken to court with A1 and A2. That they were told to admit all their crimes if 273 they were to be released, however when they accepted the cases, they were 274 instead sentenced and sent to prison. 275

In cross-examination, he denied having any sim cards on him. He also denied 277 knowledge of his co accused, Jonah or any Ezra. 278

He emphasized that whatever documents he signed, he was not given an 279 opportunity to read them. 280

8. Resolution of the grounds. 281

I will resolve the grounds in their chronological order and combining some where 282 necessary starting with the first ground. 283

The learned trial Chief Magistrate erred in law and fact by admitting and relying 284 on the prosecution electronic evidence and exhibits that were obtained contrary 285 to the law. 286

The appellants' contention is that whereas the prosecution led evidence to prove 287 that they carried out a search and seizure of the premises where they allegedly 288 seized items which were used as evidence against the appellants, the said officers 289 did not seek authority from court to execute the search and seizure as provided 290 for under the law. 291

- That the evidence heavily relied on by the magistrate in convicting the appellants 292
- did not meet the provisions of Section 28 of the Computer Misuse, 2011. 293

For the respondents, it was argued that there were peculiar circumstances in the 295 case that could not permit the police officers concerned to first seek for a search 296 warrant otherwise the evidence would be destroyed and lost. That there existed 297 compelling circumstances to justify the search and seizure of the items without 298 warrant such as: 299

That there was implied consent when the first appellant explained to the i. 300 officers how they were using GSM machine and helped them to recover 301 the sim cards and showed them where they usually destroyed them. 302

ii. The evidence was in eminent danger of destruction She relied on the case 303 of United States Versus Goshkov. 2001 WL 1024026 where a warrantless

304 search was upheld because there was probable cause to believe that the 305 computer contained evidence of crime, where good reason existed to 306 fear that delay could lead to destruction of or loss of evidence. 307

iii. The search was also justifiable as incidental to lawful arrests and the 308 police was in hot pursuit of the suspects. 309

The law on obtaining electronic evidence is clearly laid out under **Section 28 of the** 310

Computer Misuse Act, Act 2 of 2011 where it is provided as follows: 311

- (1) "Where a Magistrate is satisfied by information given by a Police officer 312 that there are reasonable grounds for believing;— 313
 - (a) that an offence under this Act has been or is about to be 314 committed in any premises; and 315
 - (b) that evidence that such an offence has been or is about to be 316 committed is in those premises, 317
 - The Magistrate may issue a warrant authorizing a police officer to enter 318
 - and search the premises, using such reasonable force as is necessary. 319
- (2) An authorized officer may seize any computer system or take 320
 - any samples or copies of applications or data— 321
 - (a) that is concerned in or is on reasonable grounds believed to 322 be concerned in the commission or suspected commission 323 of an offence, whether within Uganda or elsewhere; 324 (b) That may afford evidence of the commission or suspected 325
 - commission of an offence, whether within Uganda or 326

\$\lambda\$

elsewhere; or

- (c) that is intended to be used or is on reasonable grounds believed 327
- 328 to be intended to be used in the commission of an offence.
- 329 (3) A computer system referred to in subsection (2) may be
- seized or samples or copies of applications or data may be taken, only 330 331
- by virtue of a search warrant. Emphasis mine. 332
- (4) The provisions of section 71 of the Magistrates Court's Act 333
- apply with the necessary modifications to the issue and execution of 334
- a search warrant referred to in subsection (3) 335

According to 28 (9); an "authorized officer"; means a police officer who has 336 obtained an authorizing warrant under subsection (1); and "premises" includes 337 land, buildings, movable structures, vehicles, vessels, aircraft and hover craft. 338 Emphasis mine." 339

- Section 71 of the Magistrates Court's Act, provides;" Every search warrant may be issued and executed on a Sunday, and shall be executed between the hours of sunrise and sunset; but the court may, by the warrant, in its discretion, authorize the police officer or other person to whom it is addressed to execute it at any hour".
- My reading of the law as stipulated under section 28 above and specifically subsection 3 which applies to computers requires for a search warrant before any search and seizure can be conducted. Even further, such a warrant can only be granted with the express permission of a magistrate with justifiable cause. Even section 71 referred to above requires for the express permission of a Magistrate before any searches can be conducted.
- From the evidence of PW1 and PW2, as summarized above, there is no evidence whatsoever that the team that executed the search had a search warrant to enter and seize any equipment or anything related to the case in issue.
- It could be true that the CEO of PW1 issued him with a directive but that did not mean that he flouts the law pertaining to conducting a search and seizure of any exhibits in form of equipment used in the commission of any offence under the Computer Misuse Act.

Nowhere in his testimony does he allude to a search warrant or the requisite authority to seize and search the room where he purportedly led the team under his CEO's instructions.

As regards to PW2 despite being a serving officer at the level of a Deputy Assistant Inspector of police, he also acted like a lay person. In his evidence, he stated in part

"Around September 2019, I received a complaint from the CEO MTN Uganda ltd. The complaint was arising from the meeting the CEOs of Telecom companies had with the president of Uganda... we started investigations. We deployed investigation tool. We established that in the one located around Masanafu-Lubya Rubaga Division there was an equipment unserialised which had made about 25,000 calls and that those calls were not charged. We further established that the sim cards used in the equipment were being reported in different police stations as being stolen, robbed or obtained after committing other crimes.

Using the coordinates identifying equipment around Masanafu, a team of officers from MTN, UCC and officers from State House where the complaint was originating moved to Masanafu following the coordinates. With the coordinates on record, we identified a room that was closed...."

The above information was enough to make him as a police officer to apply to court and convince the magistrate that it was necessary to procure a search warrant from court.

Clearly, there was no attempt by the witness to seek the necessary authorization 379 or apply to the Magistrate for a search warrant. 380

From his evidence, the investigations had started in 2019 and what was remaining 381 was to take action by entering the room where the equipment was to conduct a 382 search and seize any relevant exhibits and evidence. 383

It is absurd that it never occurred to any of the officers that there was need for 384 them to seek authorization under the law before proceeding to seize and search 385 under the Computer Misuse Act. 386

The learned Chief state attorney in an attempt to justify the conduct of the state 387 witnesses in this matter classified this case as one with circumstances that 388 warranted the officers to act without a warrant because the evidence they sought 389 would be destroyed or lost. She cited the High court case of Guster Nsubuga and 390

\$\mathcal{L}\$ 12

Another Vs Uganda HCT-00-AC-SC-0084-2012 as her authority which was 391

Clearly the trial Chief Magistrate who decided this case did not address her mind 392 to the court of Appeal decision that arose out of the High Court decision. 393

In GUSTER NSUBUGA AND ANOR VS UGANDA CRIM APPEAL NO.223 OF 2021 394 ARISING FROM HCT-00-AC-SC-084-2021 ARISING FROM SUP COURT CRIM APPEAL 395 NO.92 OF 2018.; the learned justices of the Court of Appeal while considering the 396 jurisprudence pertaining to search and seizure and most importantly section 28 (3) 397 398 of the Computer Misuse Act. 2011 made the following observations at page 27;

"The following highlights should be set out for purposes of analysis of 399 section 28 of the Computer Misuse Act. The first is that it is a magistrate 400 who is supposed to be satisfied by information given by a police officer 401 before issuing a warrant of search and seizure. The information expected 402 is to the effect that an offence under the Computer Misuse Act, is or is 403 about to be committed in the premises. Alternatively, that such an offence 404 has been or is about to be committed in the premises. It is upon the 405 magistrate to issue a warrant authorizing a police officer to enter and 406 search the premises, using reasonable force. Further, an authorized officer 407 who is armed with a search warrant, may seize and take any computer 408 system or take any samples or copies of applications or data on the grounds 409 indicated. Particularly section 28 (3) provides that the seizure of computers 410 or samples of copies of application or data may be taken only by virtue of 411 a search warrant. Further, section 71 of the MCA Cap 16 is supposed to be 412 413 applied with necessary modification"

414 They went on to hold at pages 44-45 that: 415

"In the premises, there is clearly no evidence that a search warrant was obtained from a magistrate. The items were obtained from a vehicle which 416 fits the definition of "premises" under section 28 (8) of the Computer 417 Misuse Act. ... The fact that the computer could have contained 418 incriminating evidence does not justify search without warrant. It was not 419 exigent or urgent once the items were in the custody of the state. The state 420 even had the time to send one computer to South Africa for forensic 421 analysis but did not seek leave of a magistrate. The conclusion that the 422 423

\$13\$

search of the computers was exigent in the circumstances was an erroneous conclusion of the learned trial judge. We find that the search of 424 the computers and hard disks which were in custody was an unlawful 425 search forbidden by Article 27 of the Constitution of the Republic of 426 Uganda. The search of the computers could not be justifiable in a free and 427 democratic society because it was not done in accordance with the Law 428 which allowed search and instances when it would be made. The arrest of 429 430 the appellants was lawful but clearly there was non-compliance with 431 section 28 of the Computer Misuse Act, the very law under which the 432 appellants were charged. It is section 28 of the Computer Misuse Act which 433 authorizes a magistrate upon being satisfied that offence was being or is 434 about to be committed only to issue a warrant authorizing a police officer 435 to enter and search premises which include a motor vehicle.

Secondly, the authorized officer may seize any computer system found in 437 such a vehicle or premises. In other words, the very law which authorizes 438 the seizure of the computers specifies how it is to be done. If the appellants 439 were about to escape, it was sufficient to arrest them and impound the 440 computers and obtain a search warrant so that the contents of the 441 computers can be established. The investigation had taken a long period of 442 time. We would find that the evidence extracted from the computers ought 443 to have been excluded for violation of section 28 of the Computer Misuse 444 Act as well as Article 27 of the Constitution of the Republic of Uganda. We 445 do not agree with the trial judge that compliance with section 28 of the 446 Computer Misuse Act, would make it difficult for the police to enforce the 447 law or to investigate crime. This is because even if the appellants were 448 arrested in the heat of the moment when committing the offence, there 449 was still sufficient time within 48 hours when they were arrested to obtain 450 the warrant of search so that the computers can be investigated. ... Breach 451 of the law rendered the evidence obtained in violation of it an illegality and 452 therefore the search of the computers was unlawful and forbidden by 453 Article 27 of the Constitution of the Republic of Uganda." Emphasis mine. 454 The above case sufficiently and elaborately discusses the contents and applicability 455 of section 28 of the Computer Misuse Act to cases prosecuted under the Act.

\$14\$

The facts in the Guster Nsubuga case supra are similar to facts in the instant case. 457 Where the trial Chief Magistrate chose to rely on the hearsay evidence of the 458 prosecution and police that they acted on the directives of HE the president and 459 the CEO MTN Uganda. 460

Conducting a search in any premises where seizure of the equipment would 461 automatically follow under the provisions of the Computer Misuse Act is not done 462 under the directive of anybody but a search warrant issued by court. 463

PW2 expressly stated that the investigations had started in September 2019 464 implying that they had up to January 2020, that is over 3 months to sufficiently 465 prepare and go through with all the requisite processes and procure a search 466 warrant from court, which they simply chose to flout. 467

From the evidence on record and the decision arrived at by the trial Chief 468 Magistrate, it is obvious that she did not address her mind to the provisions of the 469 law pertaining to conducting searches and seizures under the Computer Misuse 470 Act. She was not guided by precedent because this case did not fall under the 471 category where they had to conduct a search without warrant. 472

With the authority cited above, which clearly interpreted section 28(3) of the 473 Computer Misuse Act, 2011, the evidence before court was illegally obtained 474 rendering it inadmissible in law. 475

In the result, this court finds that the learned trial Chief Magistrate erred in law 476 and fact by admitting and relying on the prosecution electronic evidence and 477 exhibits that were obtained contrary to the law which renders the conviction 478 illegal. 479

The first ground is upheld. 480

Grounds 2, 3, 4 and 5 all refer to evaluation of evidence and I will resolve them 482 jointly. 483

Ideally resolution of the first ground disposes off this appeal. 484

However there are some very glaring irregularities on the part of the prosecution 486 and the trial Chief Magistrate in regard to her evaluation and analysis of the 487 evidence and application of the law to the facts that this court being a court of 488 record wishes to address. 489 $\sqrt{5}$

490 It is trite law that the duty of the first appellate court is to re-evaluate the evidence 491 on record and check the propriety of the decision if it is backed by the law and 492 evidence. 493

The prosecution must prove its case beyond reasonable doubt because the accused 495 has no duty to prove his innocence. Article 28(3) (a) of the Constitution of the 496 Republic of Uganda is very clear on this legal principle which is premised on the 497 common law principle of presumption of innocence until proven guilty or until one 498 pleads guilty. See the case of Woolmington versus DPP [1935] AC 462. 499

It is also a principle of our law that an accused person should be convicted only on the strength of the case as proved by the prosecution but not on the weakness of his defence. This was the holding in the case of *Install Epuku S/O Achietu versus R* 502 [1934] 1 EACA 166. 503

The standard of proof expected was stated in the case of *Miller versus Minister of Pensions* (1947) 2 ALL E. R 372 at page 373 by Lord Denning as follows: 505

- "That degree is well settled. It needs not reach certainty but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would prevail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility of his favor which can be dismissed with the sentence of cause, it is doubt but nothing short of that will suffice." 512
- The above legal principles guide court in the decision making process. 513

For the trial court to return a verdict of guilt, the prosecution evidence must prove all the essential elements of the offence. 515

It is not enough for the trial court to refer to the legal principles mentioned above 516

and later depart from them. The final decision made should reflect the application 517 of these principles. 518

- The trial Chief Magistrate referred to these principles but did not apply them in this case as it will be reflected herein. 520
- It should also be noted that much as the Computer Misuse Act, 2011, is now 12 years old, it is still regarded as a new law with growing jurisprudence. 522
- 523 Under the first count, the statement of offence was access with intent to commit 524 or facilitate the commission of further offence c/s 13 (1) (b) and 4 of the Computer 525 Misuse Act. The particulars of the offence were that Kagulire Ibrahim, Musaazi 526 Denis, Bingi Maxie and others still at large between the month of June 2019 and 527 January 2020 within Kampala District, knowingly and unlawfully caused the 528 computer device to wit MTN SIMCARDS to intercept the international calls to be 529 charged as local calls on the MTN Network.
- This court observed that, the learned trial Chief Magistrate while formulating 531 ingredients of the offence of access with intent to commit or facilitate the 532 commission of further offence c/s 13 (1) (b) and 4 of the Computer Misuse Act 533 stated them on page 4 of her judgement to be as follows: 534

- 1) There was interception of international calls. 535
- 2) International calls were charged as local calls, 536
- The accused participated. 537
- I must state clearly that this was erroneous and the beginning of her poor 538 evaluation of the evidence because it was based on wrong statement of the 539 ingredients of the offence. 540
- The ingredients of the offence Contrary to section 13 (1) (b) and 4 of the Computer 541 **Misuse Act** are the following; That there is: 542
- 1) Unauthorized access to computer materials. 543
- 2) Unauthorized access with intent to commit or facilitate commission of 544 further offences 545
- 3) Unauthorized acts with intent to impair, or with recklessness as to 546 impairing operation of Computer, or telecommunications network 547 operations and other related acts. 548
- 4) That the accused participated in the unauthorized access. 549
- 550

Unauthorized access occurs in many ways depending on facts of each case, but in 551 this case, it would require evidence showing that the accused persons accessed 552 or hacked into the MTN or any other telecommunications company networks 553 without authority with intent to commit the offence of intercepting international 554 calls for purposes of having them charged like local calls. 555

\$\sim\$ 17

What the learned Chief Magistrate put as ingredients was actually supposed to be 556 evidence to prove the above ingredients. For example, the prosecution was 557 supposed to adduce evidence proving that the accused intercepted international 558 calls by indicating the international calls that were intercepted, by number and 559 duration and where they originated from and how much was charged. 560

I read through the entire record of proceedings and did not find any such evidence 561 on record. 562

It is not enough to state that they intercepted international calls. This was the 563 unauthorized act that was to be proved by stating the calls that were intercepted. 564

Charging the international calls like the local calls is also a criminal act that would 565 necessitate evidence of how much was charged visa viz how much was to be 566 charged. 567

It was also important to establish the mens rea. What was the motive of this act? 568

If it is to defraud the company or evade tax, how much money was defrauded in 569

this computer misuse act and how much tax was evaded? 570

It is not enough to state that international calls were charged like local calls or were 571 intercepted. 572

How much were they charged and what calls were intercepted? 573

Without proof of the international calls and evidence of how much they were 574

charged, it remained an allegation and not a proved fact. 575

This kind of evidence needed a very technical person not a mere tracker of systems 577 or mobile phones sim cards. 578

The prosecution evidence had to prove all the four ingredients of this offence. 580

PW1 did not bring out the relevant evidence and PW2 was just part of the arresting 581

team which even conducted an illegal search warrant. 582

From the evidence of PW1, He was instructed to track people who were committing 583

the alleged electronic fraud and locate them. 584

He did not mention a single international call that was charged as a local call and 585 how they accessed the network and on which dates. His evidence was not 586 corroborated by any other evidence to prove that the global system for mobile 587 communication (GSM) he seized was used to intercept international calls. 588

On the second ingredient, of unauthorized access with intent to commit or facilitate 589 the commission of further offence, evidence had to be adduced proving the offence 590 591

that was committed. 592

In her judgment on page six first paragraph she held that; 593

"From the evidence of PW1, and PW2 the SGM was used to illegitimately 594 intercept international calls and made to be received as local calls with 595 local characteristics. This was well explained by PW1 in his evidence, the 596 presence of over 600 sim cards in the room explains the use of the machine, 597 I hence find that the first and second ingredients of count 1 were proved 598 beyond reasonable doubt". 599

As mentioned earlier she got the ingredients wrong as that was the evidence that 600 was to be adduced. The witnesses did not mention any single international call and 601 how much was charged. 602

If the offence that was committed was computer fraud that is the use of 603 computers, internet, internet devices, internet services, to defraud people or 604 organizations or telecommunications companies like in the instant case of 605 resources, then evidence should be adduced showing how much resources were 606 lost in the fraud and how the accused were benefitting from this fraud, 607

- The financial loss on international calls that have been localized can be computed 608 and proved. 609
- There was no such evidence that satisfied the trial Chief magistrate beyond 610 reasonable doubt that so much was lost in terms of taxes and so much was earned 611
- by the accused as a result of the fraud. 612

She was convinced with presence of the machines, a laptop, sim cards which in 613 my view would just raise suspicion that they could be involved if no further 614 evidence was adduced to corroborate PW1's evidence.

615 It is trite law that suspicion, however strong it may be can never be a basis of 616

- conviction. 617
- 618

Furthermore, whereas the witnesses solely based their allegations on the alleged 619 MTN sim cards found with the appellants, none of them attempted to list to court 620

any particular numbers or names belonging to the owners of these sim cards save 621

for casually stating that they had found so many sim cards some of which had been 622 reported as missing at some police stations.

"Sim card is defined as a smart card inside a mobile phone, carrying an 623 identification number unique to the owner, storing personal data and 624 preventing operation if removed. It is an integrated circuit intended to store 625 securely the international mobile subscribers on mobile telephone devices. 626

No single witness whose sim card was stolen came to testify and no evidence of 627 628 use of such sim cards in the fraud was adduced.

629 630

It is trite law that where the prosecution withholds evidence, the presumption is 631 that such material evidence would be detrimental to their case. 632

In regard to the 3rd ingredient, the prosecution needed to adduce direct or 634 circumstantial evidence on how the accused persons impaired the operations of 635 international calls in terms of billing and or taxation. 636

It was very important to get a technical person from either MTN or UCC the 637 controlling authority of all communications to testify with concrete evidence on 638 what the accused were really doing. 639

PW1 who was the key prosecution witness, stated at page 21 of the record that; 641

"We got to know that A1 and A2 operate the machine while A3 supplies 642 sim cards...." On the same page in cross-examination he stated that, "most 643 times white people come here with those machines. They give them to 644 people here to operate to intercept traffic. Usually the ones who use the 645 machines don't know where the machines come from. They are only 646

- instructed to insert cards and that is to intercept traffic." 647
- 648

He did not inform court where A3 gets his supply of Sim Cards and if they were 649 from MTN, or whether they were sold by MTN.

650 He did not mention a single white person who supplies the machines.

651 He did not even state how they got to know that A1 and A2 operate the machines.

652 This was mere speculation and suspicion. No wonder the second Accused was 653 acquitted. 654

\$d\$

655 "PW1 and PW2 testified that when they reached the room where the 656 exhibits where recovered, the room was locked A1 opened the door. That 657 upon seeing the witnesses A1 attempted to close the door but they forced 658 it open. That inside the room they also found A2. That A1 told them that 659 they were receiving international calls and converting them into local calls. 660 That A1 told them that he was employed by one Jonathan but whom they 661 not able to arrest. That A1 helped them to recover sim cards in the house 662 and he showed them a place where they were burning used sim cards." 663

The appellants denied all these allegations and it is my finding that no evidence of 664 intercepting any international call and converting it into a local call was adduced 665 before court. 666

In view of all the above, it is my finding that the learned Chief Magistrate did not 668 properly evaluate the evidence before convicting the accused persons. 669

Her finding of guilt is not backed by any evidence proving all the ingredients of all 670 offences beyond reasonable doubt. 671

I must say that charging the accused with the 2nd and 3rd counts was just gambling 673 on the part of the prosecution. Why would a prosecutor who is aware of his or her 674 facts resort to the offence of abating when he or she has facts on the case of 675 unauthorized access. 676

- Charging an accused with a main case together with a less cognate offence is assign 677 of weakness on the side of the prosecution case 678
- 679

In the result I uphold grounds 2, 3, 4 and 5 of the appeal and agree with the 680 appellants that the trial Chief Magistrate failed completely to evaluate the evidence 681 and convicted the accused on insufficient and uncorroborated evidence thereby 682 causing a miscarriage of justice. 683

Considering grounds 6 and 7 would not be of any consequence after resolving the 684 first 5 grounds. 685

In the result, the appeal is allowed, the conviction and sentence is hereby set aside. 687

It is directed that the accused persons should be released immediately from custody unless held over some other lawful charges.

Since they deny owning any of the seized items, no order is made as to their return. The state is free to appeal against this decision if it is not satisfied within the statutory time.

Dated at Kampala this 21st day of JULY 2023.

MARGARET MUTONYI, JHC

CRIMINAL DIVISION.

TO BE SERVED ON:

- 1) THE DPP C/O CAROLINE MARION ACIO.
- 2) THE APPELLANTS
- 3) THE CHIEF MAGISTRATE, BUGANDA ROAD H/W KAMASANYU GLADYS MUSENZE.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://ulii.org/akn/ug/judgment/ughccrd/2023/182/eng@2023-07-21>

CASE PAGE <https://chat.esheria.ai/case-law/uganda/kagulire-v-uganda-criminal-appeal-75-of-2022-2023-ughccrd-182-21-july-2023-and-others-unknown-topic-unknown-court-2023--6a3ea4d93b1caa91297e6350>

Prepared on 13 October 2026 · Esheria