THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CONSOLIDATED CRIMINAL APPEALS NOS. 723, 734, 735 & 742 OF 2014
(Arising from High Court (Anti-Corruption Division) Criminal Session Case No. 47 of 2012)

1. JOHN MUHANGUZI KASHAKA
2. HENRY BAMUTURA
3. ROBERT MWEBAZE :: APPELLANTS
4. SAM EMORUT ERONGOT
5. TIMOTHY MUSHERURE
6. ADAM ALUMA

VERSUS

UGANDA :: RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Anti-Corruption Division) before Bamugemereire, J. (as she then was) delivered on 15th July, 2014 in Criminal Session Case No. 47 of 2012)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE HELLEN OBURA, JA
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

These consolidated appeals arose from the decision of the High Court (Bamugemereire, J. (as she then was)), in which the appellants were convicted on various counts of corruption related offences, sentenced to various custodial sentences, and also ordered to pay compensation to the government.

Brief Background

The appellants were involved at different levels in the procurement of 70,000 bicycles for Chairpersons of Village Councils and Parishes within Uganda, by the Ministry of Local Government in the following capacities:

The 1st appellant was the Permanent Secretary of the relevant Ministry and the head of the Ministry as a Procurement and Disposal Entity; the 2nd appellant was the Principal Accountant in the same Ministry; the 3rd appellant was the Principal Procurement Officer and the Head of the Procurement and Disposal Unit in the same Ministry; the 4th appellant was the Assistant Commissioner for Policy and Planning, the Chairman of the Evaluation Committee and Contract Manager in relation to the procurement in issue; the 5th appellant was a consultant in relation to the procurement in issue with the same Ministry while the 6th appellant was a member of the Evaluation Committee in relation to the procurement in issue.

The appellants were charged, committed and tried before the Anti-Corruption Division of the High Court on an indictment containing various counts of abuse of office, causing financial loss and neglect of duty. The background to this appeal which was largely accepted by the learned trial Judge was that:

Sometime in 2010, the Government of Uganda conceived the idea of providing every Local Council (LC) Chairman at village and parish level in the country with a bicycle as a means of transport to effectively carry out government programmes and activities. The Ministry of Local Government (as the relevant Ministry) was tasked with overseeing the procurement of those bicycles. Subsequently, the required budgetary provision was made and thereafter the procurement process was set up under the **Public Procurement and Disposal of Public Assets Act (PPDA), 2003**. Thereafter:

a. The relevant Ministry invited interested parties to bid for the contract to supply the bicycles. Several business entities applied, paid for bid documents and presented their respective bids to the Procurement and Disposal Unit (PDU) of the relevant Ministry.

b. An Evaluation Committee comprising of five persons, including the 3rd to 6th appellants, was appointed to study the bids and evaluate the

same under the Public Procurement and Disposal of Public Assets Act and the Regulations made there under;

c. The Evaluation Committee sat, and after evaluating all the bids concluded that the best evaluated bidder was a Company named Amman Industrial Tools and Equipment Limited (AITEL).

d. The report and recommendation of the Evaluation Committee was forwarded to the relevant Contracts Committee which considered the same and, after some back and forth consultations it awarded the contract for the supply of the said bicycles to AITEL.

e. Eventually, after the several requisite processes were carried out, including obtaining the advice of the Attorney General, a contract for the supply of the bicycles was signed between the relevant Ministry, represented by the Permanent Secretary, and AITEL. Subsequently, an advance payment to AITEL was made although the bicycles were never supplied.

After the trial, the learned trial Judge largely believed the prosecution's case making the following decisions regarding the 6 appellants:

1. The 1st and 2nd appellants, were convicted on count 1 for causing financial loss and were each sentenced to 10 years and 10 days imprisonment. A1 was also disqualified from holding any public office in Uganda for 10 years.

2. The 3rd appellant was convicted on count 9 for abuse of office and count 12 for Neglect of duty. He was sentenced to six years imprisonment on count 9 and four years imprisonment in count 12 and disqualified from holding any public office in Uganda for 10 years.

3. The 4th appellant was convicted on count 4 for neglect of duty, count 9 for abuse of office and count 12 for neglect of duty. He was

sentenced to 3 years imprisonment on count 4, 6 years imprisonment in count 9, 4 years imprisonment on count 12, and disqualified from holding any public office in Uganda for a period of 10 years.

4. The 5th appellant was convicted on count 9 for abatement, and count 12 for neglect to prevent a felony. He was sentenced to 20months in count 9 and 20 months in count 12, and barred from seeking employment with the Government of Uganda or consulting with the Government of Uganda for 10 years.

5. The 6th appellant was convicted on count 9 for abuse of office and count 12 for neglect of duty. He was sentenced to 1 year in count 9 and 9 months in count 12 and disqualified from holding public office in Uganda for 10 years.

The appellants were also ordered to jointly refund USD 1,719,454.58 which was lost by the Government of Uganda as a result of the botched procurement in issue. Being dissatisfied with the decision of the High Court, the appellants lodged this appeal. The grounds of appeal were set forth in the respective appellants' separate memoranda of appeal.

The **1st appellant's grounds of appeal** were these:

"1. The learned trial Judge erred in law and fact when in reaching her decision that the appellant was guilty of Causing Financial Loss c/s 20 of the Anti-Corruption Act 6 of 2009, she failed to apply the PPDA Act No. 1 of 2003 (as amended) (hereinafter called "the PPDA Act") and the ingredient of bad faith. (sic)

2. The learned trial Judge erred in law and fact when she failed to apply the PPDA Act in determining the ingredients of the offence of causing financial loss allegedly committed by the appellant in the performance of his duties arising in a public procurement transaction. (sic)

3. The learned trial Judge erred in law and fact when she failed to consider bad faith under Section 92 of the PPDA Act as a required

ingredient of the offence of Causing Financial Loss c/s 20 of the Anti-Corruption Act arising in a public procurement transaction. (sic)

4. The learned trial Judge erred in law and fact when she found and determined that the Appellant in the performance of his duties knew and/or had reason to believe that his acts in the chain of payment of the USD 1,719,454.58 for the purchase of bicycles would cause loss to the Government of Uganda. (sic)

5. The learned trial Judge erred in law and fact when she convicted the Appellant of the offence of causing financial loss c/s 20 of the Anti-Corruption Act 2009 as a strict liability offence against the Appellant in his capacity as Accounting Officer for the Ministry of Local Government. (sic)

6. The learned trial Judge erred in law and fact when she convicted the Appellant of the offence of causing financial loss c/s 20 of the Anti-Corruption Act 2009 without any evidence and proof of mens rea and/or intent to cause loss on the part of the Appellant. (sic)

7. The learned trial Judge erred in law and fact when in reaching her decision she raised the standard of behavior of the Appellant in performing his duties above the required standard of reasonable behavior to the exercise of high level of due diligence, prudence and more caution. (sic)

8. The learned trial Judge erred in law and fact when in reaching her decision to convict the Appellant of causing financial loss c/s 20 of the Anti-Corruption Act did not evaluate evidence of the chain of authorization in effecting payment between the Ministry of Local Government, Ministry of Finance & Economic Development, Bank OF Uganda, Citibank and Stanbic Bank in the context of Letters of Credit transaction. (sic)

9. The learned trial Judge erred in law and fact when in convicting the Appellant of Causing Financial Loss c/s 20 of the Anti-Corruption Act, she reached her decision on evidence that did not support her findings and decision. (sic)

10. **The learned trial Judge erred in law and fact when she convicted the Appellant on the basis of what he did not do or ought to have done rather than what he did and intended to do to constitute the offence of causing financial loss. (sic)**

11. **The learned trial Judge erred in law and fact when she convicted the Appellant on Count 1 of the amended indictment whose particulars were neither proved to the required standard nor supported by evidence on record. (sic)**

12. **The learned trial Judge erred in law and fact when she found and held that the Appellant signed away USD 1,719,454.58 on discrepant shipping documents that caused financial loss. (sic)**

13. **The learned trial Judge erred in law and fact when she failed to give effect to the fact that the Appellant never saw the originals and none were produced in court. (sic)**

14. **The learned trial Judge erred in law and fact when she failed to give effect to the role of a confirming bank in a Letter of Credit transaction and the consequent discarding of Citibank as the confirming bank. (sic)**

15. **The learned trial Judge erred in law and fact when she failed to evaluate the effect of the forged shipping documents on the whole transaction of Letters of Credit for the procurement of bicycles. (sic)**

16. **The learned trial Judge erred in law and fact when she failed to find that the loss of USD 1,719,454.58 was caused by the presentation and exchange of forged shipping documents by and between the advising bank (Stanbic) and issuing/paying bank (BOU). (sic)**

17. **The learned trial Judge erred in law and fact when in reaching her judgment she criminalized the conduct of the Appellant in his capacity as accounting officer and held that: (sic)**

    a) **This case is a sad tale of Senior Government officials outdoing themselves in opening up Government coffers to fraudsters, rogues, crooks, conmen and by whatever name**

else called by unconditionally issuing irrevocable and transferrable letters of credit to strangers of untested business experience. (sic)

b) Equally curious was the fact that both A1 and A2 authorised the Bank of Uganda to pay despite the discrepancies pointed out by the Bank. Besides, there was another reason the two accused ought to have been more cautious to authorize payment – the sheer amounts involved. If indeed A1 and A2 were acting as good custodians of government funds and resources, they should have exercised more diligence prior to effecting payment of public funds to an unknown supplier. (sic)

c) The position of Permanent Secretary and that of Principal Accountant which A1 and A2 respectively held are very senior in the Uganda Civil Service hierarchy and holders of those roles are expected to exercise a high level of diligence and prudence in managing public affairs. A Permanent Secretary is a Public Officer Appointed by the President to head a ministry. He takes charge of the implementation of policies and programmes of his ministry under general directions of the Minister responsible. A permanent Secretary is at the helm and the centre of the running of government machinery. The effective running of government machinery depends on how efficient and able the PS is (sic)

d) In view of the centrality of their roles, A1 and A2 ought to have known the signing away of USD 1,719,4564.58 on discrepant shipping documents was likely to cause financial loss. I agree with gentleman assessor in this regard. I find that the prosecution has proved Count No. 1 beyond reasonable doubt and convict each of A1 and A2 accordingly. (sic)

e) While there is no doubt that A1's overzealousness to have the bicycles delivered at all costs was an unmitigated disaster, his unrestrained appetite to deliver was outmatched by the equally unrestricted technical officers

out to make a kill. Unfortunately for A1 he solely depended on his technical officers for guidance and advise. Nothing good could come from advice of one such as A4. (sic)

18. The learned trial Judge erred in law and fact when she contradicted herself in holding that:

a) "the prosecution did not prove beyond reasonable doubt that A1 and A2 acted in any arbitrary manner or that indeed the two were responsible for the change of the Final Destination in the Contract. This Court found that the persons who made the alteration to the final destination did not do so in abuse of their offices." (sic)

b) "I found the fact that A1 refused to see Rajasekaran a curious fact. The inference drawn was that there was no relationship between A1 and the fraudster who passed off as an investor capable of delivering huge supplies. (sic)

c) DW1 stated that no Abuse of Office resulted from the change in the Final Destination because the decision was made by people who had the power to make that kind of decision and who were doing so by virtue of their offices. He further stated that since the Treasury advised that taxes had to be paid, the Ministry of Local Government had no choice but to change the delivery points to Kampala to enable the payment of taxes. I accept this defence. (sic)

19. The learned trial judge erred in law and fact when she contradicted herself in holding that:

a) The actus reus of the offence of causing financial loss was that the two (A1 & A2) agreed to sign off a payment of USD 1,719,454.58 thereby causing financial loss to the Government of Uganda. (sic)

b) Prudence would have dictated that more caution than usual was required in this particular transaction since the Bank had queried the destination of the Bills of lading and the obvious alterations on the certificate of origin. (sic)

c) The standing instructions of the Accountant General were inconsistent with the International standard and practice, inimical to practice,

contrary to the UCP 600 Rules which our banks must adhere to and altogether unhelpful. (sic)

d) The evidence of Mr. Bwoch, the Accountant General was an attempt to save ones ilk and not much weight would be attached to it. (sic)

e) The appellant ought to have known that signing away USD 1,719,454.58 on discrepant shipping documents was likely to cause financial loss. (sic)

f) The loss was occasioned on the Appellant on signing away USD 1,719,454.58 on discrepant shipping documents without scrutinizing and determining what caused the loss. (sic)

20. The learned trial judge erred in law and fact when she contradicted herself in holding that:

a) It remains a puzzle that Bank of Uganda decided to refer the discrepancies to MOLG instead of referring them to the Confirming Bank which had both the expertise and duty to confirm the documents. (sic)

b) The Accountant General attempted to put measures in place to protect public funds by issuing new guidelines. However the guidelines were not in sync with international standards. Indeed the guidelines had the effect of promoting worthless red tape which could only worsen the already existing vulnerabilities of the system to corruption. (sic)

c) The matter was referred to the Solicitor General for legal advice but the Principal State Attorney from the Legal Advisory Directorate did not seem to notice anything odd about a government granting irrevocable and transferrable letters of credit to private foreign nationals. One would expect Government lawyers to be the last line of defence in transnational business transactions before the state resources are committed to the purchase of goods and services from suppliers who are based outside the jurisdiction of the sovereign state of Uganda. (sic)

d) However due care must be taken to ensure that all the dots are joined and the Ts crossed before serious commitments by either party are made. (sic)

21. **The learned trial Judge erred in law and fact when she failed to evaluate the evidence of PW2, PW3, PW4, PW5, PW6, PW7, PW10, PW11, DW1 and DW5 in the context of payments by Letters of Credit. (sic)**

22. **The learned trial Judge erred in law and fact when she convicted the Appellant of causing financial loss c/s 20 (1) of the Anti-Corruption Act No. 6 of 2009 and sentenced the Appellant to a term of 10 years imprisonment and ordered him to jointly with other convicts to refund the total amount of USD 1,719,454.48. (sic)**

23. **The learned trial judge erred in law and fact when she passed an arbitrary and erroneous sentence of compensation of USD 1,719,454.58 which sentence is not prescribed by law. (sic)**

24. **The learned trial judge erred in law and fact when in reaching her decision, she failed to apply the law, practice and procedures of Letters of Credit in the context of bicycle procurement and Uganda Government payment procedures. (sic)"**

The **2nd appellant's grounds of appeal** were these:

"1. **The Learned Trial Judge erred in law and fact when she failed to properly reevaluate the evidence adduced at the trial and apply it to the law of the offence of causing financial loss under section 20 of the Anti-Corruption Act 2009.**

2. **The Learned Trial Judge erred in law when she shifted the Burden of proof from the prosecution and placed it on the Appellant.**

3. **The Learned Trial Judge erred in law and fact when she held that the loss was occasioned by the Appellant on authorizing payment and signing away USD 1,719,454.58 (United States Dollars One Million Seven Hundred Nineteen Thousand Four Hundred Fifty Four and Fifty Eight Cents) on the discrepant shipping documents without scrutinizing and determining what caused the loss.**

4. **The Learned Trial Judge erred in law and fact when she sentenced the Appellant to a term of 10 years imprisonment**

and ordered him to jointly with other convicts refund USD 1,719,454.58 (United States Dollars One Million Seven Hundred Nineteen Thousand Four Hundred Fifty Four and Fifty Eight Cents). (sic)

The 3rd appellant's appeal abated by reason of his death.

The 4th appellant's grounds of appeal were these:

"1. **The Learned trial Judge misdirected herself and erred in law when she failed to apply section 92 of the Public Procurement and Disposal of Public Assets Act No. 1 of 2003 and consider whether the Appellant were not done in good faith. (sic)**

2. **The Learned trial Judge misdirected herself and erred in law and in fact when she convicted the Appellant in respect of Count No. 4 for Negligence of Duty contrary to section 114 of the Penal Code when he had not been charged with that offence nor informed of the nature of the offence in the said Count No. 4 in the indictment as required by law.**

3. **The learned trial Judge erred in law when she deprived the Appellant of his right to a fair trial guaranteed in the Constitution of the Republic of Uganda.**

4. **The learned trial Judge erred in law and in fact when she convicted the Appellant in Count No. 9 for Abuse of Office in respect of an arbitrary act not set out and for which he was not indicted in count 9.**

5. **The Learned Trial Judge erred in law when she failed to consider and apply the provisions of Regulation 147 (2) of the Public Procurement and Disposal of Public Assets Regulations, 2003 and came to the erroneous finding that the Appellant committed the offences of Abuse of Office and Neglect of Duty.**

6. **The Learned trial judge erred in law when she ignored and/or failed to consider and appraise the evidence during**

cross examination of PW18 Uthman Segawa Ismail and PW12 ASP Umaru Mutuya.

7. **The Learned trial Judge misdirected herself, failed to properly construe the evidence before her and erred in fact when she held that;**

   a. **Nothing good could come from the advice of one such as the Appellant;**

   b. **The Appellant appeared to have a relationship with the fraudsters and had an opportunity to save the government money when he talked to them in his office;**

   c. **Bidding processes are fraught with corruption, conflict of interest and undue influence;**

   d. **AITEL was smuggled onto the list of eligible bidders.**

   e. **The conduct of the Evaluation Process by the Evaluation Committee was flawed;**

   f. **There was no Joint Venture Contract between AITEL and Amani Impex and that any insinuation of the same was an afterthought.**

8. **The learned trial Judge erred in fact and in law when she misconstrued and/or failed to properly evaluate and consider the evidence before her came to wrong conclusions of fact and of law."**

The 5th Appellant's grounds of appeal were these:

"1. **The Learned trial Judge misdirected herself and erred in law when she failed to apply section 92 of the Public procurement and Disposal of Assets Act No. 1 of 2003 and consider whether the acts or omissions alleged to have been done by the Appellant were not done in good faith.**

2. The Learned trial Judge misdirected herself and erred in law when she convicted the Appellant for offences that he had not been charged with nor informed of the nature of those offences as required by law.

3. The learned trial Judge erred in law when she deprived the Appellant of his right to a fair trial guaranteed in the Constitution of the Republic of Uganda.

4. The Learned trial Judge erred in law and contradicted herself when she held that the Appellant could be tried as a joint offender in respect of the offence of Abuse of Office for which she held that she could not be lawfully tried.

5. The learned trial Judge misdirected herself and erred in law and in fact when she convicted the Appellant for offences that are not minor and cognate to the offences with which he was charged and for which he had prepared his defence.

6. The Learned trial Judge erred in law when she failed to consider and apply the provisions of Regulation 147 (2) of the Public Procurement and Disposal of Public Assets Regulations, 2003 and came to the erroneous conclusion that the Appellant committed the criminal offences of Preparation and Abatement of a Crime and of Neglect to prevent a Felony.

7. The Learned trial Judge erred in law when she ignored and/or failed to consider and appraise the evidence during cross-examination of PW8 Uthman Segawa Ismail and PW12 ASP Umaru Mutuya.

8. The Learned trial Judge misdirected herself, failed to properly construe the evidence before her and erred in fact when she held that;

   a. Bidding processes are fraught with corruption, conflict of interest and undue influence;

   b. AITEL was smuggled onto the list of eligible bidders.

c. **The conduct of the Evaluation Process by the Evaluation committee was flawed;**

d. **There was no Joint Venture Contract between AITEL and Amani Impex and that any insinuation of the same was an afterthought.**

9. **The learned trial Judge erred in fact and in law when she misconstrued and/or failed to properly evaluate and consider the evidence before her and came to wrong conclusions of fact and of law.**

10. **The learned Trial Judge erred in law when she sentenced the Appellant on a non-existent charge of neglect to report."**

The 6th appellant's grounds of appeal were these:

"1. **The learned trial Judge erred in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision of convicting the appellant of Abuse of Office c/s 11 (1) of the Anti-Corruption Act and Neglect of Duty c/s 114 (1) of the Penal Code Act.**

2. **The learned trial Judge erred in law and fact when, (sic)**

i) **She concluded that the appellant and other members of the Evaluation Committee abused their office when they failed to disqualify Amman Impex and Amman Industrial Tools & Equipment Ltd (AITEL) without a Joint Venture Agreement whereas it was not a requirement in the solicitation documents.**

ii) **She failed to consider the evidence on record that there was a joint Venture between Amman Impex and AITEL.**

iii) **She held that the appellant and his co-convicts had neglected their duty when they failed to disqualify AITEL's bid at the Preliminary stages.**

3. **The learned trial Judge erred in law and fact when she ordered the appellant to jointly pay with other convicts the sum of USD 1,719,454.58 whereas he was neither charged nor convicted of the offence of causing financial loss.**

4. **The learned trial Judge erred in law and fact when she passed sentence that was not in accordance with the law."**

Representation:

It should be noted that there was a reconstitution of the Panel of Justices hearing the appeal, one of the members of the earlier panel having retired. At the hearing of the appeal before the present panel, Mr. Didas Nkurunziza and Mohammed Mbabazi all learned counsel appeared for the 1st appellant; Mr. Kato Sekabanja and Ms. Sophie Nyombi, both learned counsel appeared for the 2nd appellant; Mr. Richard Mwebembezi, learned counsel appeared for the 3rd appellant; Mr. Didas Nkurunziza also appeared for the 4th and 5th appellants; while the 6th appellant was represented by learned counsel Twaha Mukasa. On the other hand, the respondent was represented by Ms. Josephine Namatovu, a learned Principal State Attorney with the Directorate of Public Prosecutions. The respective Counsel filed written submissions which were accordingly adopted with leave of this Court.

On 24th April, 2019, when the matter came up for hearing before the reconstituted panel, the Court was informed that the 3rd appellant had died. There is also communication of the death, which was stated to have occurred on 10th November, 2018 vide a letter on record from Richard Mwebembezi Solicitors & Advocates. The 3rd appellant's appeal, therefore abated by reason of his death and it is unnecessary to consider it.

In disposing off this appeal, I will handle the 1st appellants' case, followed by the 2nd appellant's case, then the 4th and 6th appellants' case jointly, given that they substantially adopted each other's submissions, and the evidence brought against them at trial was essentially the same, and finally the 5th appellant's case.

I have carefully considered the submissions of the respective counsel for either side, studied the court record as well as the law and authorities cited to us by counsel, and those not cited which are relevant to the determination of this appeal. This is a first appeal, and the duty of a first appellate court, is to reappraise the evidence and come up with its own inferences, bearing

in mind that this Court did not have the advantage of seeing the witnesses testify like the trial Court. **See Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10** and **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No.10 of 1997,** where the Court observed that:

> **"The first appellate court has a duty to rehear the case and to consider the materials before the trial judge. The appellate court must then make up its mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impressions made on the judge who saw the witnesses, but there may be other circumstances quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate court has not seen."**

I shall proceed to consider this appeal with the above principles in mind.

The 1st appellant's appeal.

1st appellant's case.

In his submissions, counsel for the 1st appellant proposed the following issues, which in his view would adequately cover the 24 grounds set forth in the 1st appellant's memorandum of appeal:

> **"1. Whether acting in bad faith is an ingredient of the offence of causing financial loss in a public procurement transaction – Grounds 1,2 and 3, 17(e), 20(d), 19(c).**
>
> **2. Whether the accused acted knowingly or had reason to believe that his acts would cause financial loss – Grounds 4, 6, 10, 11, 18(a), 18(b), 19(b), 20(a), 20(b) and 20(c).**
>
> **3. Whether the learned trial Judge imposed the burden of strict liability on the accused in determining whether he was guilty of causing financial loss – Grounds 5, 7, 17(c), 17(e), 19(b), 19(d) and 20(d).**

4. Whether the appellant signed away the USD 1,719,454.58 on discrepant shipping documents that caused financial loss – Grounds 12, 13, 14, 17(b), 17(d), 18(c), 19(e) and 19(f).

5. Whether the fact that shipping documents were forged ought to have been considered by the trial Judge in her evaluation of evidence and final decision – Grounds 15, 16 and 17(a).

6. Whether the trial Judge contradicted herself when on one hand she found the appellant's conduct culpable and guilty of causing financial loss while on another exonerated the appellant of being guilty of abusing office – Ground 20.

7. Whether the earned trial Judge criminalized the conduct of the appellant on the basis of being Accounting Officer rather than applying the proper standard of conduct or behavior of reasonable man in similar circumstances and conditions – Ground 17.

8. Whether the trial Judge did not evaluate the claim authorization in effecting payment under LCs between Ministry of Local Government, Ministry of Finance & Economic Development, Bank of Uganda, Citibank and Stanbic Bank – Grounds 8 and 24."

On issue 1, counsel while referring to **section 92** of the **Public Procurement & Disposal of Public Assets Act, 2003** contended that acting in good faith was a statutory defence to any criminal charges preferred against a member of a Procurement and Disposal Entity. Counsel submitted that the 1st appellant was the Accounting Officer of the Ministry of Local Government (a Procurement and Disposal Entity) and the learned trial Judge erred to convict him yet the prosecution had failed to prove bad faith on his part. Counsel then contended that acting in bad faith was an ingredient of the offence of causing financial which ought to have been proved beyond reasonable doubt. In counsel's view, no bad faith could be imputed on the appellant in light of the fact that the shipping documents were proven to have been forged with the prosecution adducing no evidence to link the 1st appellant to the said forgery.

It was further contended for the 1st appellant that no evidence had been adduced to show that he had a culpable state of mind at the material time which was intended to cause financial loss. Yet on the other hand, the 1st appellant had, according to his Counsel ably adduced evidence in his defence to show that he acted in good faith during the entire procurement process. Moreover, according to counsel, the discrepancies in the shipping documents which were relied on by the learned trial Judge to convict the 1st appellant were a concoction of Bank of Uganda Officials.

Further still, counsel contended that the discrepancies in issue had been explained away by the 1st appellant while giving his defence. Counsel then re-iterated that it was the forgery of the shipping documents and not the discrepancies in issue which had caused the financial loss in issue. He then concluded that acting in good faith was a statutory defence and the appellant ought to have been acquitted by the learned trial Judge.

On issue 2, counsel contended that the prosecution had failed to prove that the 1st appellant had reason to believe that his acts would cause financial loss. The submissions by counsel under this issue seemed to overlap with those under issue 1 and were repetitive. Central to his submissions under this issue was the contention that the 1st appellant by doing the acts in issue, did not have the criminal state of mind to cause financial loss to his employer.

On issue 3, counsel faulted the learned trial Judge for having required the 1st appellant to exercise a higher level of diligence and prudence than he did yet the relevant transaction had been cleared by the Attorney General.

On issue 4, counsel faulted for her finding that the 1st appellant had approved the relevant payments based on discrepant documents. He contended that PW6 Anthony Musumba, a Bank of Uganda Official testified that there were no discrepant documents and the learned trial Judge should have relied on that evidence.

On issue 5, counsel contended that as the cause of the financial loss in issue was the reliance on forged shipping documents with the appellant having not participated in any forgery, he ought to have been acquitted.

On issue 6, counsel contended that the acquittal of the 1st appellant on the count of abuse of office meant that he should have been acquitted on the count of causing financial loss as well.

On count 7, counsel contended that the learned trial Judge had criminalized the appellant's conduct because he was an accounting officer. However the attempts to substantiate on this ground by counsel were rather incoherent.

On issue 8, counsel contended that the learned trial Judge had failed to evaluate the claim that the 1st appellants had been authorized to approve the ill-fated payments.

Respondent's case.

On issue 1, the learned State Attorney for the respondent submitted that the element of acting in 'good faith' was not an ingredient of the offence of causing financial loss, which offence is created under **section 20 of the Anti-Corruption Act, 2009**. Instead, counsel contended, the element which the 1st appellant seeks to read into the foregoing section is provided for under the PPDA Act, which is a different statute. The learned State Attorney was however in agreement with the first appellant's submissions that 'acting in good faith' may be pleaded as defence. She however contended that the prosecution had duly proved that the first appellant acted in bad faith and with a criminal intent in authorizing Bank of Uganda to pay for the 70,000 bicycles basing on discrepant documents. In support of the foregoing contention, counsel pointed out that the relevant payments were made by Letters of Credit and given the peculiar circumstances of payment under Letters of Credit, the conformity of the documents with the specifications in the Letters of Credit was both paramount and mandatory before payments could be made. In counsel's view, PW6 had raised issues

about the letters of credit which should have put the appellant on higher alert.

Counsel further submitted that certain discrepancies in the relevant documents had been communicated to the 1st appellant by PW6 in his letter dated 2nd March, 2011 (PEX 26(1)). Counsel pointed out that in his letter dated 3rd March, 2011, the 1st appellant wrote to the Bank of Uganda waiving the discrepancies and instructed them to pay. On the same day (3rd March, 2011), the 1st appellant also wrote to the Accountant General seeking for his permission to pay. In this letter, which is referred to as 'Form A', the 1st appellant assured the Accountant General that he was 'satisfied with the quality and quantity of goods rendered as per the contract'. According to evidence, however, the bicycles have never been delivered to date.

Further, that PW5 Fixon Akonya Okonye, a Commissioner responsible for Internal Audit and Inspectorate in the Ministry of Finance Planning and Economic Development (MoFPED) had testified that at the time the 1st appellant sought for the Accountant General's approval to pay, he had already paid out the money. In the prosecution's view, the 1st appellant's actions were not only misleading but they were also a clear indication of his ill intent and bad faith in making the payments.

On the contention by the 1st appellant's counsel that the element of mens rea was never proved against the 1st appellant because Bank of Uganda never alerted him that the shipping documents were forged, counsel contended that Bank of Uganda as the issuing bank had no responsibility to verify the authenticity or otherwise of the shipping documents; their duty as stipulated under Article 14 of the UCP 600 Rules as well as the evidence of PW6, was to examine the shipping documents and establish whether or not they were in compliance with what had been asked for in the Letter of Credit. In this case, when Bank of Uganda noted the discrepancies in the shipping documents, they timely notified the 1st appellant about them but he waived them and instead instructed them to pay. Counsel contended that given the relevance of documents in transactions that are based on Letters

of Credit, Bank of Uganda's warning about the discrepancies provided sufficient knowledge and reason for the 1st appellant to believe that paying on such documents would result into financial loss to Government. The 1st appellant waived the discrepancies under PEX 26(2).

Resolution of this Court regarding the 1st appellant:

In my view, the question for determination in this appeal is whether the 1st appellant was rightly convicted for the offence of causing financial loss contrary to **section 20 (1)** of the **Anti-Corruption Act, 2009** by the learned trial Judge.

In count one of the relevant indictment, the 1st and 2nd appellants were convicted of the offence of causing financial loss. The said offence is criminalized under section 20 (1) of the Anti-Corruption Act, 2009 which provides that:

> **"Any person employed by the Government, a bank, a credit institution, an insurance company or a public body, who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the Government, bank, credit institution commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or a fine not exceeding three hundred and thirty six currency points or both."**

My reading of the above section reveals that the ingredients which the prosecution had to prove beyond reasonable doubt so as to sustain a conviction against the 1st appellant were:

> **"1.The accused person was an employee of the Government.**
>
> **2. The accused did an act which caused financial loss to the Government.**
>
> **3. At the time of doing the act, the accused knew that the said act would cause financial loss or alternatively that there was reason for the accused to believe that the act in issue would cause financial loss."**

At the trial, PW6 Musumba Anthony then Head of Quality Control at Bank of Uganda clearly explained the 1st and 2nd appellant's role in the matter at hand. He testified that as the Bankers to the Government of Uganda, the Bank of Uganda was involved in the handling of letters of credit for a transaction involving the procurement of 70,000 bicycles by the Ministry of Local Government. He further testified that around 2010, Bank of Uganda received an application to open letters of credit for purchase of the bicycles in issue. The said application was signed by the 1st appellant (as accounting officer) and the 2nd appellant (as Principal accountant) in the relevant Ministry and the beneficiary was Amani Industrial Tools and Equipment Ltd. The relevant letters of credit were accordingly opened and subsequently Bank of Uganda received supporting documents from Stanbic Bank Uganda (the advising Bank to the relevant Ministry) namely, an invoice, a packing list, bill of lading, certificate of origin, insurance and photographs of the bicycles in relation to the transaction of purchasing the bicycles in issue.

Apparently upon examination of the supporting documents Bank of Uganda found that they were not compliant with the terms of the earlier opened Letters of Credit which they considered to be a red flag to the entire transaction of purchase of the bicycles in issue. They wrote to the 1st and 2nd appellant (as the applicants for opening the Letters of Credit) informing them of the issues with the entire transaction and requesting for instructions on how to proceed in the circumstances.

PW6 further testified that the 1st and 2nd appellants elected to waive the alleged red flag by Bank of Uganda and the related discrepancies asking Bank of Uganda to pay 40% of the total Contractual sum to the beneficiary in accordance with the terms of the relevant contract. Bank of Uganda obliged. What happened next is history, the intended supplier turned out to be a rogue and never supplied the bicycles in issue. Attempts to reverse the payments proved to be futile and the government lost a lot of money.

I observe that the documents used to clear the transaction turned out to be a forgery. In retrospect, the red flag raised to the 1st and 2nd appellants was

not without merit and could have saved the money from the rogue supplier. In his defence, the 1st appellant argued that he approved the payment in issue basing on contractual documents which were approved by other procurement organs under his Procurement and Disposal Entity (the relevant Ministry). The officers in charge of those organs, according to the 1st appellant were independent and were not subject to his control and further that the relevant contractual documents were approved by the Solicitor General.

Back to the ingredients of the offence of causing financial loss, I note that the 1st and 2nd ingredients were not disputed. As to whether the appellant had reason to believe that approving the relevant payments, we are of the opinion that the red flag raised to him by Bank of Uganda (that the relevant supporting documents were not compliant with the relevant Letters of Credit) gave the 1st appellant reason to believe that approving the payment in issue would cause financial loss to the Government (his employer). In the very minimum, it gave him something to think about.

In my view, the relevant provision (section 20 of the Anti-Corruption Act, 2009) requires the accused person to refrain from doing an act which a reasonable person would consider capable of causing financial loss. In relation to the case before us, would a reasonable person in the 1st appellant's shoes have stopped the payments upon the red flag in issue being raised as it was? If so, the trial Court would act properly in convicting the appellant and need not investigate his mental state at the material time. In a way, **section 20 (1)** of the **Anti-Corruption Act 2009** imposes criminal liability on a person for acts which would constitute negligence under civil law. Furthermore, the said section does not require proof of bad faith and therefore the assertions to that effect by counsel for the 1st appellant cannot be sustained. However, subject to the rules of statutory interpretation proof of good faith may constitute a defence to the charges under the said section 20 (1) by virtue of **Section 92** of the **Public Procurement and Disposal of Public Assets Act, 2003 (PPDA Act)** which provides as follows:

> **"No action shall lie against any member or staff of the Authority or a procuring and disposing entity for any act or omission done in good faith."**

However, I must observe that the Anti-Corruption Act 2009 is a later Act (having commenced in 2009) than the PPDA Act which commenced in 2003. The Anti-Corruption Act, 2009 is also more specific to the prosecution of Corruption related offences than the PPDA Act, 2003 which relates to procurement. In **David Sejaaka Nalima vs. Rebecca Musoke, Supreme Court Civil Appeal No. 12 of 1985,** the Court made the following observations in relation to Interpretation of statutes:

> **"...where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. It is immaterial whether both Acts are Penal Acts or both refer to civil rights. The former must be taken to be repealed by implication. Another branch of the proposition (which is relevant to this Case) is this, that if the provisions are not wholly inconsistent but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act." (Underlining is for emphasis)**

In light of the above authority, the provisions of the **PPDA Act, 2003** to the extent that they are inconsistent with those of the **Anti- Corruption Act, 2009** stand repealed by implication by the latter Act. In the context of section 20 of the Anti-Corruption Act, 2009, having facts from which a reasonable person would have concluded that an act or omission is likely to lead to financial loss would be sufficient to establish the ingredient of knowledge. It cannot be in good faith to do a reckless act even if the person alleges that his state of mind was innocent. Therefore, in the present case, I am unable to find that the 1st appellant who trivialized the red-flag issued to him by Bank of Uganda that the letters of credit were discrepant with the accompanying documents can be said to have exercised the requisite diligence of an accounting officer who was responsible for the colossal sums

in issue. The learned trial Judge had this to say of the matter at page 1609 of the record:

> **"Besides, there was another reason the two accused ought to have been more cautious to authorize payment-the sheer amounts involved. If A1 and A2 were acting as good custodians of government funds and resources, they should have exercised more diligence prior to effecting payment of public funds to an unknown supplier".**

The above finding by the learned trial judge points to negligence on the 1st appellant's part, namely, a failure to exercise due diligence in the circumstances given the huge sums of money involved. In view of the above analysis, I form the opinion that there was reason for the 1st appellant to believe that his acts would cause financial loss, and I would, accordingly, uphold his conviction by the learned trial Judge.

The other grounds in the 1st appellant's memorandum concerned the sentence and the relevant order for compensation. I observe that the 1st appellant was sentenced to a term of imprisonment for 10 years and along with his co-convicts was ordered to refund a sum of US Dollars 1,719,454.58 (US Dollars One Million, Seven Hundred Nineteen Thousand, Four Hundred Fifty Four and Fifty Eight Cents). It should be noted that the maximum sentence for the offence in respect of which the 1st appellant was convicted is fourteen years imprisonment. The learned trial Judge sentenced the 1st appellant after taking into consideration the relevant aggravating and mitigating factors and the colossal sums of money which were lost by the 1st appellant's actions and I have no reason to interfere with the relevant sentence.

I further observe that the order for compensation flows from the order of conviction of the 1st appellant of causing financial loss. For that reason, the submission by counsel that section 20 of the Anti-Corruption Act, 2009 does not permit the award of adequate compensation does not lead to the conclusion that compensation cannot be awarded. This is because Article 126 (2) of the 1995 Constitution and Section 126 (1) of the Trial on Indictment Act, Cap. 23 permit the High Court to make an award of

compensation for any offence where it appears from the evidence that some other person whether or not he or she is the prosecutor or witness in the case, has suffered material loss or personal injury in consequence of the offence committed. Having caused the financial loss, it is immaterial that the benefit thereof could have accrued to some other person. It would be a matter of the ordinary and natural consequence of the law that the loss is recoverable from the person who caused it though it may in appropriate cases be no bar to a convict pursuing indemnity from any third parties who could have received the money or property under the scheme in question. Therefore, I would uphold the order of compensation against the 1st appellant, who I found to have caused the financial loss in question.

The 2nd appellant's appeal.

The 2nd appellant's case

As earlier noted the 2nd appellant was the Principal Accountant in the relevant Ministry, and was jointly convicted, with the 1st appellant, of the offence of causing financial loss. The grounds of appeal for this appellant were as follows:

> "1. **The Learned Trial Judge erred in law and fact when she failed to properly evaluate the evidence adduced at the trial and apply it to the law of the offence of causing financial loss under section 20 of the Anti-Corruption Act, 2009.**
>
> 2. **The Learned Trial Judge erred in law when she shifted the burden of proof from the prosecution and placed it on the appellant.**
>
> 3. **The Learned Trial Judge erred in law and fact when she held that the loss was occasioned by the Appellant on authorizing payment and signing away USD 1,719,454.58 (United States Dollars One Million Seven Hundred Nineteen Thousand Four Hundred Fifty Four and Fifty Eight Cents) on discrepant shipping documents without scrutinizing and determining what caused the loss.**
>
> 4. **The Learned Trial Judge erred in law and fact when she sentenced the Appellant to a term of 10 years and 10 days and ordered him**

to jointly with other convicts refund USD 1,719,454.58 (United States Dollars One Million Seven Hundred Nineteen Thousand Four Hundred Fifty Four and Fifty Eight Cents)."

Arguing grounds 1 and 3 together, counsel faulted the learned trial Judge for holding that the 2nd appellant had authorized the payment of US Dollars 1,719,454.58 to the rogue supplier Amman Industrial Tools & Equipment Limited (AITEL) a holding which in his view was legally & factually untenable. In support of the foregoing submissions, counsel contended that the 2nd appellant had testified in his defence that he had signed the alleged letter of authorization of the payments in issue (P.Ex 26(2)) under duress as the 1st appellant had threatened to discipline him for delaying the procurement in issue. In further support, counsel pointed out that he had received a loose minute (D.Ex. 8) from the 1st appellant which evidenced the threats which the 1st appellant had sent to the 2nd appellant. He then concluded that had the learned trial Judge properly evaluated this evidence she would have acquitted the 2nd appellant.

It was further the case for the 2nd respondent that the purported authorization letter (PEx. 26 (1)), a response to a letter from Bank of Uganda pointing out the discrepancies in the relevant Letters of Credit was not an authorization at all but an equivocal instruction which the Bank of Uganda could have elected not to abide by. Counsel concluded by asserting that had the learned trial Judge construed the purported authorization as the equivocal instruction it really was, she would have acquitted the 2nd appellant.

In further support of the 2nd appellant's case, counsel was of the view that Bank of Uganda had been the true cause of the financial loss in issue having failed to follow the relevant procedures resulting in the payments in issue. He contended that Bank of Uganda should have contacted the paying bank (Citi-Bank) as well as the advising bank (Stanbic Bank) to address the discrepancies they had noted. Counsel then concluded that the laxity by Bank of Uganda in failing to point out the discrepancies in issue to the concerned banks, and not the 2nd appellant's acts had caused the financial loss in issue.

On ground 2, counsel faulted the learned trial Judge for shifting the burden of proof to the 2nd appellant to prove his innocence. He further contended that the learned trial Judge had made a baseless finding that PW5 Dr. Okonye Akonye and PW9 Gustavo Bwoch had contrived their testimonies to exonerate the 2nd appellant. In counsel's view, PW5 and PW9 were witnesses of truth who had been called by the prosecution; those witnesses were never challenged by the prosecution which never declared them hostile or challenged their testimony during cross examination. He further contended that PW5 and PW9's testimony brought doubt on the prosecution case which ought to have been resolved in the 2nd appellant's favour. In counsel's view, the learned trial Judge had already presumed that the 2nd appellant was guilty and in need of exoneration (as for example the exoneration by PW5 and PW9). He urged this Court to resolve the said doubt in the prosecution's case in the 2nd appellant's favour and acquit him.

On the sentence, counsel faulted the learned trial Judge for failing to make reference to the **Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) (Directions) 2013** which would have prompted her to take note of the following mitigating factors for the appellant:

- The 2nd appellant's conduct was not premeditated as he could not have known that Bank of Uganda would refer the matter of the discrepancies to the relevant Ministry and not the confirming Bank (Citi Bank)
- The 2nd appellant's conduct in the botched procurement was minimal and not sophisticated and he was not motivated by greed.
- The effect of the 2nd appellant's conduct was not as pernicious or drastic as misappropriation of funds intended for drugs, food, scholastic materials etc where parents die, children go malnourished or uneducated.

Further on the orders imposed by the learned trial Judge, counsel contended that the learned trial Judge did not have powers under the Anti-Corruption Act, 2009 to impose orders of compensation. In counsel's view, the foregoing Act gives Court power to order for confiscation of a convict's property an not to order for compensation as the learned trial Judge purported to do. It was

further contended for the 2nd appellant there was evidence to the effect that the Attorney General had sued an Insurance Company to recover the lost money, the learned trial Judge's order of compensation would have the effect of compensating the Government twice.

Respondent's reply.

In reply, counsel adopted the submissions made while replying to the first appellant's case only making a few further clarifications. On the contentions that the 2nd appellant acted under duress when he authorized the payments in issue, counsel submitted that the contents of the relevant letter concerned the appellant's dubious conduct in making errors and his subsequent delay in rectifying them. These errors according to counsel were; the 2nd appellant's delay in correcting mistakes in the account numbers submitted to Bank of Uganda for payment and submitting Citibank as the relevant Ministry's local bank instead of Stanbic Bank. She then contended that the the 2nd appellant cold not hide behind his incompetency and suspicious conduct to justify his own wrong doing.

Regarding the 2nd appellant's contentions that his actions of co-signing the authorizing letter with the 1st appellant did not cause the loss in issue, counsel submitted that those contentions were merely diversionary. According to counsel, the 1st and 2nd appellants ought to have acted on the discrepancies which were raised by Bank of Uganda as in retrospect had they acted on the said concerns they would have been prevented financial loss.

On the equivocal nature of the authorizing letter, counsel submitted that the use of the word 'request' in that letter was only a polite way of transmitting an unequivocal command to the Bank of Uganda to pay as it subsequently made the relevant payments pursuant to their authorization.

On ground 2, counsel submitted that no miscarriage of justice was occasioned on the appellant as a result of the impugned prosecution evidence thereunder.

On ground 4, counsel submitted that the sentence imposed on the 2nd appellant was justified in the circumstances. She further submitted that contrary to the assertions for the appellant, the learned trial Judge had powers under **Article 126** of the **1995 Constitution** as well as **Section 126** of the **Trial on Indictment Act, Cap. 23** to order for compensation of the victim as she did. She invited this Court to dismiss the 2nd Appellant's appeal and uphold the conviction, sentence and orders of the Trial Court.

Resolution of the 2nd appellant's appeal

I must reiterate that the case against the 2nd appellant was similar to that against the 1st appellant as the couple had co-signed a letter authorizing Bank of Uganda to make the relevant payments to AITEL (the rogue supplier) in the botched procurement of bicycles by the relevant Ministry in issue. Accordingly the earlier findings made in respect of the 1st appellant hold true against this appellant. Therefore, it is our finding in respect of the 2nd appellant, too, that the Bank of Uganda had raised a red flag to him (that the supporting documents to the relevant Letters of Credit were not compliant with it) which constituted sufficient reason for him to heavily ponder about the implications of approving the relevant payments.

In his defence, the 2nd appellant testified that although he was a second signatory on the bank accounts of the relevant Ministry he never participated in the procurement process and his only role was to receive instructions from the Accounting Officer (1st appellant). In relation to the botched procurement in issue, the 2nd appellant testified that the power relations in the ministry were unequal and that what he was required to do in the circumstances was to follow the Permanent Secretary's instructions without any questioning. The 2nd appellant further testified that the permanent secretary (1st appellant) had at one occasion reprimanded him for causing delay in the opening of the relevant letters of credit. It was therefore the 2nd appellant's defence that he signed the letters to approve the payment because the 1st appellant had issued threats to him. His testimony was not seriously challenged in cross examination which set up a defence of duress for the 2nd

appellant. The defence of duress is provided for under section 14 of the Penal Code Act, Cap. 120 which provides that:

> **"14. Compulsion.**
>
> **A person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or her or do him or her grievous bodily harm if he or she refuses; but threats of future injury do not excuse any offence."**

The defence of duress or compulsion has historically been considered to be available to persons who did or omitted to do a criminal act due to threats of death or suffering grievous bodily harm. In England, for example, the law on the subject has recently been discussed in in the **R v. Hasan [2005] 4 ALLER 686**, where Lord Bingham of the United Kingdom House of Lords observed that:

> **"...but it seems to me important that the issues the House is asked to resolve should be approached with understanding of how the defence (of duress) has developed, and to that end I shall briefly identify the most important limitations:**
>
> **(1) Duress does not afford a defence to charges of murder (R v Howe [1987] AC 417), attempted murder (R v Gotts [1992] 2 AC 412) and, perhaps, some forms of treason (Smith & Hogan, Criminal Law, 10th ed., 2002, p 254). The Law Commission has in the past (eg. in "Criminal Law. Report on Defences of General Application" (Law Com No 83, Cm 556, 1977, paras 2.44-2.46, [1977] EWLC 83)) ...**
>
> **(2) To found a plea of duress the threat relied on must be to cause death or serious injury. In Alexander MacGrowther's Case (1746) Fost. 13, 14, 168 ER 8, Lee CJ held:**
>
> **"The only force that doth excuse, is a force upon the person, and present fear of death."**

But the Criminal Law Commissioners in their Seventh Report of 1843 (p 31, article 6) understood the defence to apply where there was a just and well-grounded fear of death or grievous bodily harm, and it is now accepted that threats of death or serious injury will suffice: R v Lynch, above, p 679; R v Abdul-Hussain (Court of Appeal (Criminal Division), 17 December 1998, unreported).

(3) The threat must be directed against the defendant or his immediate family or someone close to him: Smith & Hogan, above, p 258. In the light of recent Court of Appeal decisions such as R v Conway [1989] QB 290 and R v Wright [2000] Crim LR 510, the current (April 2003) specimen direction of the Judicial Studies Board suggests that the threat must be directed, if not to the defendant or a member of his immediate family, to a person for whose safety the defendant would reasonably regard himself as responsible. The correctness of such a direction was not, and on the facts could not be, in issue on this appeal, but it appears to me, if strictly applied, to be consistent with the rationale of the duress exception.

(4) The relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions ...

(5) The defence of duress is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon.

(6) The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take. It is necessary to return to this aspect also, but this is an important limitation of the duress defence and in recent years it has, as I shall suggest, been unduly weakened.

(7) The defendant may not rely on duress to which he has voluntarily laid himself open...

...

Where duress is established, it does not ordinarily operate to negative any legal ingredient of the crime which the defendant has committed.

Nor is it now regarded as justifying the conduct of the defendant, as has in the past been suggested: Attorney-General v Whelan [1934] IR 518, 526; Glanville Williams, Criminal Law, The General Part (2nd ed, 1961), p 755. Duress is now properly to be regarded as a defence which, if established, excuses what would otherwise be criminal conduct: Director of Public Prosecutions for Northern Ireland v Lynch [1975] AC 653, 671, 680, 710-711; Hibbert v The Queen (1995) 99 CCC (3d) 193, paras 21, 38, 47, per Lamer CJC.

Duress affords a defence which, if raised and not disproved, exonerates the defendant altogether. It does not, like the defence of provocation to a charge of murder, serve merely to reduce the seriousness of the crime which the defendant has committed. And the victim of a crime committed."

The limitations on a successful plea of duress as articulated in the above authority may be summarized as follows:

1. Duress does not afford a defence to charges of murder.

2. To found a plea of duress the threat relied on must be to cause death or serious injury.

3. The threat must be directed against the defendant or his immediate family or someone close to him.

4. The relevant tests pertaining to duress have been largely stated objectively, with reference to the reasonableness of the defendant's perceptions and conduct and not, as is usual in many other areas of the criminal law, with primary reference to his subjective perceptions.

5. The defence of duress is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats which are relied upon.

6. The defendant may excuse his criminal conduct on grounds of duress only if, placed as he was, there was no evasive action he could reasonably have been expected to take.

7. The defendant may not rely on duress to which he has voluntarily laid himself open.

I have referred to the common law conception of duress only to illustrate that it will be available to a criminal defendant in only limited circumstances. Those limited circumstances in Uganda are narrower and they are prescribed under Section 14 of the Penal Code Act, Cap. 120. In order for the criminal defendant in Uganda to benefit from the defence he or she must show that:

> **"He or she was compelled to do or omit to do the criminal act by threats on the part of the other offender or offenders instantly to kill him or her or do him or her grievous bodily harm if he or she refuses; but threats of future injury do not excuse any offence."**

Relative to the 2nd appellant's appeal, it is obvious that the alleged threat of reprimand cannot be said to belong to the category that involves a threat of death or serious injury. As such, the defence of duress would not be open to the 2nd appellant. Moreover, the test applicable to the defence of duress is an objective one. The defendant must show that a reasonable person in his position would not have acted any different than he did. In the present case, the 2nd appellant was a public officer. The **Public Service Act, 2008** obligates public officers to perform their duties in a transparent, accountable and professional manner and, "in performing their duties, to exhibit expertise and integrity and portray a good image of the public service." Further that, "in performing their duties, apply such management techniques as may be prescribed to ensure economy, efficiency and cost effectiveness in service delivery." **See: Section 12 of the Act.**

The 2nd appellant did not act in a manner expected of a public officer as shown above. The Uganda Public Service Standing Orders, 2010 recognize that a subordinate public officer may find himself in a situation where his superior asks him to carryout unreasonable orders (as was the case with the

1st defendant and 2nd defendant). In such circumstances the relevant Standing Orders provide that:

> **"A public officer is expected to obey official and lawful instructions of his or her supervisors and must not refuse to carry out reasonable orders. If for any reason, the order strikes him or her as beyond the limits of recognized propriety, he or she may register a protest in writing, and such protest shall not count against the officer."**
>
> **See: section F-a 10**

In the present case, the 2nd appellant did not register a protest in writing which makes him liable for causing financial loss. All in all, I would dismiss the 2nd appellant's appeal and uphold the relevant conviction, sentence and orders of the learned trial Judge.

4th and 6th appellants' appeal

The 4th and 6th appellants were convicted for the offences of abuse of office and neglect of duty under Counts 9 and 12 of the indictment, jointly with the 3rd appellant (now deceased), while the 4th appellant was also convicted of the offence of neglect of duty under Count 4 of the indictment where he had been charged with the offence of abuse of office. The 4th and 6th appellants, substantially adopted the same submissions. From the submissions of counsel and the Memoranda of Appeal filed on behalf of the 2 appellants, I find that the following issues are relevant for determination before this Court:

> "1. **Whether the learned trial Judge convicted the appellant's in respect of an arbitrary act for which they were not indicted.**
>
> 2. **Whether the learned trial Judge did not properly evaluate the evidence when she found that the Evaluation Committee acted in abuse of office/neglect of duty by the manner in which they processed the bid in the procurement."**

I will address the two issues concurrently.

Count 9;

On Count 9, it was the evidence of the prosecution that the appellants (who were members of the Evaluation Committee) had recommended as compliant M/S AITEL's bid as having met the minimum past capacity and experience requirements of having supplied 70,000 bicycles as a single lot as stated in the solicitation documents, whereas not.

In their submissions, counsel for the 4th and 6th appellants faulted the learned trial Judge for finding them guilty of abuse of office on the basis that the Evaluation Committee did not make the recommendation that is set out in the particulars of Count 9 and that what they recommended was that AITEL was the best evaluated bidder. The Particulars set out under Count 9 partly read as follows:

> **"...on the 11th day of November 2010 at Ministry of Local Government Headquarters in Kampala District, being people appointed by the Ministry of Local Government as Chairman, Secretary and members respectively of the Evaluation Committee for the procurement of 70,000 bicycles, in abuse of authority of their offices, did an arbitrary act prejudicial to the interest of the said Ministry of Local Government to wit recommended as complaint M/S AITEL's bid as having met the minimum past capacity and experience requirements of having supplied 70,000 bicycles as a single lot as stated in the solicitation document, whereas not".**

On the other hand, counsel for the respondent contended that there was no contradiction between the particulars of offence under Count 9 and what the Evaluation Committee recommended, that AITEL was the best evaluated bidder. In counsel's view, the Committee's finding that AITEL was the best evaluated bidder could only be interpreted to mean that the Company complied with the minimum bid requirements. Further, that considering that members of the Evaluation Committee were required to evaluate the bids on the basis of the solicitation documents and by recommending AITEL as the best evaluated bidder to the Contracts Committee, they were in essence stating that the Company had fulfilled the bid requirement for past capacity and experience to have supplied 70,000 bicycles in one lot, which was not true. It was also the case for the 3rd, 4th and 6th appellants that the evaluation

methodology stipulated by the solicitation documents [EXH P7) was followed. It was their argument that in evaluating a bid, substantial responsiveness would be considered a pass. This essentially meant that if a bidder significantly/largely complied with a certain requirement in the solicitation documents, he/she would be considered to have qualified accordingly. It was contended that in the present case, there was evidence that Amman Impex, which allegedly submitted the bid documents with AITEL, had not only supplied 90,000 bicycles in total, but had also ever supplied 65,000 bicycles in one single lot. It was the contention by counsel for the appellants that this was substantial responsiveness by 93%. It was for that reason that AITEL was considered the best evaluated bidder.

Counsel for the 6th appellant submitted that a recommendation from the Evaluation Committee could not be held to be a directive or an arbitrary act.

In response to the above, counsel for the respondent submitted that one of the conditions that was set out in the solicitation documents was that the bidders ought to have handled a similar or related business of 70,000 bicycles in terms of distribution as a single lot, countrywide. Counsel made reference to the evidence of PW8 (Uthman Segawa), an Advocate with the PPDA who had conducted a procurement audit into the procurement of the 70,000 bicycles and indicated that the contract had been awarded to a bidder (AITEL), which was only 2 months old and did not have the demonstrated experience as stated in the solicitation documents.

Counsel for the respondents further submitted that the letter [EXH P18(2)] allegedly written by Amman Impex to the Head Procurement of the relevant Ministry in issue informing him about a Joint Venture between Amman Impex and AITEL could not be construed as evidence of a Joint Venture in absence of a Joint Venture Agreement, and all the bid documents clearly indicated that AITEL bided as a single Company. Further, that the evidence of PW8 and Police established that there was no Joint Venture Agreement between Ammani and AITEL.

Counsel for the respondent further submitted that the bidding process with regard to AITEL was marred with irregularities which ought to have disqualified it from participating in the bidding process since it was never listed on PP Form 30 as required under Regulation 146(3)(a) of the PPDA Act.

It was the trial Judge's decision that the conduct of the evaluation process was flawed from the moment AITEL was smuggled onto the list of eligible bidders. That the due diligence conducted on AITEL and Amman was superficial and meaningless but rather a whitewash passing off as a job well done. In her view, there was no joint venture between AITEL and Amman Impex and the person who stealthily shortlisted AITEL knowing that it had been incorporated for purposes of entering this venture did so knowingly and corruptly.

It appears to me that the learned trial judge attributed bad faith on the part of the members of the evaluation committee. It was her opinion that AITEL was smuggled into the bidding process and it was curious why it had been recommended as the best evaluated bidder yet it was only a few weeks old.

Therefore, it is my finding that the contention raised that the learned trial Judge did not take into consideration the ingredient of bad faith stipulated under Section 92 of the PPDA Act cannot be sustained.

I note that the bidding documents that were tendered by AITEL included a letter (EXH P18(2)) indicating that Amman Impex was in a joint venture with AITEL, to supply the 70,000 bicycles and that it would be the lead partner jointly and severally liable for the fulfillment of the contract. Amman Impex also issued a Power of Attorney to AITEL to act on its behalf in the bid tender, which was also attached to the bid documents. I also note the argument raised by the appellants that the Evaluation Committee based its recommendation that AITEL was the best evaluated bidder on the fact that Amman Impex had the experience of having supplied over 65,000 bicycles in a single lot, therefore having passed the substantial test.

However, I also note that there was no Joint Venture Agreement attached to the bidding documents upon which the Evaluation Committee based in reaching its decision that a joint venture existed between the two companies, before recommending AITEL as the best evaluated bidder. It was not indicated anywhere in the evaluation documents on record, including the Record of Bid opening and the Preliminary Examination and Assessment Eligibility that the Evaluation Committee considered AITEL and Ammani Impex as a joint venture. It is also evident that the firm which was recommended by the Evaluation Committee, was solely AITEL, which was not in a joint venture. I accept the evidence of PW8 that if the Evaluation Committee had evaluated the bid as a joint venture between Amman Impex and AITEL, even the contract would have been awarded to the two Companies jointly and not only in the name of AITEL. In my view, the Evaluation Committee recommended AITEL, not on the basis of it being in Joint Venture with Ammani Impex.

I believe that the fact that AITEL was only a couple of weeks old when they commenced the bidding process ought to have put the members of the Evaluation Committee on notice for them to carry out reasonable due diligence on that Company. As it is, they went ahead to award the contract only to AITEL, meaning that all the obligations were only on AITEL. The fact that Ammani Impex is stated to have written a letter claiming to be in Joint Venture with AITEL and also giving a power of Attorney to AITEL to act on their behalf did not make them obligated when the award of contract is only made to one party to the Joint Venture. AITEL clearly used the name Ammani Impex to cover their lack of experience in the subject of the procurement.

With regard to the contention that AITEL was never listed on PP Form 30, the trial judge found that the record of issue of the solicitation documents (PP Form 30) [EXH P18(2)] did not list AITEL as one of the fourteen companies that signed for picking of bids, and I agree. The trial Judge also took into consideration the defence raised by the accused persons that this was a clerical error by a support staff (page 1634 of the proceedings).

Counsel for the appellants relied on Regulation 147(2) to submit that upon carrying out an investigation, it was decided that AITELS bid be accepted regardless of the fact that it was not listed on PP Form 30. Regulation 147(2) provides as follows;

> **"Where a bid referred to in sub regulation (1) is received, a procuring and disposing entity shall investigate how the bidder obtained the solicitation document and shall, where appropriate, recommend measures against any bidder or member of staff of the procuring and disposing entity found to be in breach of these Regulations, or refer the matter to the Authority for investigation."**

From the reading of the above provision, it appears to me that where a bid has been received when the bidder is not listed on PP Form 30, the procuring and disposing entity should investigate the circumstances under which the bidder obtained the solicitation documents and recommend measures against the bidder or the member of staff found to be in breach. I do not agree with the appellants' counsel that Regulation 147(2) gives powers to the Committee to accept the bid after investigations. The only other option is to refer the matter to the authority for investigation. It is also clear that reference to this regulation is an afterthought. It does not, however, help the appellants as indicated above. The act of admitting AITEL's bid when it did not appear on PP Form 30 was therefore arbitrary, and prejudicial to the interests of the government.

The defence explained that an investigation was carried out and it was discovered that a member of staff had erroneously not included AITEL and some other bidders on PP Form 30. However, AITEL was one of the bidders who were traced on the Record of Issue of Bids [EXH D21] which each bidder would individually fill in and sign. However, there is no evidence on record to show that an investigation was carried out in this respect, and even if there was, the only purpose would be to punish anyone in breach of the regulation. I am in agreement with the finding of the trial Judge that EXH D21 was simply an afterthought and a way of sneaking AITEL, or AITEL smuggling its way into the procurement process

There was also the evidence of URA receipts showing that AITEL had purchased the Bid documents. However, I also note that the payment of the URA fees by AITEL was days after the official closing date for the submission of the bid documents. It is indeed questionable how AITEL could have picked bid documents without paying the requisite fees.

I am in agreement with the finding of the trial Court that AITEL was corruptly included in the bidding process, since regulation 147(1) of the PPDA Regulations requires that a bid which does not appear on PP Form 30 must be rejected. I find that the stipulated procedures for the receiving and evaluating the bid of AITEL in this particular procurement were contravened. It is indeed curious that AITEL was only 2 weeks old when it entered the bid and about six weeks old when it was evaluated yet it was recommended by the Evaluation Committee to the Contracts Committee as the best evaluated bidder.

I do not accept the argument raised by the 6th appellant that he should not have been convicted for the above stated offences because the office in respect of which he committed the above offences is not the same office that he holds in Government. It is not disputed that he was appointed as a member of the Evaluation Committee but he was ordinarily employed as a Senior Assistant Secretary. However, unlike the 5th appellant, the 6th appellant was employed by government and he was appointed to the Evaluation Committee still holding his position as an employee of Government. He could therefore not flout his mandate merely because he was entrusted to work on a Committee by his employer, which assignment was not within his designation as per his appointment letter. I, therefore, find that the 6th appellant was properly charged and convicted in accordance with the law.

Accordingly, the conviction of the 4th and 6th appellants on this Count, are upheld.

Count 12.

The 4th and 5th appellants were convicted of the offence of neglect of duty, on account of their failure to disqualify AITEL from participating in the bidding process since it was not listed on PP 30, as required under Regulation 146 (3) (a) of the PPDA Act.

The evidence adduced for the prosecution for this charge was basically the same as for count 9 already discussed above. The trial judge reiterated her reasons of convicting the three appellants in Count 9 for abuse of office and convicted the appellants in count 12 of neglect of duty. Therefore, the decision in Count 9 above applies to this Count as well.

COUNT 4.

The 4th appellant was also indicted under Count 4 for the offence of abuse of office. The particulars of the indictment were that in abuse of the authority of his office, the 4th appellant signed an Addendum to the contract in which the delivery period for the bicycles was extended by one month without reference to the Contracts Committee, as required by the law. However, the learned trial Judge convicted him of the offence of neglect of duty, contrary to section 114(1) of the Penal Code Act.

Counsel for the 4th appellant submitted that convicting the appellant of the offence with which he was not charged amounted to denial of his right to a fair trial.

Counsel for the respondent submitted that section 87 of the Trial on Indictments Act empowers Court to convict a person with a minor and cognate offence to the one that he/she was charged with. In counsel's view, the offence of abuse of office was in the same category with the offence of neglect of duty, and accordingly, no miscarriage of justice was occasioned to the appellant.

Black's Law Dictionary 8th Edition defines a cognate offence as;

"An offence that is related to the greater offence because it shares several of the elements of the greater offence and is same class of category".

I find that the offence of neglect of duty is not minor and cognate to the offence of abuse of office. They are not of the same kind/species, and the elements of the offences are substantially different. Therefore, the appellant ought to have been charged with the offence of neglect of duty and be given an opportunity to put up a defence before being convicted of the same.

The conviction and sentence on this Count is therefore set aside.

The 5th appellant

The 5th appellant was convicted on counts 9 and 12 of the Indictment. In Count 9, he was charged with Abuse of Office but convicted of abatement contrary to Section 52 of the Anti-Corruption Act, and in Count 12, he was charged with neglect of duty but convicted of neglect to prevent a Felony, contrary to Section 389 of the Penal Code Act.

The 5th appellant was initially charged with Abuse of Office and Neglect of duty, however, the trial Judge made a finding that the appellant was not an employee of the Government but a consultant. She could therefore not convict him of the said offences.

The 5th appellant appealed on grounds that he was convicted of offences with which he was not charged.

The respondent did not respond to the above arguments raised for the applicant.

Section 52(c) of the Anti-Corruption Act provides that a person who abets or is engaged in a criminal conspiracy to commit an offence under this Act commits an offence and is liable on conviction to any penalty prescribed respectively for such an offence by the Penal Code Act. Section 19(c) of the Penal Code Act provides that every person who aids or abets another person in committing the offence is deemed to have taken part in committing the offence and may be actually charged with committing it.

From the above provisions, I hold the view that in the present case, abetting is not a minor and cognate offence to the offence of abuse of office since the two offences carry the same punishment under the law. However, from reading section 19(c) of the Penal Code Act, it appears that the said section is merely a definition section and it was not necessary that the 5th appellant should have been charged under the said section. It would suffice if the particulars of the offence were framed in such a way that the appellant was made aware of the act of abetting. In the present case, however, the particulars of offence did not indicate in any way that the 5th appellant was being charged with abetting so as to afford him an opportunity to plead and put up a defence accordingly.

It is therefore my finding that although it was not necessary to charge the appellant under Section 19(c) of the Penal Code Act for abetting, it was essential that the particulars of the offence should have adequately informed him of the abetting element so as to afford him an opportunity to prepare his defence.

On Count 12, the appellant was charged with neglect of duty but was convicted of neglect to prevent a felony. Section 389 of the Penal Code Act provides that every person who, knowing that a person designs to commit or is committing a felony, fails to use all reasonable means to prevent the commission or completion of the felony commits a misdemeanor.

In my view, the offence of neglect to prevent a felony is not minor and cognate to the offence of neglect of duty. They are not of the same kind/species. The appellant ought to have been charged with the offence of neglect to prevent a felony and be afforded an opportunity to plead and offer a defence to it before being convicted of the same. Besides, all the offences that were committed or alleged to have been committed in the procurement were not felonies within the meaning of the law. Therefore, for the above reasons, I would allow the 5th appellant's appeal in this regard.

Appeal against the compensation orders.

The 1st, 2nd, 4th and 6th appellants appealed against the order of compensation, made against them by the trial judge, and contended that this was an illegal order because it is not provided for under the law. They relied on Sergeant Baluku Samuel & anor vs. Uganda, Court of Appeal Criminal Appeal No.172 of 2011, where the Court held that the sentence of compensation was unlawful because it is not provided for under Section 11 of the Anti-Corruption Act, 2009.

It is not true as alleged for these appellants that the compensation order is illegal. I note that there is sufficient legal authority for a court to order the convicts to pay compensation to the appropriate person, if the evidence adduced during the trial indicates that that convict was involved in some wrongdoing, and there was a victim of the said wrong doing. In such circumstances, the victim is entitled to compensation for having suffered loss at the hands of the convicts. See: Article 126 (2) (c) of the 1995 Constitution and Section 126 (1) of the Trial on Indictments Act, Cap. 23. Having found that the 1st and 2nd appellants caused the financial loss in issue, I shall uphold the compensation order against them.

As regards, the 4th and 6th appellants, I am of the view that they, too, should pay compensation for the reasons I will state hereafter. The 1995 Constitution enjoins the courts, in adjudicating cases of both a civil and criminal nature to apply the principle that adequate compensation shall be awarded to victims of wrongs. See: Article 126 (2) (c) of the 1995 Constitution. Therefore, whenever, the court decides that a person has committed a wrong, for example, if a person is convicted of a criminal offence, and there is a victim of his acts or omissions, the court should order appropriate compensation against that person.

Specifically on criminal trials in the High Court, **Section 126 (1) of the Trial on Indictments Act, Cap. 23** provides that:

> **"(1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person,**

whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable."

I have considered the prayer by counsel for the 4th and 6th appellants, to quash the trial Court's compensation order against them, since they were neither convicted of causing financial loss, nor adjudged by the trial Court to have done the acts of approving the payments which caused the financial loss. While that is true, the 4th and 6th appellants originated the "wrongs" when they participated in the approval of the rogue supplier in the procurement the bicycles, which were never delivered. They too, committed wrongs against the Government, which they ought to, and were rightly ordered to make compensation for. Accordingly, the order to compensate the Government of US Dollars 1,719,454.58 (US Dollars One Million, Seven Hundred Nineteen Thousand, Four Hundred Fifty Four and Fifty Eight Cents), is upheld against the 1st, 2nd, 4th and 6th appellants, who shall make the same jointly and in equal proportions as proposed by the learned trial Judge. I also note that the issue of apportionment of compensation was not seriously canvassed on appeal by any of the appellants, and I take it that neither of them disputed the same, and I uphold it.

In the result, these consolidated appeals would be disposed of accordingly, and I would make the following orders:

a) The 1st and 2nd appellant's appeals would be dismissed and the relevant sentences and orders of the learned trial Judge upheld.

b) The 5th appellant's appeal is allowed. Accordingly, his relevant convictions are quashed, and the relevant sentences and the attendant orders of disqualification and compensation are set aside. He shall be set free unless he is being held on other lawful charges.

c) The 4th appellant's appeal regarding Count 4 of the relevant Indictment is also allowed, and his conviction thereunder is quashed.

d) The 4th and 6th appellants' appeals in respect of Counts 9 and 12 of the Indictment are dismissed and their convictions, sentences and the relevant orders, are upheld.

e) The learned trial Judge's compensation order, is upheld against the 1st, 2nd, 4th and 6th appellants, who shall jointly and in equal proportions, pay to the Government compensation of **US Dollars 1,719,454.58 (US Dollars One Million, Seven Hundred Nineteen Thousand, Four Hundred Fifty Four and Fifty Eight Cents).**

f) However, the 3rd appellant died during the hearing of the appeal, and his appeal, therefore, abated.

Decision of the Court

By unanimous decision, the 1st and 6th appellant's appeals against conviction and sentence are dismissed, while the 5th appellant's appeal is allowed. Still, by unanimous decision of the Court, the 4th appellant's appeal is allowed in part, as proposed in order (c) above.

By a majority decision of 2:1 (Madrama, JA dissenting), the 2nd appellant's appeal is dismissed.

By a majority decision of 2:1 (Madrama, JA dissenting, as regards the 2nd appellant only), the 1st, 2nd, 4th and 6th appellants shall jointly and in equal proportions, pay to the Government compensation of **US Dollars 1,719,454.58 (US Dollars One Million, Seven Hundred Nineteen Thousand, Four Hundred Fifty Four and Fifty Eight Cents).**

The 3rd appellant's appeal abated, by reason of his death.

It is so ordered.

Dated at Kampala this ..... day of .....2019.

.....

Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Musoke, Obura and Madrama, JJA)

CONSOLIDATED CRIMINAL APPEALS NOS. 723, 734, 735 & 742 OF 2014

(Arising from Judgment of the High Court, Anti-Corruption Division in Criminal Case No. 47 of 2012 before Hon. Lady Justice Catherine Bamugemereire, J (as she then was) delivered on 15.07.2014)

1. **JOHN MUHANGUZI KASHAKA** }
2. **HENRY BAMUTURA** }
3. **ROBERT MWEBAZE** } ::::::::::::::::::**APPELLANTS**
4. **SAM EMORUT ERONGOT** }
5. **TIMOTHY MUSHERURE** }
6. **ADAM ALUMA** }

VERSUS

UGANDA::**RESPONDENT**

JUDGMENT OF HELLEN OBURA, JA

I have had the opportunity to read in draft the judgment of my learned sister Hon. Lady Justice Elizabeth Musoke, JA. I agree with the findings and conclusions as relate to the 2nd, 3rd, 4th, 5th and 6th appellants with nothing useful to add. I also agree with Her Lordships findings and conclusion that the 1st appellant's appeal be dismissed, however, I will elaborate on some areas and add a few points.

Background to the appeal

The background of this appeal is elaborately set out in the draft judgment of Hon. Lady Justice Elizabeth Musoke but in summary the appellants were involved in the procurement of 70,000 bicycles for Chairpersons of Village and Parish Councils in Uganda under the Ministry of Local Government (MoLG) where the 1st appellant was the Permanent Secretary (PS). The bidding and selection processes were completed and the best evaluated bidder was found to be a company called Amman Industrial Tools and Machinery Limited (AITEL) to whom the contract was awarded. The contract was signed but during the execution process some terms were altered. Although an advanced payment was made to the contractor, the bicycles were never delivered.

The appellants were later indicted before the Anti-Corruption Division of the High Court on several counts of Abuse of Office, Causing Financial Loss and Neglect of Duty.

1st Appellant

For the 1st appellant, he was jointly indicted with the 2nd appellant on two counts. On count 1 they were indicted of the offence of causing financial loss contrary to section 20 (1) of the Anti-corruption Act, 2009. The summary of the particulars of the offence was that the 1st appellant and 2nd appellant being employed in the MoLG as PS and PA respectively, in performance of their duties, authorized payment of USD 1,719,454.58 to M/S AITEL despite being informed by the BoU that documents presented by Stanbic Bank were not in strict compliance with the terms of the Letter of Credit, knowing or having reason to believe that the act would cause financial loss to the MoLG.

On count 2, they were indicted of the offence of abuse of office contrary to section 11 (1) of the Anti-Corruption Act 2009. The summary of the particulars of the offence was that the 1st appellant and the 2nd appellant being employed in the MoLG as PS and PA respectively, in abuse of the authority of their offices, did an arbitrary act to the prejudice of their employer by writing a letter to BoU in which they amended the condition for the final destination of the bicycles from villages and parishes to Kampala with no equitable adjustment in the contract price in accordance with the special condition of contract and with reference to the contracts committee for approval as required by the law and procedure.

The 1st appellant was also indicted on counts 3 and 4 jointly with the 4th appellant of abuse of office. The gist of the particulars on count 3 was that the 1st appellant and the 4th appellant in abuse of authority of their respective offices of PS and Assistant Commissioner Policy and Planning did an arbitrary Act to the prejudice of their employer MoLG by signing a final contract with amended terms of payment to 40% on presentation of shipping documents instead of full payment on delivery as had been approved by the Contracts Committee in the solicitation document contrary to provisions of the law and procedure.

The gist of the particulars on count 4 was that the 1st appellant and the 4th appellant in abuse of authority of their respective offices of PS and Assistant Commissioner Policy and Planning did an arbitrary Act to the prejudice of their employer MoLG by signing an Addendum 1 to the contract in which the delivery period was extended by one month without reference to the Contracts Committee as required by law and procedure.

The 1st appellant pleaded not guilty to all the 4 counts and at the trial the prosecution called 12 witnesses to prove its case against him and the other 5 appellants. The 1st appellant

was found not guilty on all the counts of abuse of office and acquitted. However, he was found guilty of causing financial loss and sentenced to 10 years and 10 days imprisonment. He was also disqualified from holding any public office in Uganda for 10 years. He has appealed against his conviction and sentence on 24 grounds. His counsel in his submission raised 9 issues based on those grounds for determination by this Court, namely;

1. Whether acting in good faith is an ingredient of the offence of causing financial loss in a public procurement transaction-Grounds 1, 2, 3, 17 (e), 19 (c), and 20 (d).
2. Whether the appellant acted knowingly or had reason to believe that his acts would cause financial loss-Grounds 4, 6, 10, 11, 18 (a), 18 (b), 18 (c) 19 (b), 20 (a), 20 (b) and 20 (c).
3. Whether the learned trial Judge imposed the burden of strict liability on the 1st appellant in determining whether he was guilty of causing financial loss- Grounds 5, 7, 17 (c), 17 (e) , 19 (b), 19 (d) and 20 (d).
4. Whether the 1st appellant signed away the USD 1,719,454.58 on discrepant shipping documents that caused financial loss- Grounds 12, 13, 14, 17 (b), 17 (d), 18 (a) 18 (c) 19 (e) and 19 (f).
5. Whether the fact that the shipping documents were forged ought to have been considered by the trial Judge in her evaluation of evidence and final decision- Grounds 15, 16 and 17 (a).
6. Whether the trial Judge contradicted herself when on one end she found the appellant's conduct culpable and guilty of causing financial loss while on another exonerated the appellant of being guilty of abusing office- Ground 20.
7. Whether the learned trial Judge criminalized the conduct of the appellant on the basis of being Accounting Officer rather than applying the proper standard of conduct or behavior of a reasonable man in similar circumstances and conditions- Ground 17.
8. Whether the trial Judge did not evaluate the claim of authorization in effecting payment under LCs between MoLG, Ministry of Finance & Economic Development (MoFED), BoU, Citibank and Stanbic Bank-Grounds 8 and 24.
9. Whether the sentence for compensation was legal and lawful.

In exercise of the 1st appellate court's duty to re-appraise all the evidence and draw its own inferences of facts as provided under rule 30 of the Rules of this Court, I have considered the submissions of both counsel and carefully re-evaluated the evidence on the record.

As regards the 1st, 2nd, 3rd and 4th issues, I note the arguments of both counsel as summarized in the draft judgment of my learned sister. I do agree that good faith as provided under section 92 of the PPDA Act is a defence that is available to a person indicted of the offence of causing financial loss. However, I do not agree that it is an ingredient of the offence as argued by counsel for the 1st appellant.

The ingredients of the offence of causing financial loss were well summarized by the learned trial Judge as follows:

1. That the accused was employed by the government, a bank or credit institution, an insurance company or a public body at the material time.
2. That the accused did any act or omitted to do an act knowing or having reason to believe that such act or omission would cause financial loss
3. That the government, bank or financial institution suffered loss
4. That it is the accused who so caused the loss.

It is not disputed that the 1st appellant was employed by the Government of the Republic of Uganda as an accounting officer. What is contested is the allegation that his acts or omission caused financial loss to the MoLG.

As I consider that matter, I will address the 2nd, 3rd and 4th ingredients together as I resolve the 1st, 2nd, 3rd and 4th issues raised by counsel for the 1st appellant. In so doing, I will first highlight the relevant provisions of the law on the matter. Section 7 (2) of the Public Finance and Accountability Act, No. 6 of 2003 clearly spells out the duty of an accounting officer in the control and management of public funds as follows;

> *"An accounting officer shall control and be personally accountable to Parliament for the regularity and propriety of the expenditure of money applied by an expenditure vote or any other provision to any ministry, department, fund, agency, local government or other entity funded wholly through the Consolidated Fund, and for all resources received, held or disposed of, by or on account of that ministry, department, fund, agency, local government or other entity."*

Under section 7 (5) of the Public Finance and Accountability Act the personal accountability of an accounting officer is not affected by any delegation of his powers and duties.

Procurement process entails use of public funds and so the oversight role of an accounting officer in the control and management of such funds is preserved under the Public Procurement and Disposal of Public Assets Act No. 1 of 2003 (PPDA Act) and the Public Procurement and Disposal of Public Assets Regulation (PPDA Regulations). Section 25 of the PPDA Act provides that the accounting officer of a procuring and disposing entity

shall have overall responsibility for the execution of the procurement and disposal process in the procuring and disposing entity.

Regulation 41 of the PPDA Regulations provides that an accounting officer shall have the overall responsibility of the successful execution of the procurement, disposal and contract management processes in the procuring and disposing entity.

Regulation 42(1) of the PPDA Regulations anticipates a disagreement between an accounting officer and contracts committee on any decision pertaining to the application or interpretation of any procurement or disposal method, process or practice under the Regulations and what he should do in that circumstance. It provides thus:

> *"Where an accounting officer disagrees with the contracts committee on any decision pertaining to the application or interpretation of any procurement or disposal method, process or practice under these Regulations, the accounting officer may return the decision to the contracts committee for review, or request for an independent review by the authority."*

Regulation 252(1) and (2) of the PPDA Regulations prohibits payment to a provider under a contract for works, services or supplies without receipt of the deliverables specified in the contract except where an appropriate payment security is obtained.

This regulation is intended to cushion government from any risk of loss that may result from payment for goods that may not be delivered like in the instant case where 40% of the contract sum was to be paid upon citing the documents. It was therefore incumbent upon the 1st appellant as the accounting officer to ensure that an appropriate payment security was provided for in the solicitation document and obtained before clearance for advance payment could be made.

I note that in this case there was no provision for advance payment security in the solicitation document because the terms of payment was to the effect that full payment would be made upon delivery. It was AITEL that introduced the idea of irrevocable and transferable letter of credit and payment of 100% contract sum upon citing the documents in its bid. In that regard, the bid of AITEL was not responsive as relates to payment terms and if the Evaluation Committee had cared to evaluate that item AITEL would not have qualified. Similarly, if the 1st appellant as the Accounting Officer had exercised his oversight role in the process he would have noted this anomaly and disagreed with the recommendation of the Contracts Committee under regulation 42 (1) of the PPDA Regulations.

It is also noteworthy, that there were fundamental changes to the terms of payment under General Contract Conditions (GCC) and the Special Contract Conditions (SCC) which formed part of the contract that was signed on 26th November 2010 were done without

referring it to the Contracts Committee for approval. This included a request for a change to partial shipment of the bicycles and trans-shipment contained in letter dated 22/11/2010 which was addressed directly to the Accounting Officer (1st appellant). Another change was on payment terms. The 1st appellant should have referred the matter to the Contracts Committee for approval subject to demanding for advance payment security at that stage so that it could be incorporated into the draft contract which had not yet been signed.

The proposal for those many fundamental changes at that stage raised suspicion which should have called for proper verification of documents before authorization of payment especially after the BoU had queried them.

I have no doubt in my mind that by the 1st appellant signing the contract containing provision for advance payment without providing for the advance payment security and later authorizing the payment even when a red flag was raised, he ought to have known that financial loss would result to the entity. This is more so because the mode of payment the parties had agreed on was letters of credit by which payment is effected upon sighting the documents. It therefore called for critical analysis of the documents to ensure that they were authentic before payments could be made. Any slight indication that the documents had issues required a thorough double checking. That, in my view, squarely fell in the docket of the 1st appellant as the Accounting Officer. He had the power to withhold authorization of payments until confirmation was received from the confirming bank regarding the suspected discrepant documents especially the certificate of origin. He never bothered to do that but instead rushed to authorize payment thus causing the loss.

In addition, there was ample evidence that AITEL had been newly incorporated in Uganda. It can be safely implied that it was registered for purposes of participating in the bidding yet it had no track record of any contract performance let alone one of that magnitude. This fact called for diligence in handling the stage of payment more especially due to the fact that the purported joint venture between AITEL and Amman Impex was a glaring sham as it was not supported by any joint venture agreement. Surely, that should not have missed the attention of the 1st appellant in his oversight role in the procurement process.

I must also point out that as an Accounting Officer, the 1st appellant had a statutory duty to protect government funds and to that end, he should have instructed Bank of Uganda (BoU) to contact the confirming bank to verify the authenticity of the documents which were said to be discrepant instead of relying on the alleged verification done by the internal audit department of the Ministry of Local Government (MoLG) which had no capacity to verify documents originated in another jurisdiction.

The 1st appellant in his defence passed the buck to Bank of Uganda and the Evaluation Committee as well as the Contracts Committee forgetting that he had a statutory duty under section 25 of the PPDA Act and Regulation 41 of the PPDA Regulation to oversee the procurement process and plug out any loopholes that were likely to cause financial loss for which he is held accountable by law.

In the case of **Uganda vs Prof. Gastavus Ssenyonga & another, Court of Appeal Criminal Appeal No. 4 of 1997**, a similar back-passing was canvassed in defence but the unimpressed Justices of this Court described it as "a lame excuse." The Court in coming to that conclusion stated that every member of staff in the Ministry of Agriculture, where the respondents were Accounting Officer and an undersecretary respectively, including the Principal Accountant and the Senior Accountant (who the respondents in that case said were to blame), were under them.

In the instant case, while I agree that BoU should have contacted the confirming bank instead of sending the queries to the 1st appellant, I am of the firm view that the failure by BoU to do so did not exonerate the 1st appellant of his own statutory duty. BoU raised a red flag which if the 1st appellant had taken seriously and properly handled, the loss would have been avoided as the verification process would have revealed at that stage that the shipping documents, including those that were found to be discrepant by the BoU, were forged. That discovery would have halted the payment process. But that was not the case as the 1st appellant hurried to clear the payment without doing any due diligence and moreover, without requiring any advance payment security, hence the loss. As an Accounting Officer he ought to have known that such act and omission would cause financial loss.

There were also some other very serious anomalies from the onset of the procurement process which, in my view, were writings on the wall that AITEL was being smuggled into the process and was not likely to perform that contract. The most obvious one is the timing of incorporation of AITEL. The bid notice inviting bids for the supply of 70,000 bicycles was published by the MoLG on 9th September 2010 and AITEL was incorporated five days after on 14th September 2010. It turned out to be the most successful bidder with demonstrated capacity to supply 70,000 bicycles. The rest is now history as the saying goes.

Another serious anomaly was the non-appearance of AITEL on the Record of Issue of Solicitation Documents (Fee Payable) (PP Form 30) which is a mandatory requirement under regulation 146 (3) of the PPDA Regulations. In such circumstances, the bid should have been rejected under regulation 147 (1) (a) or received and investigation done pursuant to regulation 147 (2) of the PPDA Regulations. The bid was received but there

was no evidence of any investigation done apart from the unsatisfactory explanation given by the Principal Procurement Officer and Head of Procurement and Disposal Unit (3rd appellant).

With the above anomalies, the 1st appellant although not directly involved in the procurement process, still reserved the supervisory power to satisfy himself that there was no foul play that would cause financial loss to the entity before he could authorize payment. This is the whole essence of anticipating disagreement between an Accounting Officer and the Contracts Committee stipulated by regulation 42(1).

I must emphasize that although the documents that were said to be discrepant did not per se cause the financial loss, it is clear from the above analysis that they were part of the bigger scam to defraud tax payers' money which manifested from the onset of the bidding process and climaxed into the presentation of fictitious shipping documents to secure payment. It is my well-considered view that if due care had been taken by the 1st appellant to verify the documents the scam would have been discovered and the foreseeable financial loss avoided.

On the whole as regards issues 1, 2, 3, and 4, I find that the 1st appellant did not properly carry out his oversight role in the procurement process to safeguard the entity and GoU against the risk of non-performance of the contract, but was quick to authorize payment of USD 1,719,454.58 without proper verification of the documents with the full knowledge that his act would cause financial loss to government as it did. I do not agree that the trial Judge imposed the burden of strict liability on the 1st appellant in determining whether he was guilty of causing financial loss.

For the above reasons, issues 2 and 4 are answered in the affirmative and issues 1 and 3 are answered in the negative.

On issue 5, it was submitted for the 1st appellant that since the loss was caused by forged shipping documents, the trial Judge ought to have considered the fact that the 1st appellant did not participate in the forgery and there was no nexus between him and the fraudsters and exonerated him.

Conversely, it was argued for the respondent that the loss was caused by the 1st appellant's action of ignoring the warning of BoU on the disparities in the documents as opposed to the disparities themselves.

I have found in my analysis on issues 1-4 that there were series of anomalies that pointed to a scam right from the bid submission stage to the final stage of forged documents being submitted to secure payment, which if the 1st appellant had cared to address through his

oversight role would have prevented the loss. It is the sum total of those series of anomalies that led to the loss. It would be very simplistic to merely attribute the loss to the forged shipping documents when the whole process was riddled with anomalies that clearly pointed to a scheme to defraud government. It was within the 1st appellant's power to oversee the procurement process to prevent the loss which was clearly foreseeable. Therefore, even if the trial Judge had considered the fact that the shipping documents were forged in her evaluation of evidence, the appellant would still be found culpable on account of his statutory duty as stipulated under section 7 of the Public Finance and Accountability Act (supra) and section 25 of the PPDA Act and the glaring evidence of his omissions to exercise his powers in the circumstances which would be known to any reasonable person that it would cause financial loss.

In the premises, issue 5 is answered in the negative.

As regards issue 6, it was submitted that the trial Judge contradicted herself when on the one hand she acquitted the 1st appellant of the offence of abuse of office while on the other hand she convicted him of the offence of causing financial loss.

For the respondent, it was submitted that there could not have been any contradictions because the facts forming the basis of the two offences are different as shown by the indictment. Without delving much on this issue, I accept the respondent's submissions for the obvious reasons that the two offences are separately provided for under the Penal Code Act and their ingredients are different. Therefore, finding the 1st appellant guilty of one does not follow that he should also be found guilty of the other.

This answers issue 6 in the negative.

On issue 7, the 1st appellant faults the learned trial Judge for criminalizing his conduct on the basis of his being Accounting Officer. In response, the respondent denied the contention and submitted that no such instances have been cited to show that the trial Judge criminalized the 1st appellant's conduct.

I have carefully perused the trial Judge's judgment and I have not seen any criminalization of the 1st appellant's conduct as alleged. Issue 7 is therefore answered in the negative.

On issue 8, the 1st appellant faults the learned trial Judge for failing to evaluate the claim of authorization in effecting payment under Letter of Credit between MoLG, MoFED, BoU, Citibank and Stanbic Bank. On the other hand, it was submitted for the respondent that the trial Judge properly analysed and applied the law, practice and procedures relating to Letters of Credit before finding the 1st appellant guilty of the offence of causing financial loss.

I have carefully perused the judgment and I find no reason to fault the trial Judge as she thoroughly dealt with the matter. Issue 8 is therefore answered in the negative.

Finally, on issue 9, it was contended for the 1st appellant that the order for compensation was illegal and unlawful as it is not provided for under the Anti-Corruption Act. For the respondent, it was submitted that the order for compensation was justified as it is backed by Article 126 (2) (c) and section 126 of the Trial on Indictments Act which provide for the same and in this case it was proved beyond reasonable doubt that government suffered financial loss of USD 1,719,454.58 as a result of the 1st appellant's actions.

I have considered the submissions of both counsel. Firstly, I accept the respondent's submission that an award of compensation to a victim of wrong is legal and lawful as it is provided for under the Constitution and the Trial on Indictments Act. Secondly, it was proved beyond reasonable doubt that the 1st appellant caused financial loss to the government to the tune of USD 1,719,454.58. The trial Judge was therefore justified to order for compensation. Upon confirmation of the 1st appellant's conviction and sentence, I would also uphold the order for compensation as I now do.

In the premises, issue 9 is answered in the negative.

On the whole as regards the 1st appellant, having answered all the issues as above, I find no reason to interfere with the trial Judge's finding of his guilt. In the result, I would dismiss his appeal and confirm his conviction and sentence.

Dated at **Kampala** this....2nd....day of ....Dec....2019.

Hon. Lady Justice Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CRIMINAL APPEAL NOS 723, 734, 734, 735 & 742 OF 2014

(Arising from the judgment of the High Court, Anti – Corruption Division in Criminal Case No. 47 of 2012 before Hon. Lady Justice Catherine Bamugemereire, delivered on 15th July, 2014)

(CORAM: Musoke, Obura, Madrama, JJA)

1. **JOHN MUHANGUZI KASHAKA**
2. **HENRY BAMUTURA**
3. **ROBERT MWEBAZE**
4. **SAM EMORUT ERONGOT**
5. **TIMOTHY MUSHERURE**
6. **ADAM ALUMA**

} **.....APPELLANTS**

VERSUS

UGANDA} .....RESPONDENT

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JA

I have had the benefit of reading in draft the judgment of Hon. Justice Elizabeth Musoke, JA and Hon. Justice Hellen Obura, JA. I agree with the facts and concur with the findings and outcome with regard to the 1st, 3rd, 4th, 5th and 6th Appellants. With regard to the first appellant I would like to add a few words of my own.

I agree with the orders proposed by my learned sisters Hon. Justice Elizabeth Musoke, JA and Hon. Justice Hellen Obura, JA that the first appellant's appeal should be dismissed. I however would like to add have a few words of my own to the issue.

Secondly, I do not agree that the 2nd Appellant's appeal should fail.

The first Appellant's appeal

In relation to the first appellant, the gist of the controversy in which a lot of effort was put in by the appellant's counsel revolved on whether the first appellant had the mental element by way of intention to commit the offence. The issue raised is whether the first appellant acted in good faith and his prosecution is barred under section 92 of the Public Procurement and Disposal of Public Assets Act, 2003 (PPDA Act) and whether section 92 gave immunity to the first appellant from prosecution. Section 92 of the PPDA Act provides that:

> 92. No action shall lie against any member or staff of the authority or a procuring and disposing entity for any act or omission done in good faith.

The above section gives immunity from any action in court against a member or staff of the authority or of a procuring and disposing entity for any act or omission done in good faith. The side notes to section 92 (supra) however, reads; *"protection from prosecution"*. It can be interpreted to mean that staff or members of the Authority have immunity from prosecution or any other legal action for any act or omission done in good faith. While the appellant's counsel submitted that it was crucial for the prosecution to lead evidence to show that the appellant did not act in good faith as provided for by section 92 of the PPDA Act, the question behind this submission and which I consider as a point of law is whether section 92 of the PPDA Act and section 20 of the Anti-Corruption Act can be read in harmony. The material contention of the appellants is that in order to exclude the first appellant from benefiting from the immunity provided for by section 92 of the PPDA Act, it must be shown that the appellant did not act in good faith and therefore the element of "*bad faith*" in the charge of causing financial loss had first to be proved.

I agree that the Public Procurement and Disposal of Public Assets Act, 2003 is an earlier Act to the Anti-Corruption Act. The Anti-Corruption Act was enacted in 2009 and is a later Act to the PPDA Act, 2003 and on the face of it was not in contemplation of Parliament at the time of enactment of the PPDA Act. The above notwithstanding, by the time of the enactment of the PPDA Act, the offence of causing financial loss existed under the Penal Code Act Cap 120 laws of Uganda. This was under section 269 of the Penal Code Act Cap 120 laws of Uganda which provided that:

> 269. Causing financial loss.
>
> (1) Any person employed by the Government, a bank, a credit institution, an insurance company or public body, who in the performance of his or her duties, does any act or omits to do any act knowing or having reason to believe that such act or omission will cause financial loss to the Government, bank, credit institution, insurance company, public body or customer of a bank or credit institution commits the offence of causing financial loss and is liable on conviction to a term of imprisonment of not less than three years and not more than fourteen years. ..."

The offence of causing financial loss was in the knowledge of Parliament when they enacted the PPDA Act in 2003. By the time of prosecution of the first appellant, the offence of causing financial loss had been re-enacted in the Anti-Corruption Act, 2009 and section 20 thereof. Section 20 of the Anti-Corruption Act 2009 does not change the law in terms of definition but only amends the penalty. It provides as follows:

> 20. Causing financial loss.
>
> (1) Any person employed by the government, a bank, a credit institution, an insurance company or a public body, who in the performance of his or her duties, does any act knowing or having reason to believe that the act or omission will cause financial loss to the government, bank, credit institution commits an offence and is liable on conviction to a term of imprisonment not exceeding 14 years or a fine not exceeding three hundred and thirty six currency points or both.

The first common element in the above offence under the repealed section as well as the existing law is that the appellant was a person employed by the government. Secondly, the question for consideration following should be whether in the performance of his duties, he did any *act or omitted to do any act knowing or having reason to believe that the act or omission would cause financial loss to the government*. The key factor in the above section is the knowledge that an act or omission would cause financial loss to the government. As far as the peculiar facts of this case are concerned, the question is not whether loss was occasioned, which fact, is not for the moment of material concern since the matter in issue is whether good faith is a defence as stipulated under the PPDA Act. I must add that it is crucial to prove loss for the offence to be proved at all. The fact that loss occurred is however not in controversy. My comments will be limited to the question of the mental element of the first appellant, a matter on which appellant's counsel, dwelt on at length in submissions. The mental element was considered in the case of **Kassim Mpanga v Uganda; Supreme Court Criminal Appeal No 30 of 1994**. By that time the Supreme Court heard appeals arising from decisions of the High Court and the appeal was a second appeal, the trial having taken place in a Magistrate's Court. The Supreme Court as it then was had a quorum of 3 Justices of Appeal and heard appeals from the High Court.

In **Kassim Mpanga v Uganda** (supra) having set out the provisions of the Penal Code Act, which prescribed the offence of causing financial loss under the then section 258 (1) of the Penal Code Act as amended by Statute 5 of 1987, the Supreme Court considered whether the appellant who had been charged with causing financial loss knew or had reason to believe that his act would cause financial loss to the bank stated that:

> On the question whether the appellant knew or had reason to believe that his act would cause financial loss to the bank, we are satisfied that the learned appellate judge correctly upheld the trial court's finding that the appellant did so. This was,

firstly, because the appellant granted the overdraft on the 29 accounts in complete disregard of the bank's instructions not to give unauthorised and unsecured overdraft. This was well known to him. The prosecution evidence, his own written submissions and sworn testimony clearly indicated so. In his own evidence the appellant said:

> *"when giving out these overdrafts I was aware that I was flouting the banks policy."* ···

The Supreme Court extensively considered the evidence to establish the knowledge of the appellant. This decision was cited with approval in **David Chandi Jamwa v Uganda; Court of Appeal Criminal Appeal No 77 of 2011** where the Court of Appeal stated that:

> The meaning of the section is plain and clear, that, any person employed by any of the institutions set out above who "*does any act*" having reason to believe that, the act or omission will cause financial loss, commits an offence.

An act or omission in disregard of statutory rules prima facie would impute knowledge that loss would result as a consequence of the disregard of relevant statutory rules for committing government funds in a contract.

The issue of whether the two provisions of law namely sections 92 of the PPDA Act and section 20 of the Anti - Corruption Act can be read in harmony would in my judgment resolve the following issues:

1. Whether acting in good faith is an ingredient of the offence of causing financial loss in a public procurement transaction?

2. Whether the appellant acted knowingly or had reason to believe that his act would cause financial loss?

The point of law is that the element of causing financial loss under the repealed section 269 of the Penal Code Act Cap 120 (now section 20 of the Anti-Corruption Act) cannot be established by reading sections of another

statute. In the above decisions the mental element is a crucial aspect of the offence. The issue of whether acting in *bad faith* which is the opposite of acting in *good faith* is an ingredient of the offence of causing financial loss cannot and ought not to be answered on the basis of section 92 of the PPDA Act because it is not part of the offence. Every offence is created by a law which defines the offence and prescribes the penalty thereof according to the terms of Article 28 (12) of the Constitution of the Republic of Uganda 1995 which provides that:

> 28. (12) Except for contempt of court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law.

It is therefore crucial that all the elements or ingredients of the offence of causing financial loss are clearly defined under the section creating the offence and not in a separate legislation unless otherwise imported by the section. The element of acting in good faith can be a defence on the basis of the proposition that the accused did any act or omitted to do any act knowing or having reason to believe that such act or omission will cause financial loss to the government or relevant institution to which it applies. The import of the appellant's proposition of law is that where a person acted in good faith, he would not have done the act knowingly or having reason to believe that the act or omission would cause financial loss to the government or the relevant institution which suffered the financial loss. I consider firstly whether acting in **bad faith** is not an ingredient of the offence and that acting in **good faith** may be a defence but not by virtue of section 92 of the PPDA Act which creates immunity against an action in court against an official. Acting in good faith is a bar to an action and gives immunity from an action in terms of section 92 of the PPDA Act and therefore has nothing to do with the ingredients of the offence. What is important is that section 92 of the PPDA Act is not a mere defence to the offence in a proceeding which is not thereby barred. It is a bar to any action against any member of staff of

the Authority or a procuring and disposing entity for any act or omission done in good faith. For that reason, it ought to be considered as a preliminary bar to prosecution. I would however come back to the issue at a later stage. For now the wording of the section is clear that: **"no action shall lie against any member or staff"** in the circumstances spelt out in the section. Can it be said that no prosecution can lie against any member of staff for any act or omission in the circumstances of this case?

The first appellant is not a member of the Authority. Under section 3 of the PPDA Act, "authority" means the Public Procurement and Disposal of Public Assets Authority established in section 5 of the Act. On the other hand a procuring and disposing entity means a statutory body, Department of the Central Government, Local Government and any other body or unit established and mandated by the government to carry out public functions. Finally the "Accounting Officer" means the Accounting Officer of the procuring and disposing entity so appointed by the Secretary to the Treasury.

In my judgment the offence of causing financial loss cannot be proved without showing that the person who is accused of having done or omitted to do the act knew or had reason to believe that the act would cause financial loss. Any person who is deemed by law to have acted or omitted to do an act having reason to believe that his or her act or omission would cause financial loss cannot be said to have acted in good faith. Good faith is defined by **Black's Law Dictionary Sixth Edition** as:

> **Good faith**. Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage, and an individual's personal good faith is concept of his own mind and inner spirit and, therefore, may not conclusively be determined by his protestations alone. Doyle v. Gordon, 158 NYS. 2d 248, 259, 260. Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry. An honest intention to abstain from taking any

unconscientious advantage of another, even though technicalities of law, together with absence of all information, notice, or benefit or belief of facts which render transactions unconscientious. In common usage this term is ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation. ···

With due respect to any contrary views generated by the wording of the section, the question for consideration under section 92 of the PPDA Act is not the rank of the officer accused but must revolve on a matter of fact relating to the honest belief, the absence of malice, the absence of design to defraud, an honest intention to abstain from taking any unconscionable advantage of another, the absence of all information, notice or benefit or belief of facts which render the transaction unconscionable. It is therefore the mental element which is crucial. That mental element is intertwined with the issue of knowledge. This is a question of fact and must be considered on the basis of the evidence and not law. It can be considered as an aspect of the issue of whether the Accounting Officer knew or ought to have known that any act or omission would cause financial loss. If that ingredient is proved, it cannot be said that the accounting officer acted in good faith.

Further, under section 92 of the PPDA Act, whereas acting in good faith seems to be a plausible defence by way of immunity to an action against the person charged with an offence, this does not address the issue of knowledge implied in section 20 of the Anti - Corruption Act. Knowing that an act or omission would cause financial loss by itself means that the person who goes ahead to do the act or omit to act has not acted in good faith. The two provisions of law namely sections 92 of the PPDA Act and section 20 of the Anti - Corruption Act can be read in harmony and are not in conflict and the matter ought to turn on whether the ingredients of section 20 of the Anti - Corruption Act were proved. Specifically, the material element of acting or

omitting to act knowing or having reason to believe that the act or omission would cause financial loss should be proved.

I further propose that immunity against an action in court does not by itself bar prosecution of an individual for commission of any criminal offence. Public procurement is a major activity and section 92 of the PPDA Act cannot be taken to negate the operation of section 20 of the Anti - Corruption Act or any other criminal law creating an offence which is alleged to have been committed in the course of duty. Neither can it be taken to water down the ingredients of the offence for reason that penal laws which are enacted for the public good are to be strictly construed. We cannot for instance import into section 20 of the Anti - Corruption Act, the ingredient of bad faith. The prosecution is not under any duty to prove bad faith. In order to prove the ingredients of the offence, the key elements of the offence which include acting knowingly or having reason to believe that the act or omission would cause financial loss are *inter alia* the ingredients to be proved.

Going to the critical provisions of section 20 of the Anti - Corruption Act, what needed to be proved is that the first appellant was an employee of the Government. Secondly, that the first appellant committed an act or omitted to do an act, knowing or having reason to believe that the act or omission will cause financial loss to the government. Thirdly, it has to be proved that financial loss occurred as a result of the act or omission. The accused person does not need to have all the facts and it may be sufficient to show that he had materials before him and opportunity and therefore grounds to believe that financial loss would occur if he acted or omitted to act. It will be sufficient for the prosecution to show that he had all the materials upon which to believe that the act would cause financial loss. In **Halsbury's Laws of England, Fourth Edition Reissue Volume 11 (1) paragraph 8** it is written that:

> 8. Causation. To give rise to criminal liability it is not enough that the accused had a culpable state of mind; it must be proved that the crime was caused by some conduct on his part. That conduct need not be a direct cause of the crime, for a person may cause an event through the agency of others; nor need the conduct of the accused be the sole or the effective cause of the crime. It is sufficient if it is a cause, that is a cause which cannot be dismissed as trivial, or as merely part of the history of the events leading up to the commission of the crime.

The appellant indeed had a duty to ensure that government funds are committed on clear documents which carry no hazard of loss if executed. In the context of section 20 of the Anti - Corruption Act, having facts from which a reasonable person would have concluded that an act or omission is likely to lead to financial loss would be sufficient to establish the ingredient of knowledge. It cannot be in good faith to do a reckless act even if the person states that he acted innocently. It will be sufficient to prove that the accused who has the responsibility of an accounting officer exercised the requisite due diligence by which it may be concluded and that he therefore acted prudently. Failure to act diligently may cause financial loss and that is *inter alia* the intention of penalising the failure to exercise due diligence by section 20 of the Anti – Corruption Act, 2009. Furthermore, paragraph 9 of **Halsbury's laws of England** (supra) on the issue of omissions *inter alia* states as follows:

> Omission to act in a particular way will give rise to criminal liability only where a duty so to act arises at common law or is imposed by statute.

In my judgment the duty to so act in a particular way is imposed by accounting statutory rules which I will refer to later. For the above reasons, I agree with the facts and grounds set out in the judgment of my learned sister Hon Justice Helen Obura which sets out the duties of the first appellant. The first appellant from those facts had all the material facts by which a reasonable person exercising due diligence as an accounting officer would have concluded and would have known that to proceed with the payment

under the contract of procurement of bicycles in the circumstances would cause financial loss or had the potential to cause financial loss to Government.

Before taking leave of the matter, section 92 of the PPDA Act has a side note which reads: "**protection from prosecution**". Why did the draftsman not write *"protection from action in court?* This is what section 92 of the PPDA Act states. In my humble judgment the side note is an unfortunate addition. This is because any crime by its very nature cannot be committed in good faith. Even judicial immunity under article 128 (4) of the Constitution of the Republic of Uganda does not exempt judicial officers from criminal liability even when it provides as follows:

> (4) A person exercising judicial power shall not be liable to any action or sued for any act or omission by that person in the exercise of judicial power.

Similarly, section 92 of the PPDA Act provides that no action shall lie against any member of staff as stated in that section. It bars an action and can be raised as a preliminary bar to a civil action. That bar does not absolve and should not be taken to absolve any member of staff from criminal liability. Section 95 of the PPDA Act itself creates offences. Among the offences it creates, it provides that it is an offence for any person to connive or collude to commit a fraudulent act or a corrupt act as defined in section 3. A crime by its nature cannot be committed in good faith. The offence of theft cannot be committed in good faith. The offence of bribery cannot be committed in good faith. Similarly, the offence of causing financial loss cannot be committed in good faith. To illustrate the point, if good faith is a defence to the offence of causing financial loss, it should equally be a defence to the other offences related to acts in a public office under the Anti – Corruption Act such as corrupt transaction with agents contrary to section 3; corruptly procuring tenders contrary to section 4; bribery contrary to section 5 and diversion of public funds contrary to section 6 to name but a few. It would

be absurd to argue that good faith is a defence to the offence of theft or bribery. That is why the side notes of section 92 of the PPDA Act leaves much to be desired. It should only be taken to bar a civil action against any member of staff of the authority for acts or omissions in the exercise of their functions in good faith rather than to bar prosecution for corrupt practices or even prosecution for any offence under the Anti-Corruption Act or any other law such as the Penal Code Act.

The Anti – Corruption Act is meant to curb and deal with corruption among other things in the Public Service. The preamble to the Anti – Corruption Act provides that it is an Act:

> An Act to provide for the effectual prevention of corruption in both the public and the private sector, to repeal and replace the Prevention of Corruption Act, to consequentially amend the Penal Code Act, the Leadership Code Act and to provide for other related matters...

Where any breach of any of the sections creating an offence under the Anti – Corruption Act is committed, can an officer who is suspected to have committed the offence be exempted from prosecution on the basis of section 92 of the PPDA Act? Yet section 92 exempts an action against an officer for acts or omissions done in good faith.

For instance section 2 (h) and (i) of the Anti – Corruption Act defines corruption as:

> 2. Corruption
>
> A person commits the offence of corruption if he or she does any of the following acts—
>
> (h) any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party; or
>
> (i) neglect of duty ···

The above section encapsulates the idea that the law was intended to deal with corrupt practices including neglect of duty. Why should a public officer be exempt from this law? Specifically, section 92 of the PPDA Act 2003 is a bar to an action in a court of law against the concerned officer or member as defined and ought to be considered before the action commences. I would therefore restrict the use of the word "good faith" to the general definition showing good faith that negates the commission of an offence and for that purpose the term as used in section 92 is a mere surplusage which should not be imported in a criminal charge. The above notwithstanding, if it applies as a defence to a criminal charge in addition to the defences to any ingredients to an offence defined in a penal provision, I agree with the respondent's submissions that such an act or omission specified in section 92 of the PPDA Act should be in the selection of the supplier of the goods and services and not after the execution of the contract. It should be restricted to the procurement process which is defined by section 3 of the PPDA Act as follows:

> "Procurement process" means the successive stages in the procurement cycle including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of those offers, award of contract, and contract management.

Even such contextual interpretation does not bar prosecution for offences defined by section 95 of the PPDA Act for an act or omission in the procurement process. For further contextual interpretation, contract management under section 92 of the PPDA Act is provided for by section 76 of the Act which provides as follows:

> 76. (1) For the purposes of this Act, an award decision is not a contract.
>
> (2) An award shall not be confirmed by a procuring and disposing entity until –
>
> (a) the period specified by regulations made under this act has collapsed; and

(b) funding has been committed in the full amount of the required period.

(3) An award shall be confirmed by a written contract signed by both the provider and the procuring and disposing entity only after the conditions set out in subsection (2) have been fully satisfied.

(4) The award decision shall be posted in a manner prescribed by regulations during the period specified in paragraph (a) of subsection (2).

The process of contract management is the above process. It does not refer to the implementation of the contract which is governed by the terms of the contract. Parliament cannot provide for how to manage the terms of a contract. A contractual provision is binding on the parties thereto. The procurement process therefore should include the process up to the time when the contract is executed but does not include activities after the procurement process. Such processes after procurement of goods or services are governed by the contract. Furthermore, there is sufficient time and opportunity to notify the Contracts Committee about potential problems before execution of the contract under section 77 of the PPDA Act. It provides that any change in the circumstances of the bidder during the procurement or disposal process that could materially affect the bidder's capacity to execute the contract shall be immediately drawn to the attention of the Contracts Committee by the bidder. In the appellant's circumstances, the contract had been approved by the Attorney General. What was left was the implementation of the contract and the procurement process had ended.

Furthermore, it is a traditional view that immunity does not exempt any person from prosecution for commission of an offence even if he or she enjoys for instance, diplomatic immunity. According to **Archbold 2013 (Digital Edition)** Chapter 1 on Indictments there is no customary law that bars a person who enjoys diplomatic immunity from being prosecuted for alleged commission of a crime:

In Bat v. Germany [2012] 3 W.L.R. 180, DC, it was held that: (i) under rules of customary international law, a civil servant will be entitled to inviolability of the person and immunity from suit if he is sent on a "special mission" by his government to the United Kingdom ··· (ii) ··· and (iii) there is no customary international law that affords a person immunity from criminal prosecution or extraditionratione materiae as opposed toratione personae (i.e. by virtue of his actions on behalf of that state as opposed to his status).

Further, immunity of a Solicitor and Client communication which communication enjoys privilege from being disclosed against the client was held not to operate as a bar to the production of such communication in evidence by the prosecution in criminal proceedings to prove an offence. **Butler v The Board of Trade [1970] 3 All ER 593** being a decision of Goff J of Chancery Division is persuasive and reviews the law. His Lordship considered whether privileged communication can be adduced in evidence to prosecute a criminal offence against the client of a Solicitor.

I turn back to Ashburton v Pape. In the present case there was no impropriety on the part of the defendants in the way in which they received the copy, but that, in my judgment, is irrelevant because an innocent recipient of information conveyed in breach of confidence is liable to be restrained. I wish to make it clear that there is no suggestion of any kind of moral obliquity on the part of the solicitors, but the disclosure was in law a breach of confidence. Nevertheless, that case does differ from the present in an important particular, namely that the defendants are a department of the Crown and intend to use the copy letter in a public prosecution brought by them. *As far as I am aware, there is no case directly in point on the question whether that is merely an immaterial difference of fact or a valid distinction, but in my judgment it is the latter because in such a case there are two conflicting principles, the private right of the individual and the interest of the State to apprehend and prosecute criminals:* see per Lord Denning MR in Chic Fashions (West Wales) Ltd v Jones ([1968] 1 All ER 229 at 236, [1968] 2 QB 299 at 313) and in Ghani v Jones ([1969] 3 All ER 1700 at 1704, 1705, [1970] 1 QB 693 at 708).

In my judgment it would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of the accused in a

public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged. (Emphasis added)

Goff J in **Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd and another [1971] 3 All ER 1192** also said at 1199 - 1200 that:

> The plaintiffs rely on this principle and they say first that this exception is not limited to crime or fraud but extends to any act or scheme which is unlawful in the sense of giving rise to a civil claim or if that is putting it too high still 'fraud' must be liberally construed and includes what the defendants were doing in this case. They further say that by sending the documents to the second defendants the defendants showed that the opinion was obtained in preparation for or in furtherance of their tortious purposes or made it necessary or proper so to regard it. The principle of the exception is that the communication in such circumstances is not in truth within the scope of professional service at all and the plaintiffs submit that it is no part of a solicitor's duty innocently or otherwise to further any breach of duty or wrongful act.
>
> In my judgment that is far too wide. Apart possibly from Williams v Quebrada Railway, Land & Copper Co, the exception has always been stated as confined to cases of crime or fraud: see eg O'Rourke v Darbishire and R v Cox and Railton ((1884) 14 QBD 153 at 170, 171, [1881–85] All ER Rep 68 at 73), particularly where Stephen J quoted this passage from Sir Alexander Cockburn CJ in the Tichborne case:
>
> > *They were objected to on the ground of professional privilege, and the Court dealt with the matter as follows:—"Cockburn, C. J.—We must assume, prima facie, for the purpose of the inquiry, but only for that purpose, that the purpose which the defendant had in seeking to obtain these estates, which he proposed here to dispose of by the will for which he gave instructions to Mr. Holmes, was a fraudulent purpose, that of obtaining estates to which he was not entitled. Then the principle on which we proceed is this: that where anything is done, any communication made from a client to an attorney, with reference to a fraudulent purpose, the privilege does not exist; the fraudulent character of the communication takes away the privilege.*

The underlying principle is that the enjoyment of any privilege or immunity by an individual should not prejudice the public interest. The Anti - Corruption law was enacted in the public interest. A further clear example can be deduced from the limitation to the enjoyment of fundamental rights and freedoms under Article 43 of the Constitution of the Republic of Uganda which gives a general limitation to enjoyment of rights:

> 43. General limitation on fundamental and other human rights and freedoms.
>
> (1) In the enjoyment of the rights and freedoms prescribed in this chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.

Can immunity from prosecution or action in court be upheld to the prejudice of the fundamental or other human rights and freedoms of others or the public interest? Prosecution for a crime is commenced in the name of the people of Uganda and criminal law through penal acts is enacted in the public interest. The answer is that nobody can be immune from criminal prosecution where they have committed an offence though immunity from prosecution while in office can be provided for by statute but this does not bar prosecution after the office term comes to an end. It will be illogical for the PPDA Act to prescribe certain offences in relation to the acts that are mentioned in section 95 thereof and at the same time prescribe immunity from prosecution for any criminal offence. The commission of an offence cannot be taken to be an action or omission in the course of duty. Certain offences such as an abuse of office and causing financial loss were created in the public interest and fall outside the purview of section 92 of the PPDA Act. They are enacted in the interest of the public which interests are supposed to be upheld by those *inter alia* accused of abuse of office or causing financial loss.

For the above reasons, I respectfully agree with the judgment of Hon Justice Helen Obura and I have nothing further to add to it on the above issue.

My second comments relate to the order of compensation and again it is a point of law. I agree that the award of compensation generally is enabled by the law. It had been submitted on behalf of the appellants that the order for compensation was illegal and unlawful as it is not provided for under the Anti - Corruption Act. My learned sister Justice Hellen Obura had in mind article 126 (2) (c) of the Constitution of the Republic of Uganda and section 126 of the Trial on Indictment Act, which is the enabling law that allows for compensation to victims of wrongs. Article 126 (2) of the Constitution of the Republic of Uganda sets out certain principles in the adjudication of both civil and criminal cases and makes them subject to the law. It provides that:

> (2) In adjudicating cases of both a civil and criminal nature, the courts shall, subject to the law, apply the following principles –
>
> (a) Justice shall be done to all irrespective of their social or economic status;
> (b) justice shall not be delayed;
> (c) adequate compensation shall be awarded to victims of wrongs;
> (d) reconciliation between parties shall be promoted; and
> (e) substantive justice shall be administered without undue regard to technicalities.

The above Article 126 (2) (c) of the Constitution does not set out the procedure for making an order for adequate compensation to victims of wrongs. The procedure to do so should be found under other enactments. The first observation that I must make is that an order of compensation in a criminal proceeding is in addition to the penalty prescribed by the law and should be taken as a civil remedy and not part of the punishment prescribed. It follows that the principle of *restitutio in integrum* should *inter alia* be applied. The use of the words "adequate compensation" also imports the principle of *restitutio in integrum*. This principle underlies all orders for compensation other than punitive orders meant to punish or discourage the censored act or omission. *Restitutio in integrum* is a cardinal principle of constitutional significance under article 126 (2) (c) of the Constitution. In **Dharamshi v Karsan [1974] 1 EA 41** the East African Court of Appeal held

that general damages are awarded to fulfil the common law remedy of *restitutio in integrum* which is that the Plaintiff should be restored as nearly as possible to a position he or she would have been at had the injury complained of not occurred. In **Halsbury's Laws of England Fourth Edition Reissue Volume 12** (1) paragraph 812 general damages are stated to be the presumed natural or probable consequence of the wrong complained of. The quantum of general damages is based on the same principle and in **Johnson and another v Agnew [1979] 1 All ER 883** Lord Wilberforce held at page 896 that the award of general damages is compensatory:

> i.e. the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed.

This statutory rule under criminal law clearly stipulates that the person should be liable in terms of the evidence adduced as to quantum of loss which can be assessed as if the action was a civil action. For a review of the relevant provisions, I will consider the **Magistrates' Courts Act Cap 16** as well as the **Trial on Indictment Act Cap 23** together with the **Anti – Corruption Act 2009**. Section 197 of the Magistrate's Court Act provides that:

> 197. Order for compensation for material loss or personal injury.
>
> (1) When any accused person is convicted by a magistrate's court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.
>
> (2) When any person is convicted of any offence under Chapters XXV to XXX, both inclusive, of the Penal Code Act, the power conferred by subsection (1) shall be deemed to include a power to award compensation to any bona fide purchaser of

any property in relation to which the offence was committed for the loss of that property if the property is restored to the possession of the person entitled to it.

(3) Any order for compensation under this section shall be subject to appeal, and no payment of compensation shall be made before the period allowed for presenting the appeal has elapsed or, if an appeal is presented, before the determination of the appeal.

(4) At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section.

There are some key ingredients under the above section. It is clearly provided that the evidence would have shown that some person has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit. What is the material loss? It is also a requirement that it should be in the opinion of the court that substantial compensation would be recoverable by the person suffering injury as a result of the commission of the offence. Public bodies which lose money as a result of commission of an offence by anybody may be considered as the victims of a wrong and who are, as a consequence, entitled to benefit from the constitutional principle of **adequate compensation to victims of wrongs.** The second aspect under section 197 of the MCA is that the court has to be of the opinion that the injured party may be able to recover such compensation in a civil proceeding. What the law envisages is a civil proceeding and therefore recovery proceedings are essentially civil in character. Compensation is awarded in addition to the penalty prescribed by the law for a criminal offence.

Section 7 of the Anti - Corruption Act 2009 is clear about compensation to an aggrieved party and its wording is mandatory. It provides that:

7. Payment of compensation to aggrieved party

(1) Where a person is convicted of an offence under section 6, the court, shall, in addition to the punishment imposed under section 26, order that person to pay by way of compensation to the aggrieved party, such sum as in the opinion of the court is just, having regard to the loss suffered by the aggrieved party.

(2) An order made under subsection (1) shall be deemed to be a decree under section 25 of the Civil Procedure Act and shall be executed in the manner provided under section 38 of the Civil Procedure Act.

The first appellant was not convicted under section 6. Secondly, an order made under the section is deemed to be a decree which may be executed in the same manner as a decree in a civil court under section 38 of the Civil Procedure Act. Unlike the provisions of the Magistrates' Courts Act the above section 7 of the Anti - Corruption Act envisages a mandatory order of compensation.

Sections 27 and 28 of the Anti - Corruption Act are worthy of mention and provide that:

27. Penalty to be imposed in addition to other punishment.

Where a person is convicted of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him or her to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of the gratification or is, in the opinion of the court, the value of that gratification, and any such penalty shall be recoverable as a fine.

Causing financial loss may have nothing to do with receiving gratification unless there is evidence of the obtaining of gratification which can be considered on its own basis and which may form the subject of a separate offence on its own. Further, section 28 of the Anti – Corruption Act provides that:

28. Principal may recover amount of secret gift.

(1) Where any gratification has, in contravention of this Act, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value of the gratification either from the agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the accused person in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of the amount or money value.

(2) Nothing in this section shall prejudice or affect any right which a principal has under any written law or rule of law to recover from his or her agent any money or property.

Section 28 is not relevant to the first appellant's case and speaks for itself. It deals with an agent receiving gratification and enables the principal to recover the amount of money worth of the gratification from the agent or person who gave it to the agent. In general all the provisions of the Anti - Corruption Act do not to directly provide for compensation to the injured party or party who suffered a loss as a consequence of the commission of the offence of causing financial loss and the question remains whether this makes the **order of compensation unlawful?** I have therefore considered the provisions of **the Trial on Indictment Act (TIA**) on compensation under section 126 thereof. This section of the TIA is similar to section 197 of the Magistrates Courts Act and is of general application because it provides that:

126. Compensation.

(1) When any accused person is convicted by the High Court of any offence and it appears from the evidence that some other person, whether or not he or she is the prosecutor or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed, the court may, in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the court deems fair and reasonable.

...

(4) An appeal shall lie to the Court of Appeal against any order awarding compensation under this section.

While it can be proven that some other person suffered material loss in the amount awarded by the trial court, the question is whether, it was caused solely by the appellant. Secondly, was the quantum of compensation fair and reasonable in the circumstances?

A reading of the provision creating the offence under section 20 of the Anti – Corruption Act makes it a necessary proposition of law to prove that the appellant was the person who caused the financial loss. Having caused the financial loss, it may not be crucial that the benefit thereof could have accrued to some other person. It would be a matter of the ordinary and natural consequence of the law that the loss is recoverable from the person who caused and each case ought to be decided on the basis of its own facts. The prosecution ought to prove that the appellant or some other person benefited. Why should those other persons be let free? The appellant should share liability with other persons. The issue of causing loss does not bar the prosecution from following the persons who took the money. Further, the amount awarded should be reasonable since there is no proof that the first appellant took the money.

The order of recovery is the same as the one under civil law and should be enforceable as a decree awarding after proof of loss to the state the sum of US$1,719,454.58 which is the amount of loss. I must add that it is within the court's discretion to make a reasonable award against the available defendants for causing loss and the defendants are not barred from seeking indemnification from persons who may have received the property or money being part of the finances lost by Government.

In the premises, the order for compensation flows from the order convicting the appellant of the offence of causing financial loss in the sum of US$ 1,719,454.58 subject to orders of how to apportion the loss whether jointly or severally with others. For that reason, the submission that section 20 of the Anti – Corruption Act does not provide for award of adequate

compensation does not lead to the conclusion that such compensation cannot be awarded. Apart from article 126 (2) of the Constitution of the Republic of Uganda, section 126 (1) of the TIA allows the High Court to make an award of compensation for any offence where it appears from the evidence that some other person whether or not he or she is the prosecutor or witness in the case, suffered material loss or personal injury as a result of the offence committed.

Such an award is at the discretion of the trial judge after assessment of the loss suffered by the injured party. The question of whether the award was fair and reasonable in the circumstances is a separate issue and can be considered on its own.

Appeal of second appellant

With regard to the second appellant, I do not agree with my learned sisters on the order that his appeal fails. I agree with the judgment of Justice Elizabeth Musoke, that the defence of duress is not available to the second appellant. I wish to state that the general rule of construction of the provisions of the Penal Code Act under section 1 of the Penal Code Act is that:

> *This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used within the meaning attaching to them in English criminal law and shall be construed in accordance therewith.*

It is expressly provided that the principles of legal interpretation obtaining in England shall be used except as may be otherwise expressly provided. Those principles can be gleaned from English case law. Where the Penal Code expressly provides the principles, we may only consider what it says where the section in issue is clear and unambiguous. The Penal Code Act provides for the defence of duress under section 14 thereof which provides that:

A person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or her or do him or her grievous bodily harm if he or she refuses; but threats of future injury do not excuse any offence.

Section 14 of the Penal Code Act gives the guiding principles on whether the defence of compulsion or duress should be upheld and are that:

A person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted, the person is compelled to do or omit to do the act by threats on the part of the other offender. The question is therefore whether there was a threat to harm the 2nd appellant by the first appellant if he did not to or omit to do the act which constitutes the offence.

Secondly, the compulsion or duress should be subsisting at the time of commission of the offence or at the time of the *actus reus.*

Thirdly, the nature of the threat should be a threat to instantly kill the second appellant or do him grievous bodily harm if he refuses to commit the offence. The nature of the threat is therefore very important in the analysis.

Fourthly, threats of future injury do not excuse any offence.

A threat to face disciplinary action is not a threat within the purview of section 14 of the Penal Code Act if the person threatened is doing the right thing and is being asked to do wrong. Threatened disciplinary action is lawful and cannot constitute a threat amounting to the defence of compulsion. Secondly, disciplinary action can only be taken in future and is not an immediate threat and does not qualify to be duress within the purview of section 14 of the Penal Code Act.

In the circumstances, the defence of duress is therefore not available to the 2nd appellant.

The second appellant was also charged with the offence of causing financial loss under section 20 of the Anti – Corruption Act.

It was proved that the second appellant was a person employed by the Government of Uganda. Secondly, the question was whether he did any act in the performance of his duties knowing or having reason to believe that the act or omission will cause financial loss to the government. The first ingredient the prosecution needed to prove was that he did or omitted to do an act. What were those acts or omissions? Secondly, that the act or omission was done in the performance of duties. Thirdly, that he knew or had reason to believe that the act or omission would cause financial loss to the government. I will concentrate on the third element of *knowing or having reason to believe that an act or omission would cause financial loss to the government*. The word "knowingly" is defined by **Archbold Criminal Pleading, Evidence and Practice 1997 paragraph 17 – 49**-page 1521 as follows:

> Where this word is included in the definition of an offence it makes it plain that the doctrine of *mens rea* applies to that offence. However, its absence is no indication that the doctrine does not apply: see, Per Lord Reid in *Sweet v. Parsley* [1970] A.C. 132 at 149 H.L. it follows, therefore, that the Crown has to prove knowledge on the part of the offender of all the material circumstances of the offence. For example, on a charge of "knowingly having in his possession an explosive substance", the Crown must prove that the accused knew both that he had in his possession and that it was an explosive substance: *R. v. Hallam* [1957] 1 QB 569, Cr. App. R. 111, CCA. The courts however, have refused to apply this rule in relation to matters of exception from the definition of an offence. See *Brookes v. Mason* [1902] 2 K.B. 743, D.C. (knowingly selling liquors to minors accept such as are sold in corked and sealed vessels: no defence the defendant genuinely thought vessels were corked and sealed).
>
> There is some authority for the view that in the criminal law "knowledge" includes "wilfully shutting one's eyes to the truth": see, e.g. per Lord Reid in *Warner v. Metropolitan Police Commr* [1969] 2 A.C. 256 at 279, H.L. *Atwal v. Massey*, 56 Cr. App. R. 6, D.C. however, such a proposition must be treated

with great caution. The clear view of the courts at present is that this is a matter of evidence, and that nothing short of actual knowledge (or, in the case of dishonest handling, belief) will suffice. See the dictum of Lord Bridge in the *Westminster City Council v. Croyalgrange Ltd*, 83 Cr. App. R. 155 at 164 H.L., and the cases cited.

Was the evidence that the second appellant knew about the acts or the omissions? In relation to the ingredients of the offence of causing financial loss, did he have reason to believe that the acts would cause financial loss? In the first appellant's case, there is no controversy about the fact that he committed the act or omitted to do something in the performance of his duties as envisaged by section 20 of the Anticorruption Act 2009. What is material is the knowledge of whether the act could cause financial loss. The second appellant is in the unique position of having been aware of the transaction and being a signatory to the material documents which caused financial loss. The conclusion of the learned trial judge on the first count of causing financial loss in respect of the first and second appellants can be found at pages 96 and 97 of her judgement as follows:

> The position of the Permanent Secretary and that of the Principal Accountant which A1 and A2 respectively held are very senior in the Uganda civil service hierarchy and holders of those roles are expected to exercise a high level of diligence and prudence in managing public affairs. A Permanent Secretary is a Public Officer appointed by the President to head a ministry. He takes charge of the implementation of policies and programmes of his ministry under the general direction of the Minister responsible. A Permanent Secretary is at the helm and the centre of the running of government machinery. The effective running of government machinery depends on how efficient and able the PS is. The Permanent Secretary has the dual responsibility as an Accounting Officer and is specifically appointed to this role by the Secretary to the Treasury. The Permanent Secretary's role among others is to be the overall in charge of the general administration and financial management of the Ministry.
>
> The role of the Principal Accountant is equally important given his crucial role in the oversight and supervision of the Accounts Division in the Ministry. Additionally, he is the bank signatory and is responsible for requisitions from the Exchequer. The

Principal Accountant is the technical financial adviser to the PS and maintains the ministry's account books.

In view of the centrality of their roles, A1 and A2 ought to have known that signing away US$1,719,454.58 on the discrepant Shipping Documents was likely to cause financial loss. I agree with the gentleman assessor in this regard. I find that the prosecution has pulled count number one beyond reasonable convict each of A1 and A2 accordingly.

It is clearly the finding of the learned trial judge that signing away the sum of money on the basis of discrepant shipping documents was the act. Secondly, because of the roles of A1 and A2, they ought to have known that it was likely to cause financial loss.

The issue of signing away large sums of money on the basis of discrepant shipping documents is at the heart of the conviction of the first and second appellants. The defence of the second appellant is summarised by the learned trial judge between pages 1586 – 1592 of the record. The second appellant was aware of the opening of letters of credit in favour of the supplier and amendments made thereto. Secondly, he testified that he had been reprimanded by the first appellant as the accounting officer for delaying the opening of letters of credit. Thirdly, he had been called by the first appellant to sign the amendment in the presence of the acting Permanent Secretary and signed the documents to allow for partial delivery. Furthermore, he received instructions from the Undersecretary and the Accounting Officer directing him to initiate payment. He testified that matters of discrepancies in documents was addressed to the accounting officer. The discrepancy was that the Permanent Secretary informed the Bank of Uganda that he had written to the Accountant General informing him that the delivery notes were only required upon payment of 60% of the contractual sum. The shipper indicated on the Bill of Lading that delivery would be in Kampala. Further, that by the time payment was authorised, he was no longer in control of the money because by the time the letter of credit was obtained on 23rd December, 2011, all the money had been removed from the Ministry accounts and transferred to the Bank of Uganda.

The learned trial judge's conclusions on the role of the Accounting Officer is based on statutory law. Section 8 of the Public Finance and Accountability Act, 2003 Act 6 of 2003 which was the relevant law at the time of the facts giving rise to the prosecution provides for the appointment and duties of accounting officers:

> 8. (1) The Secretary to the Treasury shall, with the prior approval of the Minister, designate an accounting officer by name and in writing.
>
> (2) An accounting officer shall control and be personally accountable to Parliament for the regularity and propriety of the expenditure of money applied by an expenditure vote or any other provision of any Ministry, department, fund, agency, local government or other entity funded wholly through the consolidated fund, and for all resources received, held or disposed of, by or on account of the Ministry, department, fund, agency, local government or other entity.
>
> (3) in the exercise of his or her duties under subsection (2), and accounting officer shall ensure in particular –
>
> (a) that adequate control is exercised over the incurring of commitments;
>
> (b) that effective systems of internal control and internal audit are in place in respect of all transactions and resources under his or her control; and
>
> (c) in respect of paragraphs (a) and (b), that he or she complies with any instructions issued under this Act.
>
> (4) An accounting officer made, and shall, if so required by any regulations, instructions or directives issued under this Act, stayed in writing the extent to which the powers conferred and duties imposed on him or her, may be exercised or performed on his or her behalf by any public officer under his or her control, and shall give such directives as may be necessary to ensure the proper exercise or performance of those powers and duties.
>
> (5) Any delegation of the powers and duties of the accounting officer under subsection (4) shall not affect the personal accountability of the accounting officer.

(6) An accountant may, and shall if so required by the Minister, establish and maintain an audit committee which shall have such constitution, powers and duties as may be determined by the Minister.

The relevant elements by default demonstrate who is responsible for expenditure in a Ministry and whether this includes the second appellant as Principal Accountant. It is expressly provided that the accounting officer shall control and be personally accountable to Parliament for the regularity and propriety of the expenditure of money applied by an expenditure of all or any other provision of the Ministry. Secondly, it is expressly provided that the accounting officer in the exercise of the duties shall *inter alia* ensure the following:

- That adequate control is exercised over the incurring of commitments.
- That effective systems of internal control and internal audit are in place in respect of all transactions and resources at the disposal of the accounting officer.

The responsibility of the accounting officer is further reproduced in more detail By Regulation 14 of the Public Finance and Accounting Regulations, 2003. Regulation 14 (2) (c) and (d) as well as Regulation 14 (3) and (4) of The Public Finance and Accountability Regulations, 2003 Statutory Instruments 73 of 2003 provide that:

14. Accounting officers

(2) Without limiting the generality of sub regulation (1) of this Regulation, an Accounting Officer shall—

(a) prepare and sign ···

(b) ensure that the financial procedures established by the Act, these Regulations and any instructions issued under the Act and these Regulations are followed and that accounting records are maintained in a form prescribed for accounting purposes;

(c) ensure that the public moneys, property and resources for which he or she is responsible as Accounting Officer are properly managed and safeguarded;

...

(3) An Accounting Officer may authorise in writing other public officers under his or her control to exercise or perform such part of his or her powers and duties as he or she may think fit; and the limits of any such delegation shall be set out sufficiently clearly and unequivocally to avoid dispute or misunderstanding.

(4) A delegation under sub regulation (3) of this regulation shall not relieve the Accounting Officer of any of his or her responsibility under the Act and these Regulations.

The said regulations puts the duty on the first appellant to ensure that public moneys, property and resources for which he or she is responsible are properly managed and safeguarded. Secondly, it is the duty of the first appellant to establish and maintain an effective system of internal control over the financial and related operations for which he is responsible and establish and maintain an effective internal audit system in place. In addition, it is expressly provided under regulation 14 (3) that an accounting officer may authorise in writing any public officers under his or her control to exercise will perform such part of his or her powers and duties as he or she may think fit and the limits of any such delegation shall be set out to avoid dispute or misunderstanding. This is followed by regulation 14 (4) which provides that the delegation of the duties of the accounting officer shall not relieve the accounting officer of his or her responsibility under the Act or the Regulations.

Last but not least regulation 58 (1) of the Public Finance and Accountability Regulations 2003 expressly stipulates that an accounting officer has the overall authority and responsibility for payments under his or her control:

58. Control and method of payments

(1) An Accounting Officer is the official with the overall authority and responsibility for payments under his or her control.

The Public Finance and Accountability Act, 2003 as well as the Public Finance and Accountability Regulations, 2003 confers responsibility on the first appellant and not on the second appellant. The culpability of the second appellant cannot be the same as that of the first appellant. The second appellant is involved in the execution of the instructions of the first appellant and plays a technical role and is nowhere mentioned in the Public Finance and Accountability Act, 2003 or the Public Finance and Accountability Regulations, 2003 as having any right to censor the authority of the Accounting Officer. On the contrary the law is expressly clear that the Accounting Officer who is the first appellant has personal accountability for the funds under his control. This accountability cannot be transferred to the second appellant in the absence of any evidence to show that there was collusion in the commission of an offence between the first appellant and the second appellant.

In the premises, the learned trial judge erred in law to consider the second appellant on the same footing as the first appellant as playing a central role in the transaction and that he ought to have known that signing away US$1,719,454.58 on discrepant shipping documents was likely to cause financial loss. It was the main responsibility of the person authorising payments to ensure that the government is not committed by ensuring the regularity and propriety of the expenditure. Secondly, it was his duty to ensure that there was adequate control over the incurring of commitments by the government. It was not the role of the Principal Accountant to authorise payment but to process payment. Granted, the Principal Accountant could advise the Accounting Officer and alert him on any issues relating to the safety or integrity of the transaction. As I noted above, in the absence of any evidence of collusion, I find that the learned trial judge erred in law to find that the second appellant was equally responsible for the

payment thereby causing financial loss. In the premises I would hold that the 2nd appellants appeal succeeds. I would set aside the orders as against the second appellant and order that he be set free unless held on other grounds.

I concur with the rest of the Judgment of Justice Elizabeth Musoke, JA with regard to the 3rd, 4th, 5th and 6th appellants and I have nothing useful to add.

Save for the orders in relation to the second appellant, I agree with rest of the orders proposed in the judgment of Justice Elizabeth Musoke, JA and I have nothing useful to add.

As far as the compensatory award is concerned, I wish to add that there is no ground challenging the quantum of compensation and the ground 23 of the appeal is that;

> The learned trial judge erred in law and fact when she passed an arbitrary and erroneous sentence of compensation for the convicts to refund a sum of US$1,719,454.58 which sentence not prescribed by law.

However, there is no alternative prayer or ground asserting that the award of the quantum of compensation not a fair and reasonable compensation to the government for the loss suffered. In the circumstances, the appellants are not precluded from seeking indemnification from any other persons who may be liable in a civil action for the loss.

Dated at Kampala the 2nd day of ~~November~~ Dec., 2019

Christopher Madrama Izama

Justice of Appeal