

UGANDA / JUDGMENT

Uganda v Baitwa and Another (Criminal Session 1 of 2019) [2025] UGHCACD 12 (30 April 2025)

[2025] UGHACD 12

COURT

HC: Anti corruption Division (Uganda)

BEFORE

Gidudu, J

CASE / FILE NUMBER

Criminal Session 1 of 2019

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA ANTI CORRUPTION DIVISION HOLDEN AT NAKASERO CRIMINAL SESSION CASE NO. 1 OF 2019

UGANDA :::::::::::::::::::::::::::::::::: PROSECUTOR

vRs

1. OSCAR. B. BNTWA

2. GEOFFREY BIIHAMAISO :::::::::::::::::::::::::::::::::: ACCUSED

BEFORE GIDUDU, J**JUDGMENT:**

Baitwa and Bihamaiso herein after called A1 and A2 respectively are brothers. They are shareholders and directors of Three Ways Shipping Services Ltd hereinafter called the company. The company business was clearing and forwarding.

They were contracted by MTN (U) Ltd to provide forwarding and clearing services for its equipment sourced from overseas. In the course of business MTN (U) Ltd alleged that the company had been paid money based on false invoices supported by fake airway bills and false delivery notes. In other words, MTN(U) Ltd paid for services that it did not receive.

Two employees of MTN(U) Ltd and two from the company including A1 and A2 were arrested and charged with various offences of theft, obtaining money by fraud and conspiracy to defraud. When the trial started, one employee of MTN(U) Ltd, Naphtali Were, died. The other employee of MTN(U) Ltd, John Paul Basabose, opted to be guilty.

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under a plea bargain arrangement. He was convicted and returned substantial amounts in US Dollars to MTN(U) Ltd. The case proceeded against the two brothers and two of their employees.

During the trial, the DPP entered a **Nolle Prosequi** against two employees of the company, namely Farida Senkumba and Waiswa Kafuko. They were discharged.

On 20th September, 2021, an amended indictment was filed where A1 and A2 were jointly charged with **theft C/S 254(1) and 261** of the PCA, Cap 120 in count one. They are accused of stealing USD 3.800.000. the property of MTN(U) Ltd between 2009 and 2012.

In the alternative, they are charged with obtaining money by false pretence C/S 305 of the PCA, Cap 120. It is alleged that in the same period, the two with intent to defraud obtained USD 3.800.000. from MTN(U) Ltd purporting it was for clearing and forwarding services rendered.

In count two, the two are jointly charged with **conspiracy to defraud** C/S 309 of the PCA, Cap 120. They are accused of conspiring to steal USD 3.800.000. the property of MTN(U) Ltd.

The prosecution case is that two employees of \$MTN(U)\$ Ltd namely Naphtali Were-senior logistics officer and John Paul Basabose- \$20\$ accounts payables officer between 2009 and 2012 processed payment using 125 fake invoices purporting that the company had issued them to their employer for payment.

Were and Basabose mislead their bosses that the claims were genuine which caused the approval of payment to the company. These fake invoices used to be mixed with the genuine company invoices to avoid detection. Payments were made in batches periodically which made it difficult to detect fraud.

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A1 and A2 are faulted because they were the only signatories to the company accounts which was the destination of the stolen funds. As the only signatories, the prosecution case is that they were beneficial owners of the money which they must have withdrawn and given some to the said employees of MTN(U) Ltd in order to motivate them

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to continue forging invoices for about three years. The accused were put on their defence on charges of theft and conspiracy.

The accused denied the charges contending that they were not aware of any fraud against MTN(U) Ltd and only learnt of it when a complaint was raised about fictitious invoices being mixed with genuine invoices for payment to the company. It was their defence that upon learning of this complaint they engaged MTN(U) Ltd Management to reconcile accounts and resolve the issue but were frustrated.

It was their case that they even committed and paid USD 300.000. 10 to MTN(U) Ltd to show good faith in resolving the dispute but management of MTN (U) Ltd was bent on going to court. They even signed an MOU to reconcile accounts but MTN(U) Ltd walked away from the agreement by pressing for criminal charges.

Once the accused deny the charges, the prosecution has the burden of proving all the essential ingredients of the offences to the standard of beyond reasonable doubt. Proof beyond reasonable need not reach certainty but must carry a high degree of probability. It does not mean proof beyond the shadow of doubt but must be strong so as to leave only a remote possibility which can be dismissed as possible but not in the least probable. See **Woolmington Vrs DPP (1935) AC 462**; **Miller Vrs Minister of Pensions (1947) 2 AER 372**

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The prosecution is required to the following ingredients beyond reasonable doubt.

Count One. Theft C/S 237 and 244 of the PCA, Cap 128. The prosecution must prove the following ingredients beyond reasonable doubt:

- \$(i)\$ Fraudulent taking and without claim of right- *Asportation*.
- \$(ii)\$ Intent to permanently deprive the owner of the property.
- Participation of the accused. (iii)

Count Two: Conspiracy to defraud C/S 289 of the PCA, Cap 128. The prosecution is required to prove the following elements of the offence beyond reasonable doubt.

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- \$(i)\$ That two or more persons agree to defraud any person of property.
- \$(ii)\$ The agreement must be made by deceit or fraud
- (iii) There must be an intention to defraud
- \$(iv)\$ That it is the accused who conspired.

To defraud is to deprive a person of his/her property by dishonest means.

The prosecution was represented by \$M/S\$ Abigail Agaba and Gloria Inzikuru both Chief State Attorneys. Whilst the defence was represented by M/S Henry Kunya, Henry Kyalimpa and J. M Mwaya.

Count One. Theft.

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\$M/\$ Agaba Abigail (CSA) submitted that money amounting to USD 3.800.000. was processed on 125 fictitious invoices originated from the company and paid by MTN(U) Ltd. She referred to evidence of PW12, Zinabala Emmanuel and PW16, Blackburn Michael to support her submission.

She referred to the ruling of this court on 30th January 2024 at the stage of no case to answer where it was observed that USD 1.854.777. could be traced on the bank accounts of the company paid using 24 fictitious invoices. She contended that this money was transferred electronically from MTN(U) Ltd accounts to the accused's company accounts. She submitted this was asportation necessary to complete the crime of theft.

She submitted further, that asportation was accompanied with a fraudulent intent because the attachments to these invoices were false airway bills, false commercial invoices, false goods delivery notes etc. The stamp impressions on the documents were confirmed by PW7, Erisa Sebuwufu, a document examiner to be different from the genuine ones of MTN(U) Ltd and Huawei. This was evidence of fraud.

She contended that the company where the two accused were directors had no claim of right to the money because the invoices used to claim the money were already paid. They were being recycled

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fraudulently using fake airway bills and delivery notes to get additional money which was criminal.

On the issue of participation of the accused which was the main contest, Ms. Agaba submitted that the two were assisted by insiders in MTN(U) Ltd such as Naphtali Were a former logistics officer to do the paper work to raise false claims. Mr. Were Naphtali was proved to have signed and forwarded the false invoices for payment to the accused's company. Mr. J. P. Basabose of MTN(U) Ltd also helped to prepare supply payment forms to process the money to the accused's company accounts.

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Count Two. Conspiracy to defraud.

Ms. Ababa submitted that the role of the accused in this conspiracy was to provide the company accounts to be used to drain funds illegally from MTN(U) Ltd. If the accused had not offered the bank accounts on which to exit the money, she argued that the theft would not have been committed because those that processed the money in \$MTN(U)\$ Ltd were not signatories to the destination bank account.

She submitted that the doctrine of common intention was applicable to the accused contending that each participant played a given role to actualize the crime. The role of the two was to provide an account \$20\$ on which to deposit the stolen money. She dismissed the accused's defence that they were not aware of the money contending that the law in section 20 of the PCA, Cap 128 covers scenarios where different people play different, but complimentary roles to actualize the crime.

Ms. Agaba asked court to lift the veil of incorporation as was done in the case of **Uganda Vrs Jeff Lawrence Kiwanuka and 2 others, criminal case 2 of 2017** to find that the two directors are the brain and nerve center of the company that received the funds and are criminally liable as beneficial owners who had ultimate control over the company. See section 18 of the Companies Act, Cap 106 which provides that: -

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"*The High Court may, where a company or its directors are involved in*" acts including tax evasion, fraud or where, save for a single member company, the membership of a company falls below the statutory *minimum, lift the corporate veil".*

She referred to evidence of witnesses from the bank such as PW8, Akello Ann Mary, PW14, Nandutu Jacqueline and PW15, Mwesigye Rogers who testified that the two accused were the mandate holders of the accounts on which money from MTN(U) Ltd was deposited.

Ms. Agaba contended that the two were aware of the fraud as active participants because they never complained of receiving money \$10\$ which was not due to them. Further, that when MTN(U) Ltd complained, A2 met PW11, Masanso Charles of MTN(U) Ltd and offered to bribe him to clear this complaint. She argued that this is evidence that the accused were aware or had knowledge of the theft of the money and were beneficiaries.

In reply, M/S Henry Kunya and Henry Kyalimpa submitted that neither A1 nor A2 was implicated in the alleged fraud by the 18 witnesses called by the state.

They submitted that the bank statements relied on by the state vide **exhibits P98, P105 and P106** do not speak to each other. That it \$20\$ was not shown how money moved from MTN(U) Ltd bank account to Three Ways bank account. They submitted that there was no evidence that either USD 3.800.000. or USD 1.854.000. moved from \$MTN(U)\$ Ltd to the accused's company.

Further, that no evidence was adduced to show that the accused withdraw and spent the money paid from MTN(U) Ltd based on the disputed invoices.

Both counsel also contended that the money on the disputed invoices were labelled as "authorized" and also "pending authorization" which created doubt as to whether those fictitious invoices were paid or not.

The defence submitted that since the two companies had a service contract, any money paid was in respect of the services rendered and

that no money was paid to the private accounts of the accused persons in order to make them liable.

It was further submitted that on the basis of DW3's evidence, the amount paid on the 24 disputed invoices was USD 706.000. only.

Some submissions in relation to inconsistencies by PW2 were made but I did not find value in what the defence really wanted to say. No inconsistencies relevant to the case was made out to require court's attention.

Finally, on the issue of theft, the defence submitted that the prosecution evidence did connect any of the accused to the disputed 10 invoices. No evidence was adduced to show that the accused signed any of the disputed invoices or signed any documents that were attached to the disputed invoices. The defence contends that it follows that the accused were not culpable.

On the question of beneficial owner under company law, it was submitted that even if the accused were the directors of the company, there was another signatory to the account who could also be a beneficial owner as well as other persons like shareholders etc.

It was submitted that the accused did not have knowledge of fraud in this crime because the crime was an inside job by some workers \$20\$ of MTN(U) Ltd like Were Naphtali and Basabose. The defence asked court to find the accused not guilty of theft.

I have listened to both submissions and reviewed evidence adduced by both sides including tones of documentary exhibits relied. Theft is defined in section 237 OF THE PCA, Cap 128 as follows: -

- (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 30 stolen is deemed to do so fraudulently if he or she does so with any of the following intents—

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- (a) an intent permanently to deprive the general or special owner of the thing of it

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| \$(4)\$ \ldots \ldots \ldots \ldots \ldots \ldots \ldots \ldots |

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(6) A person shall not be deemed to take a thing unless he or she moves the thing or causes it to move.

(7) Without prejudice to the general effect of subsection (6), a person shall be taken to have moved money if that person moves or causes it to be moved from one account to another or otherwise out of the original account.

To steal one must **take** or **move** the item from one place to another. The slightest asportation with a **fraudulent intent** is enough.

Ms. Agaba submitted that the accused are culpable on the charge of theft under the doctrine of common intention. It was the prosecution case that the accused provided the bank account on which to "complete the chain of theft". The prosecution observed that the insider employees of MTN(U) Ltd would not have been motivated to steal the money if the accused did not provide the exit facility. The issue for determination is at what stage did the theft occur? Was

it on the \$MTN(U)\$ Ltd side or was it after the disputed funds had been credited on the accused's company accounts?

Under section 237(1)(6)(7) of the PCA, Cap 128, theft occurs when a person fraudulently takes or causes property capable of being stolen to move. If it is money as is the case here, theft occurs when a person causes it to move from **one account to another or otherwise** out of the original account.

It follows that money of MTN(U) Ltd could only be stolen from its bank account which is the original account. Theft is complete as soon as it is moved or caused to move out of the original account. It is not in dispute that money moved out of MTN(U) Ltd account in Stanbic

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Bank as per **exhibit P106** read together with **exhibit P101** which is the supplier payment instructions from MTN(U) Ltd referred to as the SUPAY. It means that what was deposited in the accused's company accounts was stolen money. The deposit was of stolen money.

Ms. Agaba for the State submitted that when money was deposited in the company accounts of the accused, that was asportation that "completed the chain of theft". That is, with respect, not correct. The law is that when money moves out of the original account with a fraudulent intent, the offence is committed. The one responsible for causing it to move is the thief.

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The abundant evidence on record through the testimony of PW1, Tushabirehamwe Edison, PW10, John Kamanyire, PW11, Charles Masanso, PW12, Emmanuel Zinabala is that the documentation was originated by Farida Senkungu (formally accused number 4 and former employee of the accused's company) and processed by Napahtali Were and John Basabose of MTN(U) Ltd.

PW1 testified that he signed the invoices for payment but was surprised later that the attachments were forgeries. It was his evidence that Were Naphtali was the responsible officer to verify documents such as invoices, delivery notes, airway bills etc. John Basabose was responsible for accounts payables and also the custodian of paid vouchers.

PW12 who investigated the matter internally before escalating it to the police testified that when he asked Were Naphtali about the fake attachments he(Were) turned hostile and even threatened to shoot him. He refused to cooperate and did not make a statement on the fraud. Sadly, Were Naphtali died during the trial. He died with his evidence.

It is clear, therefore, that money was stolen or caused to be moved from the accounts of \$MTN(U)\$ Ltd by its own employees (Were & Basabose) assisted by Farida Senkumba, an employee of the accused's company. The money was stolen from \$MTN(U)\$ Ltd bank accounts. What was credited on the accused's company accounts whether it was USD 3.800.000 or USD 1.854.000. or USD 706.000.

was already stolen money.

The prosecution submitted that A1 and A2 are culpable on the basis of common intention and circumstantial evidence. It was the view of the prosecution that A1 and A2 provided the bank account to exit the stolen funds. This was a support role critical to the theft and the two should be found guilty.

Further, it was submitted that evidence of PW11, Charles Masanso is that when the fraud was discovered, he was detailed to contact the \$10\$ directors of the company and establish the truth of the matter. He met A2 at Garden City Mall. A2 asked him to kill off the case for a fee of USD 150.000. PW11 did not commit but recorded the conversation and stored it allegedly for his "personal consumption". He did not tell the police about it or provide the recording device for investigations.

On the other hand, the accused denied being aware of the fraud until \$MTN(U)\$ Ltd complained. It was their evidence that when the fraud was brought to their attention, they engaged MTN(U) Ltd and even deposited USD 300.000. to the latter's account as an act of good faith and seriousness to settle any overpayment amicably. The accused requested for a reconciliation of the accounts of both sides but \$MTN(U)\$ Ltd was bent on taking criminal prosecution as a course of action.

Common intention if proved renders every participant a principal offender. The prosecution must prove that the accused were part of the group that had a common intention to prosecute an unlawful purpose in conjunction with one another and committed an offence which was a consequence of that of the common purpose. See section 20 of the PCA, Cap 128.

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The prosecution submitted that A1 and A2 were signatories to the destination account where stolen funds were deposited. It means that they were beneficiaries otherwise the MTN(U) Ltd employees would not be motivated to steal money over a period of three years if the accused were not cooperative. Prima facie, this a correct argument.

But the accused denied being part of the scheme to steal money from

\$MTN(U)\$ Ltd and stated that they learnt of the fraud when it was brought up by MTN(U) Ltd and took positive steps to settle it as a business dispute. They paid USD 300.000. to commit to solving the matter. The defence submitted that this was evidence of good faith and not conduct of a thief who has been discovered.

Evidence of PW11, Charles Masanso that he was offered a bribe is not credible to the extent that he claimed to have recorded the conversation but once his bosses escalated the matter to the police he chose to sit on such vital evidence. Was it not true or was the conversation incriminating to himself as well?

When the case had progressed, the prosecution filed a NOLLE PROSEQUI which discharged two employees of the accused's company. Namely Farida Senkumba and Waiswa Kafuko. It was my expectation that the two were going to be brought as prosecution witnesses to connect the accused to the scheme to steal money from MTN(U) Ltd. But the two were never called as witnesses yet the evidence from the prosecution is that the two were privy to the scheme. Without these two inside sources, it is mere speculation that the accused were in the scheme. There was no permission required from the accused before the rogues in \$MTN(U)\$ Ltd could process money to their company account. This is because there was a running contract on which MTN(U) Ltd was paying the company.

Without evidence of Naphtali Were, John Paul Basabose, Farida Senkumba and Waiswa Kafuko, it is speculative to say that the accused Chairman and CEO of the accused company respectively were active participants in the theft of money from MTN(U) Ltd merely because they had a bank account where they were signatories. Moreover, the signature mandates were such that any of the two could withdraw money from the account.

If Naphtali Were and Basabose could connive to steal money from MTN(U) Ltd without the knowledge of the CEO and the Board of MTN(U) Ltd, why should it be strange that Farida Senkumba and Waiswa Kafuko could steal money from the accused's company without the knowledge of A1 who is the chairman and A2 who is the CEO? The argument applies to both companies. Its employees could

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have fooled management and the boards and obtained for themselves money using the authorized signatures of the CEO of MTN(U) Ltd and the authorized signatures of the CEO of Three Ways Shipping Company.

The moment the prosecution opted to discharge Farida Senkumba and Waiswa Kafuko and decided not to use them as witnesses to pin their bosses, the case for the prosecution became a matter of guesswork. The defence evidence to the effect that they were only made aware of the fraud when they were contacted and took positive steps to settle by committing USD 300.000. and asked for an accounts reconciliation which MTN(U) Ltd refused raises reasonable doubt in the prosecution case.

There is a missing link to connect the accused to the crime in counts one and two. That link is evidence of Were, Basabose, Senkumba and Waiswa. These were vital witnesses to implicate not just the accused but any other signature mandates in either MTN(U) Ltd or Three Ways Shipping Company.

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Since I have found that theft occurred when money was caused to leave the MTN(U) Ltd bank account, the charges of theft against A1 and A2 without proof of common intention, cannot stand. A1 and A2 could have been charged with **Receiving stolen property** if Farida Senkumba and Waiswa Kafuko had implicated them had they been called as witnesses. These two employees would have demonstrated how excess money from the fictitious invoices were paid out and to who? They would have explained how the fraud went on for three years and who the beneficiaries were. Accomplice evidence is admissible provided it is credible and sometimes it could be the only evidence explain what happened.

The lady and gentleman assessors advised me to acquit the accused reasoning that the money was stolen by employees of MTN(U) Ltd assisted by employees of Three Ways Shipping Company. They wondered why the prosecution withdrew charges against Farida Senkumba and Waiswa Kafuko without calling them as witnesses to prove charges against A1 and A2. I agree with them that the case against the two accused cannot stand without evidence connecting them to the common intention or conspiracy to steal money from \$MTN(U)\$ Ltd.

As regards the charge of **Conspiracy to defraud** in count two, having found that there was no proof of common intention, without evidence from the active participants such as Were who died, Basabose who was convicted after a plea bargain, Senkumba and Waiswa who were discharged after a NOLLE PROSEQUE, it is difficult to imagine how the two accused would conspire between themselves to steal money from MTN(U) Ltd. Such a conspiracy would be mere fantasy.

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In conclusion, it is my finding that the evidence adduced proves that theft of money from MTN(U) Ltd occurred but was not stolen by A1 or A2. It was stolen by insiders in \$MTN(U)\$ Ltd with possible assistance from insiders in the accused's company.

Failure by the prosecution to adduce evidence of Senkumba and Kafuko to explain how requisitions were raised to exit money from the accused's company bank accounts to benefit the thieves in MTN(U) Ltd created a missing link that would have connected the accused to the crime.

The accused could have been charged with receiving stolen property if there was evidence to confirm that they had knowledge or reason to believe that the money credited on their company account had been stolen. There was no such evidence. Being signatories to the company account does not make them culpable because the mandate holders in MTN(U) Ltd were not faulted for signing off the payments.

In criminal cases there must be mens rea which is the guilty mind or 30 criminal intent to commit the crime. Mens rea is formed before the actus reus which is the guilty act or conduct. There was no evidence connecting A1 and A2 to a scheme that stole money from MTN(U) Ltd. Similarly, there was no evidence of a conspiracy by A1 and A2 to defraud MTN (U) Ltd of its money.

The fictitious invoices used in the scheme was the work of Naphtali Were, JP Basabose, Farida Senkumba and Waiswa Kafuko. There was no proof beyond reasonable doubt that the accused were active

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participants in the scheme. The fact that the accused were signatories to an account where stolen money was deposited does not of itself make them thieves.

The accused were able to account for their actions in their defence and their conduct did not portray them as criminally liable. The CEO and board of MTN(U) Ltd and the CEO and board of Three Ways Shipping Company Ltd appear to have been defrauded by their respective employees and could have sorted this matter as a business dispute. Evidence adduced incriminates employees of MTN(U) Ltd and Three Ways Shipping Company but not the accused in the dock.

The result is that the prosecution has not proved beyond reasonable doubt that A1 and A2 stole money from MTN(U) Ltd. Similarly, the charge of Conspiracy to defraud in count two has not been proved beyond reasonable doubt.

A1 and A2 are acquitted on the charges of theft in count one and also acquitted on the charges of conspiracy to defraud in count two.

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Gidudu Lawrence JUDGE 30th April, 2025

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ORDER

It is ordered that any security deposit to secure bail for A1 and A2 be refunded.

Gidudu Lawrence JUDGE 30th April, 2025

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