

5

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KOLOLO
(ANTI-CORRUPTION DIVISION KAMPALA)
CRIMINAL SESSION CASE No.017 OF 2019**

10 **UGANDA PROSECUTOR**

VERSUS

DR ROSE NASSALI LUKWAGO

15 **DR. S. OPIO OKIROR**

MR JAFFER KAWOOYA

MR CUTHBERT KAGABO ACCUSED

BEFORE: OKUO JANE KAJUGA J

20

RULING

Dr. Rose Nassali Lukwago (hereinafter referred to as A1), **Dr. S. Opio Okiror** (hereinafter referred to as A2), **Mr. Jaffer Kawooya** (hereinafter referred to as A3) and **Mr. Cuthbert Kagabo** (hereinafter referred to as A4) were charged by the Inspectorate of Government of the following offenses:

25

Theller **1. Causing Financial Loss c/s 20 of the Anti-Corruption Act:**

The particulars of the offense are that A1, A2 and A3, while employed at the Ministry of Education and Sports as Accounting Officer, Assistant Commissioner Human Resource Management and Internal Auditor respectively, within the Financial year 2014/2015, in the performance of their respective duties, unlawfully facilitated an overpayment to AH Consulting Limited well knowing that their acts would cause financial loss of Ushs 33,866,000/=

35

2. Abuse of Office c/s 11 of the Anti-Corruption Act

Count 2 is in respect of A1.

5 The particulars of the offense allege that A1, in August 2014 at the Ministry of Education and Sports in the performance of her duties as Accounting Officer, did in abuse of the authority of her office, an arbitrary act to wit, contracting AH Consulting Limited to recruit five technical staff to work for the ADB 5 HEST Project while well aware that the required five staff had already been recruited which act was prejudicial to the interests
10 of the Government of Uganda.

Count 3 is in respect of A2:

15 The particulars of the offence are that A2, in August 2014 at the Ministry of Education and Sports Headquarters in Kampala in the performance of his duties as contract Manager for ADB 5 HEST Project, in abuse of the authority of his office arbitrarily issued a certificate of completion of work certifying that AH Consulting Limited had satisfactorily performed all the terms of contract well aware that five staff for the ADB
20 5 HEST Project were never selected and recruited by AH Consulting Limited, an act which was prejudicial to the interests of the Government of Uganda.

3. Theft c/s 253, 254 and 261 of the Penal Code Act

25 This is Count 4 on the indictment. A4, the Deputy Director at AH Consulting Ltd is charged with this offense. The particulars are that in the Financial Year 2014/2015 at the Ministry of Education and Sports Headquarters in Kampala, he stole Ushs 33,866,000/= the property of the Government of Uganda.

4. Conspiracy to Defraud c/s 309 of the Penal Code Act

30 This is Count 5 on indictment, and all the four accused are alleged to have conspired variously and by means of deceit to defraud the Government of Uganda of Ushs 33,866,000/= in the Financial Year 2014/15 purporting to recruit five technical staff for the ADB 5 HEST Project whereas not.

35 When the charges were read out to the accused, they all pleaded not guilty on all counts, hence necessitating a trial. The prosecution led evidence from ten witnesses and

5 tendered various documents in evidence, in a bid to prove the allegations. At the closure of the case, all defense counsel opted to make a joint submission on no case to answer.

Representation:

10 The prosecution was represented by **Wycliffe Mutabule** and **Dr. Earnest Katwesigye** of the Inspectorate of Government. On the other hand, **Jimmy Muyanja** appeared for A1, **Emma Opio** for A2, **Ambrose Tebyasa** and **Kasumba Noah** jointly represented A3, while **Ronald Oine** appeared for A4.

15 The law:

The law in respect of whether an accused should be placed on his defense at the close of the prosecution case is as follows:

Section 73(1) of the Trial on Indictments Act provides that:

20 *"when the evidence for the witnesses for the prosecution has been concluded and the statement or evidence, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is no sufficient evidence (emphasis mine) that the accused or any of the several accused committed the offense, shall, after hearing the advocates for the prosecution and the defense, record a finding of not guilty"*

25 Conversely, **section 73 (2)** provides that the accused is to be placed on his defense if there is sufficient evidence that he has committed the offense.

The "sufficiency of evidence" to be considered at this stage of the proceedings has been elaborated by case law. The court is not required to consider whether the evidence adduced by the prosecution proves the charges beyond a reasonable doubt (**Uganda versus Mulwo Aramadhan; Mbale High Court Criminal Case 103/2008**). Rather, a *prima facie* case should have been established to warrant the accused to be placed on his defense.

A *prima facie* case has been defined in **Rananlal T Bhatt versus Republic (1957) EA 332** by the East African Court of Appeal as one where a reasonable tribunal, properly directing its mind to the law and the evidence would convict the accused person if no evidence or explanation is offered by the defense. A *prima facie* case is not established

5 by a mere scintilla of evidence or by any amount of worthless, discredited prosecution evidence.

In the case of **State Vs Rajhnath, Armoy Chin Shue, Sunil Ramdhan and Rabindranath Dhanpaul**. H.C.A No S 104/1997, J. P Moosali while quoting Lord Parker CJ in **Sanjit Chaittal Vs the State (1985)**. 39 WLR 925 stated that:

10

A submission that there is no case to answer may be made and upheld : (a) when there has been no evidence adduced by the prosecution to prove an essential element in the alleged offense and (b) when the evidence adduced by the prosecution has been so discredited or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

15

It was the joint submission of the defense team, presented by **Ronald Oine**, that the Prosecution had failed to adduce evidence to prove the essential elements of the offenses charged, and that the prosecution evidence had been so discredited during cross examination that no reasonable tribunal could convict any of the accused if they did not offer any evidence in rebuttal. They asked the court to find that there was no case to answer in respect of all the counts for which their clients were indicted.

20

On the other hand, the Prosecution asked court to find to the contrary and call upon each of the accused to defend themselves on all counts.

25

Brief facts of the case:

The brief facts of the case as surmised from the prosecution evidence are as follows:

30

The Government of Uganda (GOU) received a loan from the African Development Bank (ADB) to finance the Higher Education Science and Technology (HEST) project. The Ministry of Education and Sports (MoES) was the program implementer on behalf of GOU. There was need to recruit staff to run the project, consequently, a contract was entered into with **Ms. AH Consulting** on 22nd August 2014 whereby the latter was to provide consultancy services to review applications, conduct character checks, interview and recommend best suited candidates for recruitment by MoES of thirteen project staff at a consideration of **Ushs 74,009,000/-** (seventy-four million nine thousand shillings). The exercise was apparently completed and the contractor was paid the contract sum. However, an audit into the Ministry's accounts for the FY 2014/2015 by the Office of the Auditor General (OAG) revealed that the consultant did not conduct the contract activities for all the staff mentioned in the contract, as five specialists were

35

5 given contracts with effect from 1st January 2015, in a process independent from the contract and of the consultants. The charges against the accused are centered on the alleged "overpayment" to the contractor who the prosecution alleges did not perform the contract in respect of the 5 staff recruited independently, and should therefore have been paid less.

10 I have carefully considered the particulars of the charges against the accused persons, the evidence of the witnesses, the documentary exhibits tendered by all parties during the hearing of the case. I have also considered the joint submissions of Counsel for the accused persons and the prosecution on whether there is a case made out requiring the
15 accused to be put on their defense.

I will consider each count, summarize the submissions of counsel and resolve the counts in order.

20 **Count 1: Causing Financial loss**

For the accused to be put on their defense on count 1, the prosecution must have adduced evidence in support of each of the following elements of the offense as prescribed in **Section 20 of the Anti-Corruption Act**:

- 25 a) That the accused was an employee of the Government
b) That the accused did an act or omitted to do an act which caused loss to the Government
c) At the time of doing that act, the accused knew or had reason to believe that the act or omission would cause financial loss

30 These elements have been confirmed in several decisions: **Eng. Samson Bagonza versus Uganda**, Court of Appeal Criminal Appeal No 102/2020: **Uganda versus Lwamafa Jimmy and others**, ACD Criminal Session Case No 9/2015: They were also rightly enumerated by the Defense and accepted by Counsel for the state. It was clear that both parties knew what elements needed to be proved.

35 **Submissions**

5 In summary, the submissions of the defense team in respect of A1, A2 and A3 were anchored in the nature of the contract that MoES had entered into with AH Consulting Limited on 22nd August 2014. It was pointed out that it was a lump sum contract under which the services were performed for an all-inclusive fixed total sum that was not subject to variation. They relied on **Hydro Engineering Services Ltd versus Throne**
10 **International Boiler Services Ltd**, HCCS 818/2003 in which the court held that fixed price and lump sum contracts are synonymous, and that both indicate contracts where the price is not adjustable. They pointed out that this position was confirmed by the testimonies of **Julius Kabayo** (PW1), **Mariam Lawino Sembatya** (PW5), **Tracy Turyakira** (PW7), **Aggrey David Kibenge** (PW8), **John Omeke** (PW9) and **Erute**
15 **Nacklet** (PW10). Their evidence was to the effect that in the absence of an amendment, the contract sum cannot be varied or changed. In this case, there was no amendment.

They submitted therefore, that the loss alleged in Count 1 could only have occurred if any additional money was paid over and above the contract price, and that no single
20 witness had adduced evidence to demonstrate that to court. In essence therefore, the prosecution failed to establish that there was a loss, contrary to the law established. They relied on **Godfrey Walubi versus Uganda**, Court of Appeal Criminal Appeal No 152/2010 which required loss to be proved. They bolstered their argument with the testimony of PW7 who stated that no financial or forensic audit was carried out to
25 establish the loss and of other witnesses who testified that there was no loss or overpayment including the evidence of PW1, PW3 (**Kenneth Amagu**), PW4 (**Henry Mugerwa**) and PW5

They invited court to disregard the testimony of PW10 regarding the finding that loss
30 of **Ushs 33,866,000/=** had been occasioned on grounds that his findings were contradictory and not based on any scientific method or analysis. They invited court not to rely on the personal opinions of PW 10. It is noted that this is the amount cited in the particulars of count 1.

35 In reply, the prosecution submitted that there was an overpayment to AH Consulting since they did not recruit five technical staff yet they received payment for this activity. This is the loss that was occasioned to the employer. He submitted that this overpayment was confirmed by PW7 who attributed blame to A1 for failure to supervise

5 her staff effectively so as to avoid such loss. He agrees that PW7 from Office of the Auditor General (OAG) did not conduct a forensic audit and never therefore established the actual amount of the overpayment or loss. He asked the court to rely on the findings of PW 10, that Ushs 33,866,000/= was the overpayment to AH Consulting, and the loss that was suffered in this case on grounds that he demonstrated the methodology he
10 used to arrive at this figure before court and it was reliable as he is a qualified accountant. He disagreed with the submission that the prosecution case in this regard was contradictory. Finally, he submitted that A1 and A2 had failed to cause an amendment of the contract to exclude the 5 personnel, thus causing loss.

15 Counsel for the State offered no reply in respect of the submissions made by his opposing counsel about the nature of lump sum or fixed price contracts and the effect of this on the validity of the charges, even when prompted by court.

In rejoinder, it was submitted that the state had failed to explain the contradictions in
20 its case and that this offense cannot be sustained where there is a speculative loss as in this case. It was emphasized that PW 10 had no expertise to determine loss.

Further that court should be mindful of the manner in which the particulars of the offense are framed when determining criminal liability of their clients as none of the counts show that the accused failed to cause an amendment to the contract. This was
25 not the case brought against the accused.

Emma Opio for A2 invited court to note that amendment of contracts is a process to be initiated by the user department (ADB HEST project) and that A2 was only the contract manager. Court was also invited to note that AH consulting was never hired to recruit staff and the outputs in the contract were clear, and these were fulfilled by the
30 consultant. **Ambrose Tebyasa for A3** added that it would be inconceivable for A1 to refuse to sign a contract which had been cleared by the contracts committee and the Solicitor General. Further, that in a lump sum contract, the moneys could not be apportioned and hence the findings of PW 10 which purported to do so were not dependable.

35

Resolution of count 1:

The element of employment was not contested. The court is satisfied that A1, A2 and A3 were employees of Government within the meaning of Section 1 of the Act as Permanent

5 Secretary, Assistant Commissioner (Human Resource Management and Internal Auditor respectively.

The second and third elements of the offense are the ones in issue. In order to ascertain the culpability of the parties we need to consider the sequence of events leading up to the alleged overpayment, the structure of the contract in issue and the testimonies of the witnesses.

The prosecution case is that the ADB 5 HEST Project was lagging behind schedule and thus a need to expedite its implementation. This was clear from the evidence of PW3, 15 **Kenneth Brian Amagu** who was the project Coordinator ADB 4. He testified that the project had delayed for two years and no funds had been utilized. It was for this reason that a decision was taken to designate or use existing staff in the new ADB 5 HEST project.

From his evidence and that of PW 6, **Doreen Silver Katusiime** who was the Undersecretary at the time, the Ministry had undergone a procurement process for a consultant to help recruit staff for the project, as directed by A1. The contract was awarded to PILA Consultants but this was rejected by ADB. She never knew of any other procurement process and testified that she was not aware of how AH Consultants got contracted.

25 It should be noted that no evidence was tendered as to how and when and by whom the procurement process for AH Consulting was started. However, the minutes of the contracts committee of MoES of 3rd April 2014 show that the award of the contract for AH Consulting was approved on that day (PEX4). There was the single bid received by the deadline of 11th March 2014. The contract was sent to the Solicitor General who approved the same by their letter dated 30th June 2014, received by the MoES procurement office on 7th July 2014.

It was during this same period that a decision was taken to designate staff from ADB 4 to ADB 5. PW 6 testified that this decision was based on a mission they had with ADB in February/March of 2014 at which the Resident Representative expressed concern over the delay. A meeting was called by then Minister of Education, Rtd. Major Alupo Jesca. It was attended by A1, and PW6 was instructed to write to the bank seeking a no

5 objection to the designation of staff from ADB 4 to the new project and to write to the affected officers to assign them the duties.

PW 6 stated that she wrote to the affected five staff on 4th July 2014. These were PW1, **Kaboyo Julius**, PW2 **Henry Muganwa Njuba**, PW 3 **Kenneth Amaggu**, PW4 **Henry Mugerwa** and PW5 **Miriam Lawino**. The memos were admitted as **PEX1**, **PEX6**, **PEX9**, **PEX11** and **PEX14** respectively. All accepted the delegation of duties and commenced work. They were promised new service contracts in January 2015 under ADB 5 HEST at the conclusion of ADB 4. All testified in court that they were never interviewed by AH Consulting.

15 It is noted from the memos that the decision to delegate was anchored in the project appraisal report for ADB 5 and aide memoir of February 2014 where it was recommended that MoES should use the services of the current project coordination unit as much as possible to undertake various activities of the project.

20 On the very 4th July 2014, PW6 wrote to the Resident Representative ADB asking for no objection to designation of duties to the said officers and to the issuance of new service contracts to the staff in January 2015 when their current contracts expired (**See PEX 17**)

25 MoES received a reply from ADB (**DEX 1**) dated 14th July 2014 addressed to A1. ADB noted that the designated persons were qualified and had experience acceptable to the criteria listed for each of the staff in the project appraisal report and were already with MoES. Further that their performance was well known to ADB hence the latter had no objection to their immediate designation to the listed roles in the HEST project to avoid delay. ADB noted that the MoES intended to give the five staff new contracts with effect from 1st January 2015 and it can be implied they had no objection to the same.

35 It should have been clear to the relevant staff of MoES that the new approach to designate staff and award them contracts in the new project would affect the scope of the contract which the Ministry of Justice had just cleared. It is logical to expect that at that point, there should have been a renegotiation of the contract to exclude the 5 staff

5 who would be recruited from ADB 4. Though valid contracts had not yet been entered, the offer had been made to the 5 and accepted and ADB had okayed the process.

This was not done, and instead on 22nd August 2014, the contract was signed, for the consultant to review applications, and perform the contract in respect of 13 staff when
10 it should have been only eight staff. A1 signed the contract on behalf of the MoES. The contract price was Ushs 74,009,000/=

Further, the MoES went ahead to award the five staff members service contracts on 1st January 2015 under the HEST project. Even if it had been unclear whether the five would
15 get these contracts or not, it remains that the relevant officials should have known, and could have initiated an amendment of contract. This was possible in law, even though the contract was a lump sum. In fact, under the general conditions of the contract Paragraph 11 allows the PDE to request the consultant for such amendment. This position was confirmed by witnesses. It was no guarantee of course that the consultant
20 would agree to the same.

Handwritten signature

As per the testimonies of several witnesses, there was no move to amend the contract. The MoES went ahead to pay the consultants as if there had in fact been no change in the scope. This is the area of contention and alleged loss.

25

The defense team submit that there could not have been an overpayment because the consultant was paid as per contract. This is true in one sense. It is however rather simplistic, in my view to assume that just because there was a valid contract, then everything done was above reproach. It is important in determining criminal liability in
30 this case to go beyond the contract and examine the circumstances surrounding the procurement, execution, performance of the contract and other relevant facts.

The prosecution's case is that since there was less work envisioned under the contract, the contract sum would have been less than what was agreed and paid. The 5 people
35 not recruited out of 13 specified in the contract was a significant number and it is reasonable to expect that the price for the service would have varied. I find this a valid argument and ground for what they call the overpayment. It was an overpayment not

5 in the terms of the amounts due under the contract, but in as far as there was less work done under the contract than was agreed upon.

In order to find the accused culpable, court must be satisfied that at the time they performed the act or omitted to perform, they should have known or had reason to
10 know that the act or omission would lead to loss.

A1 was the Permanent Secretary. Following the authority of **Article 164** of the Constitution and of **Lwamafa Jimmy and others versus Uganda**, Criminal Appeal No 47/2020 A1 was responsible for the funds in the Ministry and had a supervisory role
15 over the employees and processes especially since public funds were concerned.

It is not contested that she signed the contract with AH Consulting on 22nd August 2014. At that point, the evidence of PW 6 which went unchallenged in this aspect shows that she (A1) was aware that a decision had been taken to designate staff to the new project
20 with a promise to give them contracts of service with effect from 1st January 2015. She was also aware that ADB had granted a no objection to the designation and was keen to have the project take off. They had also not objected to the communication that the five would be given service contracts. There was no reason presented for any doubt in that arena. The 5 staff had responded positively and accepted the offer in writing. This is my
25 considered view was a significant development.

The prosecution case is that the action of signing the contract had the effect testified about by PW 7, the auditor (**Kate Tracy Turyakira**) in court. She stated as follows:

30 "...Just before the contract was signed on 22nd August 2014, they asked for resignation of 5 technical staff. They got no objection on 14th July 2014 for the 5 to be rolled over from ADB 4. When we saw the contract on 22nd August 2014, the consultant was supposed to recruit the same people at Ushs 74,009,000/= we were surprised at this because they had got a no objection to roll over these people. ...The effect of including the 5 in the contract was that they would be recruiting people who were already authorized to work on the project...We went to look for the payment requisition it was asking for Ushs
35 74,009,000/= the figure in the contract yet the report showed they had reduced the scope of the work. We saw there was an overpayment because 5 had been rolled over from ADB 4."

Surprisingly, these service contracts were then given and signed in January 2015, even when there was a running contract with AH Consulting in respect of the same group. It

5 would appear that no bid was made to amend the contract or have it reviewed in light of the reduced scope.

I am of the view that A1 by signing the contract should have known or had reason to believe that Government would suffer a financial loss. I disagree with the submissions
10 of defense counsel that the case as per indictment does not mention failure to amend the contract. The broad statement of the particulars by use of the term "facilitated overpayment" allows the issue of the signing of the contract or failure to amend it to fall within the ambit. To facilitate means to help cause something, or make something possible.

15 A2 was the Assistant Commissioner HRM in MoES. He was also the Contract manager of the contract between the Ministry and AH Consulting. He witnessed the agreement by signing it. Before then, he was shown to have been a member of the evaluation committee as per the minutes of the contract committee meeting which awarded the
20 contract to the consultant.

PW1 testified that he received from A2 documents which helped him to make the requisition for payment. These included a memo of 19th March 2015 by which A2 confirmed that the consultant had accomplished the assignment as per the terms of the contract and had submitted final reports. This letter kicked off the process for payment.

25 A critical look at the TORs of the contract showed that the consultant was to conduct processes in respect of recruitment 13 officers. The consultant's final report of 17th March 2015 showed that he had only handled for 8 posts, excluding the 5 technical assistants who had been designated.

Further evidence shows that each of the memos of 4th July 2014 designating the 5
30 technical staff to the ADB 5 project and offering them contracts from 1st January 2015 were copied to A2. The five staff replied their acceptance of the offer of designation and new contracts and their responses were all copied to A2. He also signed all the service contracts offered to the 5 selected staff.

35 The prosecution evidence shows that A2 recommended payment for a task that consultants had not done. He was also aware that 5 staff had been recruited in January 2015 and did not move for an amendment of the contract yet he was a contract manager tasked with overseeing the implementation of the contract. He was also aware at the

5 time of signing the contract that the 5 staff had been offered and accepted to be recruited in 2015 and that a no objection had been secured from ADB.

Regulation 53 of the PPDA (Contracts) Regulations 2014 requires a contract manager to make certain that the provider performs the contract in accordance with the terms and conditions specified therein. Where he or she has any difficulty with the terms of the contract, he or she is expected to discuss and resolve the reservation or difficulty with the Procurement Disposal Unit. He is also required to ensure, among others adequate cost, quantity and time control where appropriate. It is the prosecution's case that A2 did not cause amendment of contract, and went ahead to recommend payment for 13 staff as if he was unaware.

In light of the foregoing, the prosecution establishes that A2 should have known or had reason to believe that his actions and omissions could lead to a financial loss for Government.

Regarding the last ingredient that a loss was occasioned, the prosecution led evidence of PW 7 who said there was loss through overpayment but that OAG did not establish the exact value of the loss. During cross-examination she provided contradictory positions, first that the loss was calculable by any other person and she would not be surprised if another person established it. Then she stated that the lump sum contract meant that it was not possible for the loss to be calculated, as the cost of executing the contract for each individual could not be determined, hence severed. The prosecution then tendered the evidence and calculations of PW 10, the investigating Officer who provided his justification for quantifying the loss at Ushs 33,866,000/= In an earlier report admitted as DEX10, he had arrived at a slighter lower figure. He explained to the court the reasons for the variance.

Though the defense challenged his competence to arrive at the figure, it is my view that at this stage of the case the court is considering a prima facie case, and not proof beyond reasonable doubt as far as the loss is concerned. The prosecution did adduce evidence to prove this element.

I have considered the authority of **Jimmy Lwamafa and others versus Uganda**, Court of Appeal Criminal Appeal No 357/2016 which held that once it is proved that a person caused financial loss with the mens rea, he or she is culpable with or without proof of

5 exact loss. This authority distinguished the earlier case of **Walubi** which required exact loss to be proved. In light of evidence of Pw 10, I am satisfied that the evidence led by the prosecution warrants an explanation from the accused.
A prima facie case is established against A1 and A2 in respect of causing financial loss.

10 As regards A3, the internal Auditor, the only evidence connecting him is the approval for payment. Pw 1 testified that he raised the loose minute for payment PEX 4 and it was addressed to A1, through various offices including that of A3, the internal Auditor. The latter after some verifications forwarded it to A1 for approval of payment on 21st April 2015. A1 authorized payment the next day, 22nd April 2015. The end result of the
15 approval process was the payment of the contract sum through EFT as evidenced by **PEX5** (EFT payment voucher). It is argued that A3 authorized payment because there was a valid contract and work was said to have been done. The memo of PW1 stated that the HR department was satisfied that the work had been done as per contract. The letter of A2, attached to the requisition confirmed that work had been done.

20 There is no evidence demonstrating A3's role in any other aspect of the procurement of the contract for AH Consulting, its negotiation or signing, nor any involvement in the matter of designation of staff from ADB 4. In the light of a valid contract which had not been amended or altered, and the presentations by Pw1 and A2, and in the absence of
25 any additional evidence pointing to his deliberate, willful act or intentional knowledge of wrongdoing, I find myself in agreement with defense submissions that no case has been made out requiring an answer from him. Evidence that he was aware of the parallel processes would have proved the relevant mens rea. If he was involved, the onus lay on the prosecution to prove it. They adduced no evidence.

30 I therefore find that the state has not established a prima facie case against him on this count.

Count 2: Abuse of Office against A1

35 The state had the duty to adduce evidence to support the following elements of the offense as required by Section 11 of the Anti-Corruption Act:

1. That the accused person is an employee of Government
2. That he/she did or directed to be done an arbitrary act in abuse of the authority of his/her office
3. That the act was to the prejudice of his or her employer or any other person.

These ingredients have been affirmed in the cases of **Eng. Samson Bagonza versus Uganda (supra)**,

The particulars of Count 2 are that A1 in the performance of her duties as Accounting Officer, did in abuse of the authority of her office, an arbitrary act to wit, contracting AH Consulting Limited to recruit five technical staff to work for the ADB 5 HEST Project while well aware that the required five staff had already been recruited which act was prejudicial to the interests of the Government of Uganda.

It was submitted that there was no arbitrary act since it was the Government of Uganda that contracted AH consulting and not A1 as cited in the indictment. Further, that the latter was never contracted to recruit staff as confirmed by PW 7 and that the count collapses on this ground alone. It was submitted that A1's signing of the contract on behalf of the MoES was not an arbitrary act, but founded on law, based on systems and processes. The procurement process was commenced by the PDU under MoES, availability of funds was confirmed by PW6, the then Undersecretary, the contracts committee awarded the contract after a successful evaluation process, the same was approved by the Solicitor General. A1 finally signed the contract as was required of her. That the processes leading to the execution of the contracts and recruitment of staff were consultative as procedures and steps were discussed and approvals sought, and therefore relying on the authority of **Eng. Samson Bagonza versus Uganda (supra)**, the accused cannot be said to have acted arbitrarily.

Court was asked to consider that the expected outputs/ deliverables of AH Consulting were spelt out in the contract and they did not include recruitment of staff for 13 posts, as alleged in the indictment. There was overwhelming evidence from PW1, PW2, PW3, PW7 that the outputs in the contract were clear and the consultant met them all before he was paid. If A1 and A2 had not acted as they did the GOU would have been liable for breach of contract. As such, that their compliance with the contract saved the GOU money.

5 In reply, Counsel for the State rather summarily submitted that A1 was well aware that they had received a no objection from ADB for the designation of the five technical staff to the HEST 5 project and therefore that they were not to be part of the scope of the contract with the consultant. As accounting officer, she should have addressed this issue but she didn't.

10

In rejoinder, it was submitted that the state had failed to address the issues raised by the defense and that court should therefore consider them as uncontested.

Resolution of Count 2:

15

The term arbitrary is defined to mean an action, decision, or rule not seeming to be based on reason, system or plan and at times seems unfair or breaks the law. (Adopted from **Oxford Advanced learner's dictionary** and applied in a myriad of court decisions)

20

There is evidence on record that there was a meeting at which the decision to designate/assign staff from ADB 4 to ADB 5 was reached. This was chaired by then Minister of Education and Sports. The decision also included the offer of contracts to the 5 technical staff involved come 1st January 2015. Acceptance of the designation and offer had been received from all. The basis of the decision was the need for use of existing staff on the new project.

25

According to PEX 22 by **John Omeke**, the recruitment of the five positions was not fully concluded due to Governments decision to utilize existing staff in the unit to carry out HEST activities.

30

The decision of A1 to go ahead and sign the contract with AH Consulting when there were actions suggesting that the scope of the contract had been narrowed, runs contrary to the agreed Government position and raises a question that warrants an answer. As accounting officer, she had the power to cause a review at that point, which she didn't. This appears then to be an action not based on reason, and differing from the official agreed position.

35

As Permanent Secretary, it was the Constitutional role of A1 to tender advice to the Ministry in respect of its business, and to implement the policies of the Government. Further, she had the responsibility for the proper expenditure of public funds. It can be

5 surmised from the facts so far tendered, that A1's impugned action was not in the interests of her employer, and was detrimental. The state led evidence to show this was an abuse of the authority vested in her.

10 I find that the prosecution has established a prima facie case on this count against A1, warranting the accused to explain.

Count 3: Charge of Abuse of office against A2

15 The particulars of the offense are that A2, in the performance of his duties as contract Manager for ADB 5 HEST Project, in abuse of the authority of his office arbitrarily issued a certificate of completion of work certifying that AH Consulting Limited had satisfactorily performed all the terms of contract well aware that five staff for the ADB 5 HEST Project were never selected and recruited by AH Consulting Limited, an act which was prejudicial to the interests of the Government of Uganda.

20 It was submitted for A2 that the state failed to adduce evidence in support of the elements of the offense save for the fact of employment by Government. That the issuance of a certificate of completion was not an arbitrary act as it was issued after a consultative process involving several actors. It was pointed out to court that neither of 25 the other actors had been faulted for playing their roles. That as a Contract Manager, A2 was obliged to oversee the execution of the contract, and once the deliverables thereunder had been complied with, he acted prudently to issue the certificate.

30 In reply, it was submitted that A2 was well aware that they had received a no objection from ADB for recruitment of the five technical staff, yet he let the process continue, hence he acted arbitrarily.

Resolution:

35 The onus is on the prosecution to adduce evidence showing there was an arbitrary act, and demonstrate the same as prejudicial to the interests of the employer.

5 In this case, the prosecution contends that A2 issued a completion certificate showing the consultant had performed as per contract whereas not. The certificate was tendered in Court by defence as DEX 4 and not by the prosecution, and I have looked for evidence of witnesses who testified about the certificate in vain. Nevertheless, it is on record as an exhibit that the court can rely on in resolving the case.

10

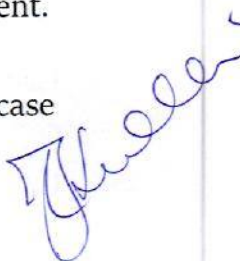
Following the definition, I earlier gave defining an arbitrary act, I have considered the wording of the Certificate. A2 only cites the specific posts in which the consultant performed the contract and does not include the 5 technical assistants on it. Nevertheless, he claims that the consultant performed and completed the tasks satisfactorily in accordance with the Terms of reference. The latter part is not true.

15

This certificate was issued after payment had been made. It is not demonstrated how its issuance at that stage was prejudicial to the interests of the employer. The prosecution did not prove this through evidence, neither did it submit on this element.

20

In the circumstances, I find that the prosecution has not established a prima facie case against A2 on this count.



25 **Count 4: Theft**

The ingredients to be proved by the prosecution under sections 252 and 261 of the Penal Code Act are as follows:

1. That there was property capable of being stolen
2. That it belonged to another and was taken dishonestly without claim of right
3. That the intention was to permanently deprive the owner of it and in case of money an intent to use it against the will of the owner
4. That it is the accused who stole the property.

30

The particulars of the case are that in the Financial Year 2014/2015 at the Ministry of Education and Sports Headquarters in Kampala, A4 stole Ushs 33,866,000/= the property of the Government of Uganda

35

5 It was submitted by the defense team that no single witness led any evidence in support
of the elements of this offense. To the contrary, Pw 2 and PW7 both testified that they
never came across any evidence that Ushs 33,866,000/= was stolen. That the evidence
instead showed that the total sum of Ushs 74,009,000/= due under the contract was
10 paid to AH Consulting through Electronic Fund transfer (EFT) and the company
acknowledged receipt of the same. No evidence was led to show how A4 got part of the
money paid to AH Consulting or to prove the element of asportation. It was stated that
it was a puzzle for the prosecution to allege that the Ushs 33,866,000/= was an
overpayment to the consultant, then in the same breath claim it was stolen by A4 at the
MoES Headquarters. They asked court to find that no case had been made out to warrant
15 an explanation from the accused.

In reply, the prosecution stated that A4 made a requisition for payment for the whole
sum when in fact he had not recruited five of the technical staff. The overpayment of
Ushs 33,866,000/= for which work was not done was therefore stolen.

20 In rejoinder, it was submitted that there was never any requisition for payment as
alleged by the State. There was only proof that AH had completed the work and
therefore payment was required. Finally, that it was erroneous for a person who signed
documents on behalf of a company, AH Consulting to be charged with theft in the
25 absence of any other evidence that he requested for or received Ushs 33, 866,000/=

Resolution:

I agree with the Defense that no single evidence was adduced to satisfy the ingredient
30 of theft of Ushs 33,866,000/=. From the evidence, this is the amount alleged by the
prosecution as an over payment. The money was part of the Ushs 74,009,000/= paid to
AH consulting under the contract with MoES. This contract was never amended and so
the accused cannot be faulted for raising a requisition for payment of the whole sum.
This is the basis on which the theft charge is based, and is misconceived in my view.
35 The money was not picked from the MoES Headquarters as alleged, neither was it
proved that the accused received it.

5 In the presence of a valid, unamended contract, the existence of a claim of right cannot be ruled out. Further the duty to look out for the resources of Government lay on the government officials. For reasons I will provide in my detailed judgement in this case, I find that the state has failed to establish a prima facie case A4 on the charge of theft.

10 **Count 5: Conspiracy to defraud**

The prosecution has to prove the following ingredients of the offense as set out under **Section 309** of the Penal Code Act and decided cases including **Walubi and another Vs Uganda**, CA Criminal Appeal 152/2012:

15

1. That there was an agreement between two or more persons to commit offenses
2. That there existed deceit or fraudulent means
3. That the agreement through deceitful means was intended to defraud a particular person of any property

20

25

The particulars are that all the four accused in the financial year 2014/2015 in Kampala conspired variously and by means of deceit to defraud the Government of Uganda of Ushs 33,866,000/= purporting to recruit five technical staff for the ADB 5 HEST Project whereas not.

30

Defense counsel submitted that the agreement envisages a common intention and a meeting of minds between all the accused to act in a certain manner. This common intention must exist before any steps are taken to commit the offense. If the Shs. 33,866,000/= was an overpayment as alleged by the prosecution, then the accused could not have conspired to defraud the same amount. They wondered why AH Consulting a legal entity was not joined as a party and why A4 was then charged with theft of the same amount.

35

They argued that there was no evidence that all the accused met or even that they had any constructive agreement. Since the money paid was as per the contract, the payment was lawful and could not be the subject of a conspiracy to commit a crime.

5 The prosecution on the other hand submitted that the conspiracy or meeting of the mind can be deduced from the failure of all the accused persons to address the issue of the overpayment. Further that A1 was asked to determine the amount overpaid but she failed to do so, meaning that there was a conspiracy to defraud.

10 **Resolution:**

It is the law that the conspiracy can be inferred from the circumstances of the case. It is a criminal act in itself, and must have involved spoken or written or other overt acts but cannot be a mere mental operation. A conspiracy cannot be proved through circumstantial evidence. See **Lwamafa and others versus Uganda** CA 357 of 2016

15 I do not agree with the submissions of the state that conspiracy between all the accused can be inferred from their failure to address the overpayment. I have considered the facts of the case and evidence of witnesses. I have not found evidence to suggest that the four conspired together to defraud the Government of the amount on the
20 indictment.

The prosecution must prove that the four agreed to commit a crime. I have not found evidence from which this can be inferred. The prosecution has therefore failed to establish a prima facie case on this ground.

25 **Conclusion**

The prosecution has established a prima facie case against A1 on Count 1 and Count 2, also against A2 on Count 1. The two accused are accordingly put on their defense as they
30 have a case to answer.

It has failed to establish a case warranting A3 and A4 to be put on their defense. I accordingly record a finding of not guilty against the two and acquit them as required
35 by S 73 (1) of the TIA. Their bail money should be refunded.

Delivered in open Court in presence of

all parties.

15/2/2022.

Thullen =

