THE REPUBLIC OF UGANDA

IN THE ANTI-CORRUPTION DIVISION OF THE HIGH COURT AT KOLOLO

CRIMINAL APPEAL NO 0010 OF 2020

(Arising out of Anti-Corruption Division Criminal Case No 0058 of 2019)

JIMMY PATTY ODERA :: **APPELLANT**

VERSUS

UGANDA :: **RESPONDENT**

BEFORE: Hon. Justice Jane Okuo Kajuga

JUDGEMENT

This is an appeal from the decision of His Worship Nabende Moses Mushebebe (Magistrate Grade 1) sitting at the Anti-Corruption Division delivered on 11th August 2020 in which the appellant was convicted on three counts of Causing Financial loss c/s 20 of the Anti-Corruption Act, three counts of Giving False Certificates c/s 25 of the Anti-Corruption Act and three counts of Abuse of Office contrary to section 11 of the Anti-Corruption Act.

He was sentenced to a fine of Uganda Shillings 2,800,000 on each count for the offence of causing financial loss or in default to suffer imprisonment of 6 years, a fine of Ushs 1,000,000 on each count of giving false certificates or imprisonment of 8 months in default. He was sentenced to a fine of Ushs 1,500,0000 on each count of abuse of office or imprisonment of 3 years in default.

He was also ordered to compensate the complainant in the sum of **UGX 50,075,545** which was the total loss occasioned by him.

The facts of the case:

Amuru District Local Government entered into a memorandum of understanding with the Royal Danish Embassy (RDE) on 15th March 2010 for the making and renovation of community access roads within Amuru District. The RDE was to provide the funding whereas Amuru District Local Government was to provide coordination, technical supervision and monitoring of the program activities within the District. Contracts were

awarded to selected companies to execute the road works, specifically the compaction of the roads. Payment to the contractors was to be effected only after presentation of completion certificates by Amuru District Local Government.

The completion certificates for the contractors were signed by Jimmy Patty Odera, the Superintendent of works, Amuru District Local Government. Payment was then effected to the contractors by the donors. Shortly thereafter, complaints were received that no compaction had actually been done.

COWE Engineering Firm was hired to investigate the allegation. They found that only two out of eight roads in Amuru had been compacted. The matter was reported to the Inspectorate of Government whose investigations revealed that by issuing false certificates the appellant caused a financial loss totaling to **Ushs 50,075,545** to Amuru District Local Government, and acted in abuse of his office. The Appellant was accordingly charged and successfully prosecuted.

The appellant being dissatisfied with the conviction filed this appeal on the following grounds:

1. The trial magistrate erred in law and fact when he failed to properly and holistically consider, evaluate and analyze evidence before him thus arriving at a wrong conclusion.

2. The trial Magistrate erred in law and fact when he concluded that the prosecution proved beyond reasonable that the appellant caused financial loss, issued false certificates and abused his office.

3. The learned trial magistrate erred in law and fact when he relied on extraneous matters and hearsay evidence to found the convictions.

4. The trial Magistrate erred in law and fact when he misdirected himself by not affording the appellant the opportunity to reply to submissions at the stage of establishing a prima facie case and make reply to final submissions.

5. The trial magistrate erred in law and fact when he wrongly convicted the appellant for the offences of causing financial loss, issuing false certificates and abuse of office without evidence of the requisite mens rea.

6. The learned trial Magistrate erred in law and fact when he failed to evaluate the evidence and wrongly concluded that the appellant was responsible for the inspection of RALNUC project road works.

7. The learned trial Magistrate erred in law and fact when he ordered the appellant to compensate the complainant given the circumstances of the case occasioning a miscarriage of justice.

Representation:

The appellant was represented by **Enoch Onzoma, Jordan Lawoko and Joseph Ogwang Okwanga** of Altus Advocates while **Daisy Acio** of Inspectorate of Government appeared for the Respondent. Both made oral submissions

Counsel for the appellant argued grounds 1, 2 and 5 together and grounds 2 and 4 alone. The Respondent on the other hand chose to handle each ground on its own.

Resolution of the Appeal

The duty of a first appellate court is to carefully and exhaustively reevaluate the evidence as a whole and come to its own decision on the facts, being mindful of the judgement appealed from and the fact that it did not have the opportunity to see the witnesses testify. **Kifamunte Henry V Uganda SCCA No, 10 of 1997 and Bogere Moses and Anor V Uganda, Supreme Court Criminal Appeal No. 1 of 1997**). Mindful of the same, I proceed to subject the evidence to fresh and exhaustive scrutiny without ignoring the judgement of the trial court.

The burden to prove the charge against an accused person lies on the prosecution. **Woolmington V DPP [1935] AC 462.** This stems from the presumption of innocence principle enshrined in **Article 28 (3) (a) of Uganda's Constitution**. Any conviction must be based on the strength of the prosecution case and not the weaknesses of the defense case **(Ssekitoleko V Uganda [1967] EA 531).** The law is that the accused does not bear any burden to prove his innocence except in a few statutory exceptions. I am further mindful that the standard of proof to secure a conviction is well settled as proof beyond reasonable doubt. This standard was elaborated in **Miller V Minister of Pensions [1947]2 All ER 372** as being satisfied once all the evidence suggesting the innocence of the accused, at its best creates a mere fanciful possibility but not any probability that the accused is innocent.

In the consideration of this appeal, the testimonies of the witnesses and the tendered exhibits will be reevaluated in light of the grounds aforementioned, while considering

whether the prosecution met the burden of proof to the requisite standard, and whether therefore, the conviction of the appellant by the trial court was proper

Grounds 1,2,5 and 6 will be considered together as they are related, while grounds 3,4 and 7 will be addressed separately.

Grounds 1,2,5 and 6

These four grounds allege failure of the trial court to evaluate the evidence hence convicting the appellant on evidence that did not meet the requisite standard of proof. They contend that there was no proof that the appellant was responsible for the inspection of RALNUC project road works.

I wish to first comment on the manner in which the grounds of appeal are formulated.

The Criminal Procedure Code Act, Cap 116, Section 28(4) thereof provides as follows;

'Where the Appellant is represented by an advocate or the appeal is preferred by the Director of Public Prosecutions, the grounds of appeal shall include particulars of the matters of law or of fact in regard to which the court appealed from is alleged to have erred' (emphasis mine).

Grounds 1 and 2 are formulated in a general manner that falls short of specifying the matters of law or fact which the appellant contends the trial court erred in.

Be that as it may, all the offenses with which the appellant was charged revolve around the question of whether he issued false certification reports as contained in Counts II, V and VIII of the Charge sheet. These counts relate to certificates of completion allegedly signed by the appellant on 7th June 2011 in respect of **Brottos Brothers**, 20th of October 2011 in respect of **Yelemot** and 29th September 2011 for **Humble suppliers** respectively. All showed that the contractors had completed compaction works on the roads contracted to them, vide their respective signed contracts documents.

I will consider the specific submissions of the parties then reevaluate the offence of Giving false certificate first as all the other offences stem from that.

Alleged wrongful admission of and reliance on two prosecution exhibits by the trial court

Counsel for the appellant contends that the admission of **Prosecution Exhibit 13 c** and **Prosecution Exhibit 16** was wrong in law, yet the magistrate heavily relied on this evidence to convict the accused on this charge. Exhibit 13 c is the statement of the appellant recorded by the IGGs office. It was argued that the investigators did not testify about the statement and that it was tendered in evidence by the Hand writing expert to prove the issue of signature and not the content of the document. The truthfulness of the statement was never proved; neither was the content of the document testified upon. Exhibit 16 is the statement of **Oguttu Joseph**, which was tendered in evidence by the investigating officer. The witness was never called to testify.

Counsel for the respondent's reply to this submission was that both statements were properly admitted and relied upon. She contended that the Hand Writing Expert had testified that Exhibit 13 c bore the signature of the appellant hence confirming that he authored the statement. Further that he was the one who signed the certificates of completion in issue. In respect of Exhibit 16, the statement was admissible under section 30 (c) of the Evidence Act. Lastly, that the appellant did not object to the admission of these documents during the trial and is therefore estopped from raising issues related to admissibility on appeal.

Analysis in respect of Prosecution Exhibit 13 c

Exhibit 13 c is the plain statement of the appellant recorded on the 28th of November 2013. The record of proceedings shows that it was tendered in court during the testimony of **PW5, Sylvia Chelangat**, the handwriting expert. She testified that she received many documents including the original plain statement in issue, for comparison with questioned documents admitted as Exhibit 13 a. These included the Certificates of Completion for Humble suppliers, Brottos Ltd and, Yelemot Auto parts.

She testified that she found similarities between the signatures of the appellant on the questioned documents and the samples submitted. In other words, both the certificates of completion and the plain statement were written by the appellant. When the prosecution made the application to tender all the documents, the defense did not object. The documents were then admitted.

I have studied the record of proceedings and noted that **PW 12, Geoffrey Matovu** (Regional Inspectorate Officer of Gulu) does not testify about how the statement was recorded but states that the appellant informed him that he was pressured by Otim Alex to prepare the certificate of completion. He confirmed that he had not inspected the

roads at the time and so did not know whether they had been compacted or not. A1 did not cross examine the witness regarding this information. **PW 13, Frederick Okech** (IG Officer) also does not mention how the statement was recorded. He was not cross examined regarding this either. The two witnesses were the investigating Officers.

The admissibility of a document by the court as an exhibit is dependent on several factors. These include competence of the witness to tender the same, relevance of the evidence and its authenticity. In all cases, the party wishing to rely on a document must lay a foundation or basis for its admissibility. The party obtains context from the witness and establishes the nexus between the witness and the exhibit, introduces the exhibit, and then testifies about it. The authenticity of the document or exhibit is also established through the witness.

In the instant case, PW 5 cannot vouch for the authenticity of the documents she received for examination. She can only testify and authenticate the hand writing report that she herself made on the basis of what she received from the investigating officers. The statement of the appellant should not have been received as exhibits through this witness as she was not competent to tender them. They should have been placed on record as identified, until the competent witnesses testified about them. I am in agreement with counsel for the appellant that the plain statement of the appellant was wrongly admitted.

It is clear from the judgement that the trial Magistrate referred to/relied on this evidence. At page 18 of his judgement he observed as follows "I *found a sharp contradiction in A1's testimony with his own statement made to the investigating officer PEX 13C. At one point he stated that he did not visit the roads but signed certificates on pressure from Mr. Otim Alex and on the other side he said he visited roads and was satisfied that works were completed. These contradictions create doubt whether the roads in issue were done and visited by the accused and team*"

The testimony of the investigators establish that the appellant was being treated as a suspect as he had accepted issuing a certificates without inspecting the roads in issue. The Evidence Act is clear in regard to the evidence recorded from persons accused of committing crimes. Where there is a confession, as is indeed contained in Exhibit P E 13C, there should have been a charge and caution statement taken from the accused. This was not done, in contravention of Section 23 of the Evidence Act. I am mindful that the two officers, PW 12 and 13 were Inspectorate investigators, but they are not exempt from the provisions of Section 23 in cases where the accused person is confessing to a crime.

I therefore uphold the appellant's submission that the court's reliance on the plain statement of the appellant confessing to the crime was wrong. The fact that the defense lawyers did not object to it is irrelevant.

Analysis in respect of Prosecution Exhibit P 16

This is the statement of Oguttu Joseph, a businessman (Managing Director of Yelemot Auto Parts) in which he states that he never actually bid for the contract for the compaction but that it was Otim Alex who asked to use his company. He states that when money was paid to his account in respect of the said contract, he withdrew it and paid it to Otim Alex.

It was submitted for the respondent that Section 30 (c) of the Evidence Act provides for circumstances where the statement of a witness can be tendered in his absence. That the statement in issue had content which could have exposed the authors to criminal prosecution and was against the author's pecuniary interest because it showed they had received money for no work done. Since the witness could not be found and evidence was laid before the court to that effect, the statement was properly admitted in law.

The record of proceedings shows that on 15th January 2019, the prosecution informed the Court that they had summoned witnesses who had failed to appear. One of these witnesses was Oguttu Joseph. The court was further informed that they had switched off their phones and could not be reached. An application for warrants of arrest was made, and granted by the court.

The next day, the 16th of January 2019, the prosecution led the evidence of **PW 13 Frederick Okech.** He testified that he had interviewed Oguttu Joseph and had established from him that his company was only "borrowed" for the job but he wasn't involved. He then identified the statement upon which the prosecutor made an application to tender the same as an exhibit. The defense objected to the admission of the document and the state replied as follows:

"**State**: *The witness before court was the investigating officer. His testimony is that he witnessed the writing of the statement. The statement was self-recorded by Oguttu.*

Court: *The witness has been able to identify his signature as a person who witnessed the contents of the statement of Oguttu Joseph. A 5 admitted as P EX 16"*

It is not in question that Oguttu was never called as a witness. The explanation for this is in the verbal statement of the prosecutor to the court during trial that the witness had been served and not turned up in court. No evidence to prove that witness summons

had been extracted and or that the witness had been summoned was tendered to court. Even when the application for the warrant of arrest was granted by court, the prosecutor did not revert to court with an explanation on whether he or she had actually extracted the warrant of arrest, and whether there were any attempts to execute this warrant or not. Considering that the order on warrants of arrest was granted on 15th January 2019, and the very next day the application to tender the statement was made, it is clear that no attempts were made to execute the same.

Section 30 (c) of the Evidence Act reads as follows:

"statements written or verbal of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appear to the court unreasonable (emphasis mine), are themselves relevant facts in the following cases:

c) when the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or her to a criminal prosecution or to a suit for damages"

The Court of Appeal in the case of **Seru Bernard versus Uganda**, Criminal Appeal No 277/2009 dealt with the issue of witness statements admitted without testimony of the witness under section 30 of the Evidence Act. The position of the law was established as follows:

1. The right to a fair hearing is non derogable under Article 44 of the Constitution and it entails examination of witnesses and their cross examination, and that it is through the latter that the veracity and credibility of a witness is tested.

2. That all oral evidence must be direct, under section 59 of the Evidence Act.

3. The procedure under Section 30 of the Evidence act must be complied with if the statement is to be admitted. This means that there should be evidence to show that the witness could not be found or that his attendance could not be procured without any amount of delay.

The burden to prove the application of section 30 lay on the prosecution in this case. The court quoted with approval its decision in **Muzamin Kisiango versus Sam Birabwa (Ccivil Appeal No 1/1980** where it held that *"it is the duty of the party seeking to tender the witness statement to satisfy the court by evidence that the witness cannot be found or his attendance cannot be produced without an amount of delay or expense*

which in the circumstances of the case appear to court to be reasonable. In this case no such evidence was led. The court had no material upon which it could exercise its discretion to receive the report. Without such evidence the medical report was wrongly admitted. It should be excluded. Section 30 (b) of the Act should be used sparingly and only in the circumstances falling within the purview of that section".

It is clear that for the statement of Oguttu Joseph to have been admitted, it should have fallen within the purview of the section 30 of Evidence Act. It may be true that the contents of his statement may have exposed him to criminal prosecution, however the law envisages that he should turn up as a witness, so that the veracity of his statement can be tested through cross examination, and where he could not appear, evidence laid before the court as to why he cannot.

In this case, no evidence was led before the court. The statement was admitted not because it fell under the exception cited, but rather because the investigating officer had identified his signature on the same statement. This was the wrong procedure. In fact, the application of Section 30 of the Evidence Act was not even advanced by the prosecutor. In my view, this was an unwarranted infringement of the appellants right to a fair trial.

I am in agreement with the appellant that Prosecution Exhibit 16 was wrongly admitted and reject the respondent's argument that Section 30 of the Evidence Act can save it. The statement should have been excluded.

It is noted that the evidence of Oguttu is referred to at page 6 of the judgement, and was relied upon by the trial magistrate when resolving the question of whether financial loss was caused at page 9 of the judgement. At page 17 the magistrate relied on it to resolve the question of whether false certificates had been issued. This was erroneous.

That the evidence of two investigators should not be relied upon to corroborate each other

At several points in the judgement, the trial magistrate found that the evidence of PW12 and PW 13 who were the investigators from the Inspectorate of Government, corroborated each other.

It is the contention of counsel for the appellant that the trial court erred in this, as the two witnesses shared the same objective and had the same terms of reference. On the other hand, counsel for the respondent argued that the court relied on other pieces of evidence to convict and not solely on the testimony of the two witnesses, hence no prejudice was suffered by the appellant.

I have carefully considered the evidence of the two witnesses. PW 12 was the head of the investigation team and PW 13 was part of the team. It is noted that their testimonies are not exactly the same, each focussed on different aspects of the investigation. It is further noted that their evidence was not discredited during cross examination. Under the provisions of the Evidence Act, the testimony of a witness can be impeached during trial through cross examination. **Section 145** provides that a witness during cross examination, may be asked any questions which tend to test his or her veracity, to shake his or her credit by injuring his or her character although the answer to those questions might tend directly or indirectly to incriminate him or her.

The question of whether any weight should be attached to the evidence of a particular witness rests on whether the witness was credible and gave evidence which was truthful or accurate regarding what the witness saw or did, or knows in respect of the issue in question. The court can rely on such evidence when it withstands cross examination.

It is therefore not enough to argue that the evidence of two investigators cannot corroborate each other. In the circumstances of this case, they can. The trial court found the evidence of PW12 and 13 reliable and it cannot be faulted on that. It is noted that the appellant has not established any grounds upon which the evidence of the two should not be relied upon other than the fact that they were both investigators with the same terms of reference. There is no proof that though they had the same TORs, they were not objective and professional about the investigation. This contention by the appellant therefore fails.

Whether there was sufficient evidence to support charges of Giving false certificate

Section 25 of the Anti-Corruption Act, 2009 provides as follows;
A person who, being authorized or required by law to give a certificate touching a matter that may affect or prejudice the rights of any person, gives a certificate which is, to his or her knowledge, false in any material particular, commits an offence and is liable on conviction to a term of imprisonment not exceeding three years or a fine not exceeding seventy-two currency points or both.

The ingredients of the above offence are as follows;

1. That the accused person is authorized or required by law to give a certificate touching a matter
2. That the certificate touches a matter that may affect or prejudice the rights of

any person

3. That the person issues the certificate which to his or her knowledge, is false in any material particular

The full submissions of both parties are on court record so I will not endeavor to reproduce them in detail. Rather, I will deal with each of the ingredients

The appellant's lawyers fault the trial magistrate for holding that there was sufficient evidence tendered by the prosecution to prove the 2nd and 3rd ingredients of the offense. They advance a number of reasons. These are:

1. That no scientific test was carried out on the roads in issue to determine whether compaction was done or not.

2. The witnesses who claimed to be experts and carried out the analysis on the roads did not furnish the court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the court to form its own independent judgement

3. That the scientific process set out by the Ministry of Works General Specifications for road and bridge works of March 2014 was not applied. It should be noted that these guidelines were never produced in court or alluded to by the defence during the trial, neither were the experts cross-examined regarding their application.

4. The witnesses contradicted themselves

5. That the evidence was circumstantial in nature and did not meet the threshold required for the court to rely on it

6. That the fact that there was reliance on labour based contractors affected the work done

7. That the prosecution did not establish mens rea on the part of the appellant.

In reply, the respondents lawyer stated that when the appellant signed the completion certificates he knew or should have known that appending his signature would imply works had been satisfactorily carried out and payment should be made. The consequences of this action are therefore his responsibility. That the evidence of PW 1,

PW 3, PW 4, PW 7, PW 12, PW 13 among others was sufficient for the court to convict the accused. That the labour based contractors/communities were meant to open up roads and the second part of the work is the one that involved compaction. The work of the contractors could not be affected because the roads were opened up, and only compaction was not done. That the engineering audit conducted by COWE was sufficient to prove that compaction was not done. That the vagaries of weather were taken into consideration in the report, and so was the passage of time from the time of the contract to the time of the inspection and that these didn't affect the outcome of the engineering audit

Analysis of court

The evidence of the prosecution shows that three companies were contracted by the RALNUC Public Works Unit to carry out compaction on community access roads within Amuru District. The appellant was employed at the time as the Superintendent of Works in Amuru District.

According to Exhibit P E 3, Brottos (U) Ltd was contracted on 4/5/2011 to compact 36 Kms of community access roads. These were Olwal-Gira road (9 Kms), Muruli-Gunya road (12 Kms), Parabongo-Guru road (11 Kms) and Karutu-Pupwonya road (4 Kms). This was at a cost of Ushs 44,975,000/- and the work was to be done within one month, from 9th May to 9th June 2011.

As per Exhibit PE 1, Humble Contractors was contracted on 8th September 2011 to compact Corner Palutoko-Parabongo road (6 Kms) and Parabongo – Atiabar (6Kms) at a price of Ushs 15,600,000/=. The work was to take one month from 15th of September to 15th of October 2011.

Yelemot Contractors was contracted on 8th September 2011 to compact Mwa-Olungu road (7 Kms) and Karutu-Kibogi road (3 Kms) at a price of Ushs 12,125,000 within the one-month duration of 15th September to 15th October 2011

The invitation for bids showed that the construction of the community access roads, related bottlenecks were to follow established district standards like compaction of road formation. The Bills of Quantities provided they were to *"compact already formed moist road bed of 3.4 metres wide with a pedestrian roller with a minimum of 6 passes unless no more roller imprint on the surface can be recognised"*.

Did the appellant issue the certificates?

I have carefully considered the completion certificates which were retrieved by the investigators as confirmation that the three contractors had completed the work according to the specifications. I have also considered the evidence of **PW1, Niels Kundsen** who testified as follows:

"The District Local Government would approve all the activities and participate in the tender where the process was used and try to supervise the work to ensure they were constructed according to the specifications. It was the District Engineering Department responsible and many of the renovations and constructions were inspected by the road inspector, Mr. Jimmy Odera (A1) from Amuru and his counterpart in Nwoya was Robert Ojok"

This evidence was not controverted in cross examination.

It was corroborated by PW 5 who testified that the completion certificates were signed by Odera Jimmy, and the evidence of PW 12 and PW 13 which was also not controverted. All three bear the signature of the appellant.

During his defense, the appellant himself stated that as superintendent of works, it was his duty to carry out supervision of building works/projects in the District, and supervision of road works. He stated as follows: *"I was able to see certificates they were issued by Ralnuc public works Unit. I am not the one who issued them. The completion certificates were generated by Alex Otim, the senior public works officer"*

While under cross examination, he stated as follows, *"Since there was a technical officer to represent the District, it was agreed that RALNUC would prepare the payment certificates and stage completion reports. The documents after being prepared would be brought to the District to append signatures. They were presented to me for signing. My signature was required for the payment to be done"*

By this evidence he agrees that he signed the certificates.

Whether the certificate touched a matter that may prejudice the rights of any party?

Prejudice is defined **in Black's Law Dictionary, 8th Edition** as damage or detriment to one's legal rights or claims. I am mindful of the use of the term "may" in the provision creating the offense. The burden on the prosecution is not to prove that any party was in fact prejudiced by the signing of the certificate. It is sufficient if the certificate relates to a matter that may affect or prejudice the rights of any party. To determine this issue, the facts of each particular case are relevant.

In this case a certificate of completion was meant to certify that work had been done. Evidence was led to the effect that the payment of the contractors was dependent upon the signing of the report confirming that work had been done. The same signing would be proof that the community has received the roads in the state that was required under the contracts. It goes without saying that the issuance of such certificate touched a matter of whether roads had been contracted to the right standard or not, and such certification stood to affect the right of many parties.

I note that the appellant did not make submissions to show how this ingredient was not proved. I am satisfied that the trial Court properly analyzed the evidence and arrived at the right conclusion in respect to the second ingredient of the offense.

This therefore leads me to the third question of **whether the appellant had knowledge that the certificate was false in any material particular.** In order to establish this, we have to first consider whether there was compaction.

The evidence of PW1 was to the effect that the Royal Danish Embassy hired an engineering company COWI to investigate reports that compaction on the community access roads in Amuru had not been done, even though completion certificates had been signed and the contractors had been paid. The report of COWI was tendered in court as **Prosecution Exhibit 29** and the same is dated November 2011. From this report, Muruli Gunya Road was found to have been compacted and was firm. The surface was even with no tyre marks. Karutu- Pupwonya road was also compacted. All the other roads in Amuru District were found not to have been compacted.

At paragraph 4.1 in the report, the parameters used to guide the assessment of whether the roads were compacted or not were the following:

1. That a compacted road has firm even surface on which new tyre marks do not show (Mwa-Olungu, Karutu-Kibogi, Corner Palutoko-Parabongo were found on inspection to bear new tyre marks)
2. That road surfaces compacted only by traffic can be firm, not showing new tyre marks, but is likely to be uneven due to different tyre positions and vehicle weights during consolidation (Olwal-Gira road, Parabongo-Guru were found to fall in this category)
3. That a road surface which has settled with time and weather is likely to be uneven and inconsistent in firmness and level (Parabongo-Atiabar was case in point)
4. That uncompacted and unused roads generally show new tyre marks and may still be loose. (Mwa-Olungu, Karutu-Kibogi)

The witnesses who visited the roads and made the COWI report include **PW 3 Olwal James** who testified that he was engaged by COWI and he went to the District and worked with other officers he found on the ground. He also interfaced with the communities who lived along the roads which he was to assess.

In Amuru, he established that some roads were indeed compacted while some were not. The ones at Parabongo were not compacted as confirmed by the sub county chief, public works committee and the communities not more than 200 meters away from the road.

He testified that the method he used was visual. He states as follows:
"I saw and tried to dig a bit if the compaction was done or not. For a road not compacted, the road surface is uneven, you get soil that is not crushed, it looks like a garden. For a compacted road, the tyre print of the vehicle does not show. If it is not compacted, ruts develop on it, you get a continuous tyre mark because the print can easily create. And this is what I found on it. Some of the roads could have had this because of high tryance"

Under cross examination he emphasizes *"compaction was not done. So whoever issued the false certificates did so falsely because the road was not compacted...Scientific method is a second option of testing the level of compaction. No I did not do a scientific method."*

What is clear from his evidence is that it was not necessary to run a scientific test because it was apparent to the naked technical eye that no compaction had been done on the roads cited in the report.

PW 3 is a civil engineer with an impressive training and experience. His expertise was not challenged and neither was his testimony damaged through cross examination. His evidence is credible and reliable.

It is corroborated by the testimony of **PW 4 Baryakamu Jorocam**, also a qualified engineer with 21 years' experience as a senior specialist trainer in road works. Again, his expertise was not impeached. He testified as follows:
"8 roads comprising 6 in Amuru and 2 in Nwoya had not been mechanically compacted. Mechanical compaction means using a machine such as a roller because there can also be manual compaction, but under engineering the compaction considered is the mechanical one"

Under cross examination, he firmly stated that *"settlement of soil is the same as consolidation, maybe due to traffic but not due to compaction. Traffic has weight and it can compact that is why we said it was firm. I never did scientific tests. It is done on highways. You have to be a technical person to know that roads were compacted.*

I find his evidence credible and reliable.

I am convinced that as technical people, it was clear to PW 3 and PW 4 that 6 of the roads out of 8 were never compacted using a machine as was required in the contract. The trial Magistrate was right to depend on their evidence.

Their evidence is corroborated by the testimony of **PW 7 Odong William George**, a community Development OFFICER OF Amuru District who testified that he knew that Mwa-Olwongu and Karutu-Kibogi was not compacted because he visited the roads and saw. He accompanied a team of investigators from IG and Local Government. Under cross examination he explained that compaction is pouring of murram on the road, and using the machine to press it.

The appellant on the other hand, during cross-examination stated that he and others inspected the roads and that they had been compacted to his satisfaction. I do not find the evidence of DW2 useful in resolving this issue.

I have weighed the prosecution evidence against that of the defense and found the latter to be contradictory and unreliable. I am satisfied that the prosecution led sufficient evidence that the appellant was authorized to issue the certificates of completion, and was tasked with the duty of inspecting road works for compliance with specifications and in fact did do so. He admits to this under cross examination. The authority to certify that works were done, goes with the responsibility to personally confirm that the work had been done. In the completion certificates, he certifies that works were done and inspected and found to comply with the technical specifications. The strong prosecution evidence renders his assertion false.

The trial court at page 15 of his judgement analyzed the evidence as follows:

"Drawing from the above, the accused persons knew that appending their signatures on completion certificates would mean that due diligence and inspection of the compaction and construction of the roads was made."
I agree with this finding. I am satisfied, as was the trial magistrate, that there was no compaction.

The appellant is a technical officer who should have understood the importance of the authority vested in him to certify that work had been done. If he had inspected the road as he claims, he would have made the same discovery as the highly qualified engineers from COWI did, and he would therefore not have issued a certificate of completion for works not done.

I find the contradictions raised by the appellants as minor and not going to the root of the matter. I am convinced that even in the absence of the statement of the appellant PE 13 C, the statement of Oguttu PE 16 and of the investigating officers, the prosecution adduced sufficient evidence to support the charge.

Ministry of Works General Specifications for road and bridge works of March 2014 is in my considered view not applicable. It was not relied upon during the trial, and so cannot be imported on appeal. The applicability of these guidelines should have been settled at trial by asking the witnesses about it and cross examining them about it. This was never done. The trial Magistrate cannot be faulted for not applying guidelines that were never presented in evidence. The appellant relies on this manual to support the case that it required the works to be done to the satisfaction of an engineer and he had accordingly exercised his discretion. Since the specifications are not tested, and this issue addressed at trial, the court rejects that explanation.

The inspection of the roads took place between 16th and 18th of November 2011. From the contracts, the works should have taken place from June to around October 2011. Not more than 5/6 months had passed. The effluxion of time could not have seriously affected the outcome of the investigations, if indeed proper compaction had been carried out on the roads as expected. Neither could have adverse weather. This is the position emphasised by the witnesses, and I find no reason not to rely on their evidence.

I am satisfied that the trial magistrate properly convicted the appellant on the three counts of giving false certificates.

Causing Financial Loss.

It is the appellant's case that there was no engineering audit carried out and as such, it was not possible to determine the financial loss occasioned by the appellant. Further, that the trial court's finding that the money in question was public funds was erroneous. It was submitted that the money was controlled by the Danish Embassy itself and there is no evidence on record to show that the local government received the money. As such, it could not be said that financial loss had been suffered by the local Government.

The respondent on the other hand contends that under the Public Finance Management Act the money in issue was public money.

I have considered the judgement of the trial court at page 13 where it was held that the funds released on the basis of the memorandum of understanding between the Local Government and RDE constituted public funds.

Section 3(b) of the Public Finance Management Act,2015 defines public money as *money received by a vote or collected for the purpose of Government and includes revenue from taxes and government, charges, proceeds of loans raised on behalf of the government, grants received by the government (emphasis mine), recoveries, or other funds for the purposes of government and any other money that the Minister or the secretary to the Treasury may direct to be paid into a public or official bank account.*

Section 44 of the Public Finance Management Act provides as follows:

1) The minister shall receive the monetary grants made to government or to a vote by a foreign government, international organization or any other person.
2) A monetary grant received under subsection (1) shall be paid into the consolidated Fund and once deposited, shall form part of the Consolidated Fund and shall be available for purposes for which the monetary grant is intended.

In the instant case **PW1, Niels Kundsen** testified on page 169 of the record of proceedings that under the Memorandum of Understanding supervision of roads was the work of the district engineering department but payments were done in Kampala by the Embassy after submission of reports by both the public unit's manager and the district engineers.

PW2, Komakech Walter testified in cross examination by the A 1, now the appellant that he did not know the financial aspects of the projects and no body from the sub county knew anything about these finances.

The evidence on record does not show that the money question was received by the local government at any one time, neither was it handled or channeled as required by section 44 of the Public Finance Management Act. It cannot therefore be said to be public money.

Section 20 of the Anti-corruption Act requires prosecution to prove that the accused's employer, Government, incurred financial loss as a result of his actions / omissions.

Financial loss generally refers to monetary or pecuniary losses.
Following the finding that the money was never in the hands of the Government, it follows that no financial loss can be said to have been suffered by it. The loss that was experienced by Amuru Local Government was not financial.

I agree with the appellant that the evidence led did not justify the conviction of the accused for the offense of causing financial loss. The appeal succeeds in that regard.

Abuse of office.

In order to secure a conviction on the offense of abuse of office contrary to section 11(1) of the Anti-Corruption Act 2009, the prosecution must prove the following ingredients:

1. The accused must have been an employee of a public body or entity in which the Government has shares
2. The accused carried out an arbitrary act
3. The act was done in abuse of the authority of the office of the accused
4. The arbitrary act was prejudicial to the interests of the accused's employer

I have carefully considered the conviction on the three counts of abuse of office. I note that the appellant did not specifically state the matters of law or fact in respect of which the trial magistrate erred in his conviction of the accused on this count. I find no legal reason to overturn the finding of the trial court. I am satisfied that the evidence adduced by the prosecution proved all the ingredients of the offense. Since I have found that the appellant falsely signed the completion certificates, I agree with the trial court that the signing of these certificates was an arbitrary Act. This action was an outright abuse of the authority of the appellant's office, and certainly prejudiced the Local Government since the roads were not done as required.

Ground 3:
The learned trial magistrate erred in fact and in law when he relied on extraneous matters and hearsay evidence to found convictions:
The appellant's submissions on hearsay evidence relied on by the magistrate relate to the admission and reliance on P Exhibits 13 C and 16. These two have already been addressed earlier in this judgement.

Ground 4

The trial Magistrate erred in law and fact when he misdirected himself by not affording the appellant the opportunity to reply to submissions at the stage of establishing a prima facie case and make reply to final submissions.

Article 28 of the constitution provides the right to a fair trial which is one of the non derogable rights under **Article 44 of the constitution. Article 28(3)(d)** is to the effect that every person who is charged with a criminal offence shall be permitted to appear before the court in person or at that person's expense, by a lawyer of his choice.

In **Soon Yeon Kong Kim and another V Attorney General, Mpagi Bahigeine, JA (As she then was)** stated as follows;

'Accused must be given and afforded those opportunities and means so that the prosecution does not gain an un deserved or un fair advantage over the accused, and so that the accused is not impeded in any manner and does not suffer unfair disadvantage and prejudice in preparing his defense, confronting his accusers and arming himself in his defense and so that no miscarriage of justice is occasioned.'

In the instant case the appellant faults the trial magistrate for not affording him an opportunity to make submission on no case to answer and make final submissions since he was not represented.

The trial magistrate at page 240 of the record of appeal stated that:

'The accused persons are un represented to make submissions. I have heard the evidence and examined i.e. have addressed myself to the law in regard to the charges against each accused person. I do find a prima facie case....'

Whereas it was not right for the trial magistrate to assume that since the appellant was un represented, he waived his right of making submissions of no case to answer, this did not occasion a miscarriage of justice because even the prosecutor did not make submissions on the same.

On page 248 of the record of appeal, the trial magistrate stated as follows

'accused persons are un represented. I shall receive submissions for the State and consider it with the evidence on record....'

The trial magistrate again assumed that since the appellant was unrepresented he did not have to make final submissions.

Whereas court emphasizes that a fair trial entails affording both parties equal opportunities, in this case failure to allow the defense make final submissions did not occasion a miscarriage of justice.

Black's Law Dictionary 8th Edition defines a miscarriage of justice as a grossly un fair outcome in judicial proceeding

I also note that since the burden of proof is on the prosecution and the defense may even opt to keep quiet, a miscarriage of justice would have not have been occasioned by just relying on the prosecution evidence and defense evidence without final submissions of defense. The evidence shows that the trial magistrate on the whole evaluated the evidence appropriately.

This ground of appeal also fails

Ground 7

The learned trial Magistrate erred in law and fact when he ordered the appellant to compensate the complainant given the circumstances of the case occasioning a miscarriage of justice.

The appellant was ordered to compensate the complainant UGX 50,075,545 as the total loss occasioned by him. He is aggrieved that the compensation order was harsh and excessive, hence a miscarriage of justice. He submits that he has so far paid Ushs 15.9 million. His complaint is premised on grounds that there was no evidence led to show that the appellant received any money or participated in the operations of the contracted companies. This made the sentence manifestly harsh.

The Respondent on the other hand submitted that compensation is allowed by section 197 of the MCA and that the amounts ordered arise from the loss on counts 1, 4 and 7 (causing financial loss).

It is not in contention that the trial magistrate has the discretion to award compensation orders. He observed in his sentencing record as follows:

"The loss occasioned by A1 in respect of counts 1,4 and 7 for Shs 23,736,795, Shs 11,518,750 and Shs 14,820,000 respectively. This totals to Shs 50,075,545. Accordingly, it is ordered that A1 compensates the complainant / RDE the above money/sum."

Whereas the appeal succeeds in respect of these counts 1,4,7, there is evidence upon which the compensation order stands. PW 1 testified and tendered into court evidence of payment of the contractors as per their contracts. He also stated that although they had written to the companies to refund the money, none of them had done so by November 2016 when he testified. The payments were made in 2011. The payments would not have been made if the appellant had not issued false completion certificates.

I see no justifiable cause to interfere with the award of the trial court. No justifiable reason has been laid before me to warrant interference.

The order is upheld.

ORDERS

1. The appeal partially succeeds
2. The conviction and sentence of the appellant on Counts 2,3,5,6,8 and 9 is upheld.
3. The appeal against conviction of the 1st Appellant on Counts 1, 4 and 7 succeeds. The conviction and sentence are accordingly set aside
4. The Compensations Order issued by the trial Magistrate is upheld.

Jane Okuo Kajuga
Judge
Delivered in open court on 22.10.2021