REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CRIMINAL APPEAL NO. 0357 OF 2016
(Arising from High Court (Anti-Corruption Division) Criminal Case No. 009 of 2015)

1. LWAMAFA JIMMY
2. KIWANUKA KUNSA STEPHEN :::::::::::::::::::::: APPELLANTS
3. OBEY CHRISTOPHER

VERSUS

UGANDA :::::::::::::::::::::::::::: RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala (Anti-Corruption Division) before His Lordship Gidudu, J. delivered on 11th November, 2016 in Criminal Session Case 0009 of 2015)

CORAM: HON. MR. JUSTICE ALFONSE OWINY-DOLLO, DCJ
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE PERCY NIGHT TUHAISE, JA

JUDGMENT OF THE COURT

This is an appeal from the decision of the High Court (Anti-Corruption Division) (Gidudu, J.) in which each of the appellants were convicted on ten counts of various offences as follows: two counts of causing financial loss, two counts of abuse of office, two counts of false accounting by Public Officer, two counts of conspiracy to defraud and two counts of diversion of public resources, and were handed sentences which will be referred to herein after. The learned trial Judge also made a compensation order against the appellants to jointly compensate the government to the tune of Uganda Shillings 50,000,000,000/= (Shillings Fifty Billion) being the money they were found to have irregularly expended during the commission of the offences in question.

Brief Background

The appellants were duly charged, committed and tried before Gidudu, J. on an indictment containing ten counts of various offences. The particulars of the relevant offences were as follows:

In count 1, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2010/11 at the Ministry of Public Service Headquarters in the Kampala District, while employed by the Government of Uganda in the Ministry of Public Service as the Permanent Secretary, Director Research and Development and Principal Accountant respectively, in the performance of their duties did an act to wit irregularly spent Ug. Shs. 44,121,294,607 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Four Thousand Six Hundred Seven Shillings), knowing or having reasons to believe that the act would cause financial loss to the Government of Uganda.

In count 2, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2011/12 at the Ministry of Public Service Headquarters in the Kampala District, while employed by the Government of Uganda in the Ministry of Public Service as the Permanent Secretary, Director Research and Development and Principal Accountant respectively, in the performance of their duties did an act to wit irregularly spent Ug. Shs. 44,120,490,323 (Forty Four Billion One Hundred Twenty Million Four Hundred Ninety Thousand Three Hundred Twenty Three Shillings), knowing or having reasons to believe that the act would cause financial loss to the Government of Uganda.

In count 3, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2010/11 at the Ministry of Public Service Headquarters in the Kampala District, while employed by the Government of Uganda in the Ministry of Public Service as the Permanent Secretary, Director Research and Development and Principal Accountant respectively, in abuse of authority of their offices did an arbitrary act prejudicial to the interest of their employer in that they made budgetary provision of Ug. Shs. 44,121,295,000 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Five Thousand Shillings) as social security contributions (NSSF) item 212101, while knowing that employees in the public service are exempted from contributing to NSSF.

In count 4, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2011/12 at the Ministry of Public Service Headquarters in the Kampala District, while employed by the Government of Uganda in the Ministry of Public Service as the Permanent Secretary, Director Research and Development and Principal Accountant respectively, in abuse of authority of their offices did an arbitrary act prejudicial to the interest of their employer in that they made budgetary provision

of Ug. Shs. 44,121,295,000 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Five Thousand Shillings) as social security contributions (NSSF) item 212101, while knowing that employees in the public service are exempted from contributing to NSSF.

In count 5, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2010/11 at the Ministry of Public Service Headquarters in the Kampala District, while employed by the Government of Uganda in the Ministry of Public Service as the Permanent Secretary, Director Research and Development and Principal Accountant respectively being charged with receipt custody and management of Ug. Shs. 44,121,294,607 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Four Thousand Six Hundred Seven Shillings) which was public fund, knowingly furnished false statement or return of it in their quarter three progress report and the financial statement.

In count 6, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2011/12 at the Ministry of Public Service Headquarters in the Kampala District, while employed by the Government of Uganda in the Ministry of Public Service as the Permanent Secretary, Director Research and Development and Principal Accountant respectively being charged with receipt custody and management of Ug. Shs. 44,121,294,607 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Four Thousand Six Hundred Seven Shillings) which was public fund, knowingly furnished false statement or return of it in their quarter four progress report and the financial statement.

In count 7, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2010/11 at the Ministry of Public Service Headquarters in the Kampala District, conspired to defraud the Government of Uganda of Ug. Shs. 44,121,294,607 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Four Thousand Six Hundred Seven Shillings).

In count 8, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2011/12 at the Ministry of Public Service Headquarters in the Kampala District, conspired to defraud the Government of Uganda of Ug. Shs. 44,121,294,607 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Four Thousand Six Hundred Seven Shillings).

In count 9, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2010/11 converted and disposed of public funds amounting to Ug. Shs. 44,121,294,607 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Four Thousand Six Hundred Seven Shillings) for purposes unrelated for which the resources were intended (Social Security Contributions, NSSF) for the benefit of third parties.

In count 10, that Lwamafa Jimmy, Kiwanuka Kunsa Stephen and Obey Christopher in the financial year 2011/12 converted and disposed of public funds amounting to Ug. Shs. 44,121,294,607 (Forty Four Billion One Hundred Twenty One Million Two Hundred Ninety Four Thousand Six Hundred Seven Shillings) for purposes unrelated for which the resources were intended (Social Security Contributions, NSSF) for the benefit of third parties.

The appellants pleaded not guilty to all the counts but after the trial the learned trial Judge believed the prosecution's case convicting the appellants as indicted. As a result, the learned trial Judge imposed the sentences indicated below:

The 1st appellant was sentenced to seven years (7) years imprisonment on counts 1 and 2 for causing financial loss; three (3) years imprisonment on counts 3 and 4 for abuse of office; three years imprisonment on counts 5 and 6 for false accounting, three (3) years imprisonment on counts 7 and 8 for conspiracy to defraud by public officer, and seven years (7) years imprisonment on counts 9 and 10 for diversion of public resources.

The 2nd appellant was sentenced to five years (5) years imprisonment on counts 1 and 2 for causing financial loss; three (3) years imprisonment on counts 3 and 4 for abuse of office; three years (3) imprisonment on counts 5 and 6 for false accounting, three (3) years imprisonment on counts 7 and 8 for conspiracy to defraud by public officer, and five years (5) years imprisonment on counts 9 and 10 for diversion of public resources.

The 3rd appellant was sentenced to ten years (10) years imprisonment on counts 1 and 2 for causing financial loss; three (3) years imprisonment on counts 3 and 4 for abuse of office; three (3) years imprisonment on counts 5 and 6 for false accounting, three (3) years imprisonment on counts 7 and 8 for conspiracy to defraud by public

officer, and ten years (10) years imprisonment on counts 9 and 10 for diversion of public resources.

Being dissatisfied with the above decision of the learned trial Judge, the appellants lodged this appeal in this Court. The appellants herein lodged separate memoranda of appeal and we propose to handle their cases separately in ascending order.

Representation

At the hearing of the appeal, Mr. Ochieng Evans, learned Counsel represented the 1st appellant; Mr. John Isabirye, learned Counsel represented the 2nd appellant; Mr. Nsubuga Mubiru, learned Counsel represented the 3rd appellant while, Ms. Alice Komuhangi, learned Assistant Director of Public Prosecutions assisted by Ms. Abigail Kabayo Agaba and Ms. Emily Mutuzo Sendawula, all Senior State Attorneys from the Directorate of Public Prosecutions, represented the respondent. This Court granted permission to the parties to file written submissions which were accordingly adopted.

1st appellant's appeal.

The 1st appellant's memorandum of appeal sets forth the following grounds of appeal:

"1. **The Learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thus coming to a wrong conclusion both in fact and law when he held that:**

   (a) **The appellant in the performance of his duties knew and or had reason to believe that his acts in the budget process in the financial years 2010/11 and 2011/12 would cause financial loss to the Government of Uganda to the tune of 44, 121, 000, 000 for each of the financial years.**

   (b) **The appellant abused his office in the financial years 2010/11 and 2011/12 respectively when the ingredients of the offence were not proved.**

   (c) **The appellant conspired with the co-accused persons to defraud government in the financial years 2010/11 and 2011/12.**

(d) **The appellant diverted funds to the tune of 44, 121, 000, 000/= for each of the two financial years by budgeting for and paying the funds as NSSF.**

(e) **The appellant falsely accounted for the expenditure of shs 44, 121, 000, 000/= for the financial years 2010/11 and 2011/12 respectively.**

2. **The learned trial Judge erred in law and fact when he imposed an arbitrary, harsh and excessive sentence of 7 years imprisonment and compensation of UG shs 50 billion against the Appellant."**

Preliminary objection by the Respondent.

At the hearing, counsel for the respondent raised a preliminary objection to the 1st appellant's memorandum of appeal on a point of law that it offended **Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10**. She submitted that the said rule was to the effect that grounds of appeal must relate to specific areas or issues of objection. Counsel complained that grounds 1 (b), (c), (d) and (e) in the 1st appellant's memorandum were too general and did not specify the issues of contention. In counsel's view those grounds of appeal as framed would likely ambush the respondent as they would require the respondent to tackle every aspect in the judgment of the trial Court. In reference to ground 1 (b) counsel was of the view that the appellant was complaining that the learned trial Judge had erroneously convicted him of abuse of office without specifying the specific ingredient respecting to which the learned trial Judge had erred. Counsel relied on the authority of **Opolot Justine & another vs. Uganda, Court of Appeal Criminal Appeal No. 155 of 2009** for the proposition that Rule 66 (2) of the Judicature (Court of Appeal Rules) Directions S.I 13-10 is mandatory and not merely regulatory and was intended to ensure that the Court adjudicates on specific issues complained of in an appeal and to prevent abuse of Court process. She further cited the authority of **Imere Deo vs Uganda, Court of Appeal Criminal Appeal No. 0065 of 2012** where it was held that the consequence of none compliance with the rule in issue is dismissal of the ground of appeal because it would be incompetent and that appellants and their counsel should always take heed and always ensure compliance with the rules of this Court. Counsel then asked this Court to strike out the offending grounds of appeal.

Reply by counsel for the 1st appellant

In reply counsel for the 1st appellant asserted that those grounds do not offend the rules of this Court. He pointed out that the 1st appellant's complaint in ground 1 (the main ground of appeal) was that the judge erred in law and fact when he failed to properly evaluate the evidence on record and thus came to the wrong conclusion both in law and fact. Counsel further pointed out that sub grounds a, b and c point allege specific areas of discontent with the judgment of the learned trial Judge. He then contended that the specific complaints about the ingredients of the offences in the issue would be brought out in the 1st appellant's written submissions. Counsel concluded by asking this Court to maintain all the grounds set forth in the 1st appellant's memorandum of appeal.

Rejoinder by the Respondent

In rejoinder, counsel merely reiterated her earlier contentions and asked this Court to dismiss the offending grounds of appeal.

Ruling on the Preliminary Objection

The preliminary objection relates to whether the grounds of appeal as set forth in the 1st appellant's memorandum of appeal contravene **rule 66 (2)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**. The said rule provides that:

> **"The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact or mixed law and fact and, in the case of a second appeal, the points of law, or mixed law and fact, which are alleged to have been wrongly decided, and in a third appeal the matters of law of great public or general importance wrongly decided."**

In our view, if ground 1 of appeal is taken as the main ground which has to be read together with sub-grounds (a), (b), (c), (d), and (e), it is clear that although those grounds are not only concise but specify the points of law or fact on which the 1st appellant objects to the decision of the learned trial Judge. The contention by the learned Senior Assistant Director of Public Prosecutions that the appellant had to spell

out the precise ingredients from which he sought to appeal are misconceived. Having to specify the ingredients (say of the offence of abuse of office) from which the 1st appellant objected to would have made the memorandum undesirably wordy. Accordingly, we find no merit in her objection and we hereby overrule it. We shall proceed to determine the merits of the 1st appellant's appeal.

1st appellant's case

In presenting the 1st appellant's case, his Counsel pointed out that the gist of ground 1 (a), (b), (c), (d), (e) is that the elements of the various offences for which the 1st appellant was convicted had not been proved beyond reasonable doubt. On ground 1 (a), counsel faulted the learned trial Judge for convicting the 1st appellant on counts 1 and 2 of causing financial loss yet the ingredients of those offences had not been proved beyond reasonable doubt. He contended that the ingredients of causing financial loss were that:

> **"1. That the accused were employees of government.**
>
> **2. That they did or omitted to do an act they had knowledge or reason to believe would cause financial loss.**
>
> **3. That loss occurred."**

Counsel conceded that the learned trial Judge correctly laid out the ingredients of the offence of causing financial loss. He further conceded that the first ingredient that the 1st appellant was an employee of government had been sufficiently proven. Counsel's complaints were on the learned trial Judge's conclusions on the second ingredient. He submitted that the prosecution had not proved that the 1st appellant knew or had reason to believe that his act or omission if any would cause financial loss hence the second and third ingredients were not proved. Counsel further submitted that the 1st appellant never irregularly spent any money and that the at all material times the Ministry of Public Service budgeted for pensions and gratuity and not for NSSF contributions.

In a further attempt to absolve the 1st appellant of any wrongdoing, counsel contended that the budgeting process and expenditure of money in government is an elaborate process which involves various technocrats. In reference to the relevant Ministry, where the 1st appellant worked, counsel pointed out that there were 9

departments and 3 Directorates and the Permanent Secretary was not involved in the departmental budgeting process. According to counsel, it was PW5 Joseph Tegyeza, who as Assistant Commissioner Policy and Planning was responsible for compiling the Ministry's budget estimates.

Counsel further submitted that there was no irregular budgeting at all as the then Secretary to the treasury Mr. Kasami (now deceased) had confirmed that the misdescription of the budgeting line for pensions and gratuity as that of NSSF contributions was an error in the Output Budgeting Tool (OBT) software. In support of his submissions, counsel contended that in a letter (Exhibit D1) PW3 Keith Muhakanizi the successor to Mr. Kasami had confirmed that indeed the funds were budgeted for and released for expenditure on pensions and gratuity (which was otherwise referred to as Social Security Contributions).

Regarding the expenditure of the monies in issue, it was contended for the 1st appellant that the Pensions Department in the Ministry of Public was responsible for the expenditure of the monies in issue and not the appellant. Counsel pointed out that the responsibility for managing the expenditure in the Pensions Department lay at the feet of the department Commissioner and Principal accountant. Counsel further submitted that although the appellant was a signatory to the Pensions Account, he did not generate the schedule of payments which was the responsibility of other technocrats in the relevant Ministry.

On the third ingredient respecting to whether the actions of the 1st appellant caused financial loss, counsel contended that the prosecution had failed to prove that there was loss. Counsel cited the case of **Godfrey Walubi and Another vs. Uganda Court of Appeal Criminal Appeal No. 152 of 2012,** where it was held that where financial loss is alleged, the exact loss which occurred, must be proved and should not be assumed. Counsel further relied on the foregoing authority where it was further held that it should not be assumed that the accused's actions caused loss but the actual loss has to be proved. In other words, actual loss must be proved, qualified and must not be speculative. He then submitted that as the ghost workers in the present case were not identified, it could be deduced that no such loss occurred. Counsel then concluded that the ingredients of the offence of causing financial loss had not been proved beyond reasonable doubt and asked this Court to allow ground 1 (a) and thereafter acquit the appellant of the offence of causing financial loss.

On ground 1 (b) counsel faulted the learned trial Judge for making a finding that the 1st appellant abused his office by making a budgetary provision of Ug. Shs. 44, 121, 295, 000/= as social security contributions with knowledge that Public Service employees are exempt from making contributions to NSSF. Counsel pointed out that the 1st appellant was convicted of the offence of abuse of office which was particularized in counts 3 and 4. Counsel then conceded that the ingredients of the offence of abuse of office were as follows:

> **"1. That the accused are government employees.**
>
> **2. That they did or directed to be done an arbitrary act prejudicial to the interest of the employer.**
>
> **3. That they abused authority of their office."**

On the relevant ingredients, counsel made a concession on the first ingredient that the 1st appellant was a government employee but contended that the second and third ingredients had not been proven to the requisite standard. In support of his contentions, counsel maintained that the 1st appellant had at all times budgeted for pensions and gratuity and not NSSF contributions. He repeated the contentions made under ground 1 (a) that the relevant Ministry had departments in charge of budgeting and that the 1st appellant was at no time a member of any of those departments. He also repeated the contentions about PW3 Keith Muhakanizi clearing the budgeting process in issue. Counsel attributed the mess regarding the monies in issue to fraudsters who may have included PW5 who was in charge of the budgeting department.

Counsel then concluded by saying that the 1st appellant's actions were not deliberate, fraudulent, harmful or detrimental to the Government and to deem it fit to acquit him of the convictions for the offence of abuse of office.

On ground 1 (c), counsel faulted the learned trial Judge for convicting the 1st appellant for the offence of conspiracy to defraud the government yet there was insufficient evidence to support the said conviction. Counsel contended that the learned trial Judge omitted to examine whether or not there was an agreement between the appellant and his co-accused to defraud the government which occasioned a miscarriage of justice.

On ground 1 (d), counsel faulted the learned trial Judge for convicting the 1st appellant for the offence of diversion of public funds yet there was insufficient evidence to support that conviction. In support of the case on this ground, counsel contended that according to the Public Finance and Accountability Act, 2003, the authority to re-allocate public funds is vested in the Permanent Secretary/ Secretary to the Treasury (PS/ST). Counsel then pointed out that in his letter to the Parliamentary Public Accounts Committee (DEx.1), the PS/ST authoritatively confirmed that the budgeting, release and payment of funds for pension and gratuity for financial years 2010/11 and 2011/122 did not flout any procedures. In counsel's view the foregoing letter fully exonerated the 1st appellant. Counsel submitted that there was no diversion since the released money was spent on pension and gratuity as intended. He then asked this Court to acquit the 1st appellant on this offence as well.

On ground 1 (e), counsel asked this Court to acquit the appellant of the conviction of the offence of false accounting because the appellant had accounted for all the monies in issue in accordance with the law and had not talked about NSSF contributions.

On ground 2, counsel asked this Court to interfere with the sentences imposed by the learned trial Judge as they were manifestly harsh, excessive and illegal in the circumstances. On illegality, counsel submitted that the judge did not make an arithmetical deduction of the period the 1st appellant had spent on remand from the sentence imposed contrary to the directions in **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 0025 of 2014.** He further submitted that considering that the appellant was a first offender who had not taken benefit of the monies (no evidence proved this according to counsel), the learned trial Judge imposed a very harsh sentence. Counsel proposed that a sentence of 2 years imprisonment would have been fair in the circumstances.

On the order of compensation made by the learned trial Judge, counsel submitted firstly that there was no evidence to prove that the 1st appellant had personally benefitted from the payments related to the monies in issue. Accordingly, the learned trial Judge should not have ordered the 1st appellant to compensate the government of the said monies. Secondly, the order for compensation was vague as it did not apportion the monies among the appellants and ought to be set aside.

All in all, counsel urged this Court to allow the appeal, quash the appellant's conviction by the learned trial Judge and set aside his order for compensation. In the alternative, if the conviction is upheld to impose a more lenient sentence.

Respondent's case

Ms. Alice Komuhangi, presented the respondent's reply to the 1st appellant and supported the findings of the learned trial Judge submitting that the totality of the prosecution evidence had revealed that the 1st appellant as the head of the Ministry of Public Service had, in the two financial years 2010/11 and 2011/12, submitted detailed budgetary estimates for social security contributions to a total of Ug. Shs. 88,242,590,000/= (Eighty Eight Billion, Two Hundred and Fourty Two Million, Five Hundred and Ninety Thousand Shillings) under code No. 21210 to the Secretary to the Treasury. She further submitted that the Secretary to the Treasury testifying as PW3 had informed court that the Permanent Secretary had responsibility for all the activities in his Ministry.

It was further the submission for the respondent that the 1st appellant, as the Permanent Secretary had a duty to appraise the work output of the junior staff to whom he had delegated the budgeting process. In counsel's view, it was not available to the 1st appellant to allege that the errors in the budgeting process were done by those officials to whom he had delegated his authority.

On the letter (Exhibit D.1) where the secretary to the treasury purportedly exonerated the appellant, it was submitted for the respondent that the secretary to the treasury could not authorize the appellant to budget for social security contributions in respect of government employees who were by law not required to pay NSSF contributions.

Counsel further submitted that the second and third ingredients of the offence of causing financial loss were sufficiently proven as it was evident that the appellant and his co-appellants knew that their acts in the budgeting and expenditure of the monies in question would result into financial loss and indeed that loss was occasioned. Counsel then prayed to this Court to uphold the conviction of the 1st appellant on grounds 1 and 2 for causing financial loss to government.

On ground 1 (b) which related to the 1st appellant's conviction on counts 3 and 4 for abuse of office, counsel disagreed with the assertions for the 1st appellant that the second ingredient on whether he had done an arbitrary act which was prejudicial to the government had not been proven. She pointed out that the arbitrary act complained of during the trial was that the 1st appellant had irregularly budgeted for an illegal item, namely NSSF contributions for public servants. She referred to the definition of the word "arbitrary" as adopted by the learned trial Judge from the **7th Edition** of the **Oxford Advanced Learners Dictionary** where the term arbitrary is defined to mean, "an action, decision or rule not seeming to be based on reason, system or plan and at times seems unfair or breaks the law." Counsel then concluded that the act of irregularly budgeting for Ug. Shs. 88.2 billion for the Financial Years 2010/11 and 2011/12 as NSSF was an arbitrary act which was done by the 1st appellant and his co-appellants and the said act was prejudicial to the interests of their employer, the government of Uganda in that it resulted into a financial loss of the said monies. She asked this Court to uphold the convictions of the 1st appellant on counts 3 and 4 for abuse of office.

While replying to the 1st appellant's submissions on ground 1 (c) that it was an error for the learned trial Judge to find the appellant guilty of conspiracy to defraud in the absence of evidence of an agreement between the 1st appellant and his co-accused, counsel contended that there was no need for proof of a formal meeting but only need to show, as was shown for the prosecution that the 1st appellant worked in concert with the other co-accused throughout the process of budgeting, defending the budget in the Ministry of Finance and Parliament while accounting for those funds. She submitted that this ground, too, should fail.

Replying to the submissions for the 1st appellant on ground 1 (d) that there was no diversion of public funds by the appellant, counsel supported the findings of the learned trial Judge submitting that the 1st appellant had budgeted for and received payments respecting to NSSF contributions and yet the same payments were not paid to NSSF. She asked the Court to uphold the relevant conviction.

On the conviction for false accounting by a public officers for which the 1st appellant was convicted, counsel supported the relevant conviction submitting that the prosecution had adduced evidence to show that although the 1st appellant had budgeted for NSSF contributions and made accountability indicating that he had paid for the NSSF Contributions, no money was ever paid to NSSF. In counsel's view that

was clear evidence that the 1st appellant was rightly convicted for the offence of false accounting.

On whether the sentence was illegal as the learned trial Judge did not take into consideration the period spent on remand by the 1st appellant, counsel submitted that the said remand period was considered by the learned trial Judge and therefore the sentence imposed was not illegal. On the submissions for the appellant that the sentences imposed on him were harsh and excessive, counsel for the respondent disagreed submitting that those sentences were neither harsh and excessive given that the sentences imposed were of much shorter than the respective maximum sentences recognized under the law.

Counsel also supported the compensation orders made by the learned trial Judge arguing that the same were permissible under the law. Moreover, according to counsel, while it was proved that the government lost Shs. 88.2 Billion during the commission of the offences in question, the learned trial Judge had made a fair and reasonable compensation order respecting to only Shs. 50 Billion (Shillings Fifty Billion).

In all, counsel supported the conviction of the 1st appellant on all the ten counts and invited this Court to uphold the relevant convictions and the sentences in respect thereof as well as the orders of compensation made.

Resolution of the 1st appellant's appeal

We have carefully considered the submissions of counsel for either side, the court record as well as the law and authorities cited and those not cited. This is a first appeal and we are alive to the duty of this Court as a first appellate court to reappraise the evidence and come up with its own inferences. **See Rule 30 (1) of the Rules of this Court** and **Kifamunte Henry v. Uganda Supreme Court Criminal Appeal No. 10 of 1997.**

The key question for determination in relation to the 1st appellant's appeal is whether on the basis of the evidence adduced for the prosecution in the trial Court, his convictions for the various offences by the learned trial Judge could be sustained. We shall proceed to determine the fore going question and in so doing we observe that the 1st appellant was convicted on 2 counts of causing financial loss, 2 counts of abuse of office, 2 counts of false accounting by a financial officer, 2 counts of

conspiracy to defraud and 2 counts of diversion of public resources. We shall proceed to re-evaluate the evidence concerning the relevant offences below:

Causing Financial Loss

The offence of causing financial loss is criminalized under section **20 (1)** of the **Anti-Corruption Act, 2009**. The said section 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."**

Our 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 are:

> **"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."**

As always the prosecution must prove its case beyond reasonable doubt and as **Denning, J.** put it in the oft-cited case of **Miller vs. Minister of Pensions [1947] 2 ALLER 372** to a degree that:

> **"...need not reach certainty, but must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt."**

The 1st appellant was the Permanent Secretary in the Ministry of Public Service at the relevant time of commission of the offences in question, hence the above 1st ingredient had been sufficiently proven.

In proving the 2nd ingredient, the prosecution relied on a number of witnesses and documents to prove that his acts of budgeting for NSSF, which was illegal, caused the Government of Uganda Financial loss. There was a report by the Auditor General's (P.15), which showed that the Shs. 88, 242, 384, 930/= in issue was part of a grand total of Ug. Shs. 165 billion released for pension payments which was spent on ghost pensioners. Several payment schedules were attached to the said report showing that the 1st and 3rd appellants had endorsed several payments respecting to ghost pensioners as for example:

- By a letter dated 9th August, 2010 a payment schedule for Shs. 11, 184, 797, 383/= (Shillings Eleven Billion, One Hundred Eighty Four Million, Seven Hundred Ninety Seven Thousand, Three Hundred Eighty Three Only).
- By a letter dated 25th October, 2010 a payment schedule for gratuities totaling to Shs. 24,732,870,160/= (Shillings Twenty Four Billion Seven Hundred Thirty Two Million Eight Hundred Seventy Thousand One Hundred Sixty only).
- On 14th January, 2011, the 1st and 3rd appellants forwarded a payment schedule for Monthly pensions and gratuities totaling to shs. 23, 557, 890, 486 (Shillings twenty three billion, Five hundred fifty seven million, eight hundred ninety thousand, four hundred and eighty six only).
- On 7th November, 2011 a payment schedule for shs. 12,307,523,876/= (Shiliings Twelve Billion Three Hundred Seven Million Five Hundred Twenty Three Thousand Eight Hundred Seventy Six only).
- On 2nd May, 2012 another payment schedule, this time respecting to Shs. 25, 499, 415, 851/= (Shillings Twenty Five Billion Four Hundred Ninety Nine Million, Four Hundred Fifteen Thousand Eight Hundred Fifty one only).

In total, the evidence on record indicated that Shs. 84,987,281,403 (Eighty Four Billion, Nine Hundred Eighty Seven Million, Two Hundred Eighty One Thousand, Four Hundred and Three) was requisitioned for by the 1st and 3rd appellants concerning NSSF contributions (clothed as pensions and gratuities payments). PW9 Semakula Lawrence confirmed that the above mentioned monies were indeed released to the Pension Account of the Ministry of Public Service at the time. The prosecution further alleged that the money was paid to ghost pensioners. Ghost pensioners here meant

fictitious pensioners who had been created by the ill-motivated fabrication of the 1st and 3rd appellants. Objectively speaking, expending tax payers' money on "ghosts" would only enrich the 1st and 3rd appellants and would doubtless cause financial loss to the government.

Having perused the court record, we are aware that there was no direct evidence showing that the 1st appellant had put together the list of ghost pensioners. However, he was the Permanent Secretary in the Ministry and as such, several responsibilities were imposed on him by the Constitution as well as other laws. For example in **Article 174** of the **1995 constitution**, the following is said about the duty of a permanent secretary:

> **"1. Subject to the provisions of this Constitution, a ministry or department of the Government of Uganda shall be under the supervision of a Permanent Secretary whose office shall be a public office. (Underlining for emphasis).**
>
> **2. A Permanent Secretary shall be appointed by the President acting in accordance with the advice of the Public Service Commission.**
>
> **3. The functions of a Permanent Secretary under this article include**
>
> **a. organisation and operation of the department or ministry;**
>
> **b. tendering advice to the responsible Minister in respect of the business of the department or ministry;**
>
> **c. implementation of the policies of the Government of Uganda;**
>
> **d. subject to article 164 of this Constitution, responsibility for the proper expenditure of public funds by or in connection with the department or ministry."**

According to the **Black's Law Dictionary (8th Edition),** supervision is defined as the act of managing, directing, or overseeing persons or projects. Further still, **Article 164** of the **1995 Constitution** is relevant and is reproduced below:

"164. Accountability

1. The Permanent Secretary or the accounting officer in charge of a Ministry or department shall be accountable to Parliament for the funds in that Ministry or department.

2. Any person holding a political or public office who directs or concurs in the use of public funds contrary to existing instructions shall be accountable for any loss arising from that use and shall be required to make good the loss even if he or she has ceased to hold that office.

3. Parliament shall monitor all expenditure of public funds."

The import of the two provisions above is that the Permanent Secretary is a supervisor to all the employees in his Ministry or Department and will be liable for any fraudulent behavior on the part of his junior employees (as for example the fraud of the 3rd appellant). Later in our judgment, we reach a finding of fact that the 3rd appellant created lists of non-existent and/or undeserving pensioners to whom the public monies were paid. The 1st appellant would be liable for endorsing those questionable lists and basing on them to requisition for money. The above findings imply that ingredients 2 and 3 of the offence of causing financial loss were proved against the 1st appellant beyond reasonable doubt. To recap, the prosecution proved that the 1st appellant caused financial loss to the government when he concurred and/or endorsed the submission of payment schedules concerning NSSF contributions (clothed as pensions and gratuities payments) which related to "ghost pensioners". Those payments caused financial loss as they were made to non-existent, undeserving and fabricated pensioners.

However, we find that there was sufficient to show that as the accounting officer, the 1st appellant actively participated in the budgeting for the money as NSSF contributions and eventually signing off the money to the alleged NSSF contributions and eventually signing off the money to the alleged pensioners. According to the evidence of PW2 AND PW5, the 1st appellant was actually at the forefront before the budget could be sent to Ministry of Finance. Even after getting to know that there was an error in description of the items as budgeted for as he alleged, he did not bother to seek re-allocation of funds.

In regard to EXH D1, we agree with the learned trial Judge that the PS/ST could not clear what the law prohibited and that the said letter was not a deed agreement such that its contents would bind the parties to it.

We find that the 1st appellant had reason to believe that the act of budgeting for NSSF and expending the funds as pensions would cause financial loss. It is apparent that the 1st appellant budgeted for NSSF without the mandate to do so and this fact was within his knowledge. The process under which the budget was passed was in such a way that if the appellant had wanted to, he would have stopped this illegality. This illegality paved way for wrong doers to fleece the Government of UGX 88 Billion still with the participation of the 1st appellant when he signed off the money as payments for pension and gratuity.

For the above reasons, the 1st appellant's conviction on counts 1 and 2 is upheld.

Abuse of office

This was the second offence (covering counts 3 and 4 of the relevant indictment) for which the 1st appellant was convicted. The said offence is criminalized under section 11 of the Anti-Corruption Act, 2009 which provides that:

"11. Abuse of office.

(1) A person who, being employed in a public body or a company in which the Government has shares, does or directs to be done an arbitrary act prejudicial to the interests of his or her employer or of any other person, in abuse of the authority of his or her office, commits an offence and is liable on conviction to a term of imprisonment not exceeding seven years or a fine not exceeding one hundred and sixty eight currency points or both."

The ingredients which ought to be proved against the accused person which are discernable from the above provision are that:

"1. The accused person was employed by the government.

2. The accused person did or directed to be done an arbitrary act in abuse of his office.

3. **The said arbitrary act was prejudicial to the interests of his employer or any other person."**

Of the above three ingredients, the 1st ingredient was sufficiently proved. Regarding the 2nd ingredient, we observe that in convicting the 1st appellant for this offence, the learned trial Judge had this to say at page 330 of the record:

> **"The term arbitrary is an English word defined in the 7th Edition of Oxford Learner's dictionary as:-**
>
> **an action, decision or rule not seeming to be based on reason, system or plan and at times seems unfair or breaks the law"**
>
> **The budget provision for NSSF broke the law. If PW5 had uploaded money on this item by error as A1 indicated in his letter of 24th January 2011, he should have moved the PS/ST to have it relocated to the correct item. He went for the meeting with the PS/ST but ended it without seeking a relocation. A2 defended the matter despite objections from parliament disguising it as contributions for scientists on contract. A1 dismissed the talk about such contracts for scientist. The accused were shooting each other in their defence."**

It appears that the learned trial Judge based the 1st appellant's relevant conviction for the offence of abuse of authority on two reasons; first that the 1st appellant and his co-appellants submitted budget estimates for NSSF contributions well knowing that government officials do not make NSSF contributions and, secondly that believing the 1st appellant's testimony that he budgeted for pension and not NSSF contributions, then the alleged pension budget was posted on a wrong code, namely 212101 which was meant for NSSF contributions. Having perused the record of appeal, we are satisfied that (and this is despite the 1st appellant's denials) that budgets were put in place by the 1st appellant and his cohorts relating to NSSF contributions which they had no business collecting as the law exempts officials in public service from contributing to NSSF. This was an illegal act and in our view, it amounted to an arbitrary act. The state has interests such as protection of health and protection of life. In the same context, the state has an interest in proper budgeting by the officers employed in the public service, which is vital to enable proper allocation of resources. Although the illegal/improper budgeting for NSSF did

not lead to money being unlawfully paid as NSSF contributions, public funds were exposed to fraudsters in the process. Those funds would have been better spent on other priority areas by Government. Therefore, the illegal/improper budgeting process referred to above was prejudicial to Government, and we find no reason to interfere with the convictions of the 1st appellant on counts 3 and 4 of the relevant indictment. The same is upheld.

False Accounting by Public Officer.

This was the subject of counts five and six of the relevant indictment. The offence is criminalized under **section 22** of the **Anti-Corruption Act, 2009** which is reproduced below:

> **"22. False accounting by public officer.**
>
> **A person who, being an officer charged with the receipt, custody or management of any part of the public revenue or property, knowingly furnishes any false statement or return of money or property received by him or her or entrusted to his or her care, or of any balance of money or property in his or her possession or under his or her control, commits an offence and is liable on conviction to a term of imprisonment not exceeding three years or a fine not exceeding seventy two currency points or both."**

In our view the following are the ingredients of the offence of false accounting by a public officer:

> **"1. The accused is an officer of the government of Uganda.**
>
> **2. He/ she was charged with the receipt, custody or management of the public revenue or property.**
>
> **3. In exercise of his/her duties, the accused knowingly furnished a false statement or return of money or property received by him or her."**

It is not in dispute that the 1st appellant was a government official, hence proving the 1st ingredient. It is further not in doubt that in Uganda government revenue may only be received, kept or managed by the Accountant General. As such, the second

ingredient could not have been proved against the 1st appellant (or against the 2nd and 3rd appellants for that matter) as they did not occupy the office of the Accountant General.

On this matter the learned trial Judge had this to say at page 331 of the record:

> **"I have read the reports in exhibits P24, P25, P7, P39. It is clear that accountability for the 44.12 billion for each FY was accounted for as Social Security Contributions. The accused deny paying money to NSSF. It is a fact that the accused did not pay money to NSSF. On the face of it the returns for the money is false.**
>
> **I have been asked to consider that the reporting had to follow a format on the OBT which recorded the funds as Social Security Contributions whereas not.**
>
> **Granted, I have already found and held that budgeting for this item was illegal. The fact that it was defended and accountability made to follow that defence rendered the report not only false but illegal.**
>
> **This money was not uploaded on NSSF code 212101 by accident. It was deliberate. The Ministry kept quiet about it. When PS/ST raised a query, he was silenced. The matter surfaced in parliament and the technocrats in the Ministry of Finance who must have helped reclassify this item as gratuity for teachers etc drafted a letter for PW3 to sign claiming the money was correctly itemized on code 2121201 (sic) only for PW3 to deny that in court. Besides the budget offends the NSSF Act which exempts pensionable employees from contributing to NSSF.**
>
> **The accused knew this was an illegal item. They knew the return was false. They did not pay the teachers or UPDF who were disguised recipients but paid this money to ghosts purporting to be former employees of the EAC. The return is certainly false. A1 and A3 signed it off while A2 provided the accountability uploaded on the OBT. To argue that A2 was not a signatory and so was innocent is to miss the point that pensions could not be processed for payment without his approval. PW4 was in court and was not challenged when he**

attributed all approvals to A2. The allegation that PW4 was the approver of payments to former EAC staff is an afterthought.

The prosecution has proved all the essential ingredients on counts five and six against each of the accused persons."

We observe that the 1st and 3rd appellants were signatories to the relevant Ministry's accounts. For that reason, they were responsible for the receipt, custody and management of funds. It was therefore established that they gave false returns about the monies they spent on several occasions, including even to parliament.

Therefore, we find no reason to fault the findings by the learned trial Judge, and we uphold the 1st appellant's convictions on counts 5 and 6 of the offence of causing financial loss.

Conspiracy to defraud

This was the substance of the seventh and eighth counts of the appellants' indictment and is criminalized under **section 309** of the **Penal Code Act, Cap. 120** which provides that:

"309. Conspiracy to defraud.

Any person who conspires with another by deceit or any fraudulent means to affect the market price of anything publicly sold, or to defraud the public or any person, whether a particular person or not, or to extort any property from any person, commits a misdemeanour and is liable to imprisonment for three years."

From the above provision, the ingredients of conspiracy to defraud would be:

"1. The accused person conspired with another by unlawful means.

2. The said conspiratorial agreement was intended to defraud the public."

Conspiracy is defined by the Black's Law Dictionary, 8th Edition as follows:

"An agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and (in

most states) action or conduct that furthers the agreement; a combination for an unlawful purpose."

In convicting the appellants for conspiracy to defraud the government, the learned trial Judge had this to say at page 333 of the record:

> **"In a conspiracy, it is trite law that the prosecution does not have to prove that a formal meeting was held. All that is required is evidence to prove actions from which an agreement to commit fraud can be inferred. In this case the evidence of PW5 was elaborate on how this issue was contested by Finance and Parliament but A2 as the vote holder stood his ground promising to provide answers to PAC. Luck smiled on them when the Treasury wrote exhibit D1 which clearly contained an illegal statement that the Ministry of Public Service could upload gratuity funds on code 21201 for Social Security Contributions (NSSF)..."**

A conspiracy is an agreement where two or more people agree to carry out their criminal scheme into effect. The agreement is the criminal act itself, and must have involved spoken or written or other overt acts but cannot be a mere mental operation. A conspiracy cannot be proved through circumstantial evidence.

We find that a conspiracy could be imputed from the following prosecution evidence:

"i. The 1st appellant and other appellants budgeted for NSSF contributions, with knowledge that Ministry of Public Service was exempted;

ii. The money was released and instead paid allegedly as pension and gratuity;

iii. The 1st and 3rd appellants signed off money to be paid to ghost pensioners;

iv. Accountability was furnished through reports showing that NSSF contributions had been paid, whereas not."

We accept the learned trial Judge's finding that there was no need for a formal meeting or formal agreement to prove conspiracy to defraud on the appellant's part. The evidence on record shows a scheme at play which was agreed upon by the appellants. In the absence of such a scheme, by virtue of their positions they held, at least one of them would have queried the process, right from budgeting, paying money to alleged pensioners as opposed to NSSF that had budgeted for, purporting to make payment of pension to non-existent pensioners, and finally submitting reports that contributions had been made to NSSF as budgeted for, which was not true. From the said acts, it could be inferred that the appellants had agreed to a scheme that culminated in the Government of Uganda, being defrauded.

In view of the above, analysis, the 1st appellant's convictions on counts 7 and 8, for conspiracy to defraud are upheld.

Diversion of Public Resources

This was the subject of counts nine and ten of the relevant indictment and is criminalized under **sections 6 and 26 of the Anti-Corruption Act, 2009** which are reproduced below:

> **"6. Diversion of public resources.**
>
> **A person who converts, transfers or disposes of public funds for purposes unrelated to that for which the resources were intended, for his or her own benefit or for the benefit of a third party, commits an offence."**

Section 26 of the same Act provides that a person convicted of the above offence is liable to a term of imprisonment not exceeding ten years or to the prescribed fine. In view of the above provisions, the ingredients of the offence of diversion of public resources would in our view be the following:

> **"1. The accused person converted, transferred or disposed of public funds for purposes unrelated to that for which the resources were intended.**
>
> **2. The accused's actions were meant to benefit him/herself and/ or other third parties."**

Regarding the first ingredient above, we have already found elsewhere that the 1st appellant endorsed the raising of payment schedules which effectively transferred public monies to the hands of ghost pensioners. The appellants' actions did not benefit the genuine pensioners to who such monies ought to have been paid and as such the ingredients of the offence of diversion of public resources were proved against him beyond reasonable doubt. Accordingly, the conviction of the 1st appellant for the offence of causing financial loss is hereby upheld.

All in all, respecting the 1st appellant, we have upheld his convictions by the learned trial Judge on all of the ten counts for the offences of causing financial loss, abuse of office, false accounting by a public officer, diversion of public resources and conspiracy to defraud, respectively.

In ground 2, the 1st appellant complained about the sentence imposed on him by the learned trial Judge on the following grounds:

Firstly, that the learned trial Judge had not made an arithmetical deduction of the period he had spent on remand while attending trial contrary to the mandatory directions in **Rwabugande Moses vs. Uganda, Supreme Court Criminal Appeal No. 0025 of 2014**.

We note that the **Rwabugande case** was decided in March 2017 which was some 4 months after the decision to sentence the 1st appellant was reached by the trial Court. It would, therefore, be unfair to criticize the learned trial Judge on the basis of a decision reached after he had imposed the sentence. **Article 23 (8)** of the **1995 Constitution** requires that the period spent by a convict on remand while attending trial is taken into account during his or her sentencing. We note that at the time of sentencing the 1st appellant, the prevailing interpretation of the said article 23 (8) law was that enunciated in **Kizito Senkula vs Uganda, Supreme Court Criminal Appeal No. 24 of 2001** thus:

> **"As we understand the provisions of article 23 (8) of the Constitution, they mean that when a trial Court imposes a term of imprisonment as sentence on a convicted person the court should take into account the period which the person spent in remand prior to his/her conviction. Taking into account does not mean an arithmetical exercise."**

At page 339 of the record, the learned trial Judge took into consideration the period of 14 months the appellant had spent on remand before imposing the sentences on him. In view of the above authorities, that was sufficient and the trial Court did not have to make an arithmetical deductions as suggested by counsel for the appellant. Therefore the sentences imposed on the appellant were legal.

On whether the sentences were manifestly harsh and excessive in the circumstances, the principles upon which the first appellate Court will act to interfere with the sentence imposed by a trial Court were considered in **Kizito Senkula vs Uganda, Supreme Court Criminal Appeal No. 024 of 2001** where court observed that:

> **"...in exercising its jurisdiction to review sentences, an appellate court does not alter a sentence on the mere ground that if the members of the appellate court had been trying the appellant they might have passed a somewhat different sentence; and that the appellate court will not ordinarily interfere with the discretion exercised by the trial judge unless, as was said in James versus R (1950) 18 EACA 147, it is evident that the judge has acted upon some wrong principle or over-looked some material factor or that the sentence is harsh and manifestly excessive in view of the circumstances of the case."**

We have already indicated that the learned trial Judge sentenced the appellant to 7 years imprisonment in counts 1 and 2 for causing financial loss; 3 years imprisonment in counts 3 and 4 for abuse of office; 3 years imprisonment in counts 5 and 6 for false accounting; 3 years imprisonment in counts 7 and 8 for conspiracy to defraud; and 7 years imprisonment in counts 9 and 10 for diversion of resources.

Although the learned trial Judge considered the material factors in mitigation and aggravation for the appellant, we find that the sentences imposed were manifestly harsh and excessive. We are also mindful that the corruption, for which the appellant was convicted has the effect of depriving vulnerable citizens of much needed state resources. However, given that the 1st appellant was ordered to refund the monies he had misappropriated, we would impose more lenient sentences as follows:

"i. **4 years imprisonment on each of the counts of causing financial loss.**

ii. **2 years imprisonment on each of the counts of abuse of office.**

iii. **2 years imprisonment on each of the counts of false accounting.**

iv. **2 years imprisonment on each of the counts of conspiracy to defraud.**

v. **4 years imprisonment on each of the counts of diversion of resources."**

The 1st appellant further complained about the learned trial Judge's compensation order, however, we shall reserve our decision on the order of compensation until we dispose of the 2nd and 3rd appellants' appeals.

2nd appellant's appeal

The 2nd appellant's memorandum set forth the following grounds of appeal:

"1. **The learned Trial Judge erred in law and fact when he held that the appellant in the performance of his or her duties knew or had reason to believe that his acts in the budget process would cause and indeed caused financial loss of 88,241,784,930/= in the financial years 2010/11 and 2011/12 in the absence of any evidence to support his finding.**

2. **The learned trial Judge erred in law and fact when he held that the appellant had made a budgetary provision of UGX 88,242,590,000/= in the financial years 2010/1 and 2011/12 in the absence of any evidence to support his finding.**

3. **The learned trial Judge erred in law and fact when convicted (sic) the appellant of the offence of fraudulent accounting by public officer when it was not within his schedule of duties to provide accountability for expenditure in the ministry of public service.**

4. **The learned trial Judge erred in law and fact when he held that the appellant had diverted public resources to the tune of UGX.**

88,241,784,930/= in the financial years 2010/11 and 2011/12 in the absence of any evidence to support the finding.

5. The learned trial Judge erred in law and fact when he held that the appellant had conspired with the co-accused to defraud the government of Uganda in the financial years 2010/11 and 2011/12 without any evidence to support the finding.

6. The learned trial Judge erred in law and fact when he found that the appellant had abused his office in the financial years 2010/11 and 2011/12 by budgeting for National Social Security Contributions (NSSF) without any evidence to support the finding of commission of any arbitrary act.

7. The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record and thus came to wrong findings when he;

a. Held that there was a syndicate between the Ministry of Public Service, Ministry of Finance, Bank of Uganda and Cairo International Bank (U) Ltd to defraud the government of Uganda when there was no evidence led by the prosecution or at all to prove the same.

b. Held that the appellant budgeted for the sum of 44,121,295,000/= as social security contribution (NSSF) for the financial years 2010/11 and 2011/12 respectively in the absence of cogent evidence to support the same.

c. Ignored DE1 which exonerated the appellant from any wrong doing.

d. Ignored to evaluate the evidence of all prosecution witnesses who failed to prove loss to the Government of Uganda.

e. Believed the evidence of PW5 Joses Tegyeza on chits when the same was hearsay.

8. **The learned Trial Judge erred in law and fact when he gave an excessive sentence of 5 years imprisonment and compensation of 50 billion against the appellant and his co-accused."**

2nd appellant's case

In grounds 1, 7 (a) and 7 (c), the appellant contested his conviction by the learned trial Judge of the offence of causing financial loss. Counsel for the 2nd appellant submitted that all the ingredients of this offence had not been proven by the prosecution beyond reasonable doubt. Although counsel conceded that the 2nd appellant was a government employee, he submitted, firstly that the learned trial Judge had erred when he faulted the appellant for budgeting for NSSF. He made reference to the letter dated 24th January 2011 where the first appellant wrote to the Permanent Secretary/Secretary to the Treasury informing him about the error in the item description 212101 which was caused by an error with the OBT. Further, that Keith Muhakanizi (PW3) had also written a letter to the Public Accounts committee of Parliament explaining that the budgeting release and expenditure of UGX 44.1 Billion under item 212101 social security contributions was in order and that the same item catered for gratuity as well. Further, that reference to NSSF was subsequently deleted from the OBT database. He further made reference to the evidence of PW2 that NSSF was removed in 2012/2013 because it was serving no purpose.

Counsel submitted that the trial Judge had erroneously relied on the evidence of PW3 that Exhibit D1 contained errors yet PW2 who authored the same document had testifies that the contents of the document were correct. Counsel further made reference to the evidence of the 2nd appellant that they had budgeted for gratuity although the money was described as NSSF. In that regard, that the 2nd appellant having budgeted for gratuity and indeed paid gratuity, there was no intent or knowledge that his actions would cause financial loss.

It was further submitted for the 2nd appellant that PW5, who claimed to have received budget related information from the 2nd appellant to upload to the OBT tool on chits, had failed to produce evidence of the said information. Moreover, that PW5 did not provide any draft estimates he claimed to have submitted to the 1st and 2nd appellants.

Secondly, as regards the conviction for causing financial loss, it was submitted for the 2nd appellant that the prosecution did not adduce any actual evidence of loss of money or evidence of the alleged beneficiaries of the said money. Further, that while PW1 testified that money for NSSF was used to pay gratuity and pensions, he however did not adduce evidence of loss to the Government of Uganda.

Counsel further submitted that although PW1 in his testimony testified that the special Audit Report (EXH P42) revealed that the money had been paid to ghost pensioners, however, that said document was not conclusive that the payments were made to none existent persons. He further pointed out that no witnesses from the Ministry of Public Service Registry were produced to testify that there were no files of the said ghost persons and PW1 did not interview any person from internal audit in regard to verification prior to payments being made. In counsel's view, there was no conclusive evidence of loss incurred by the Government adduced at trial. For that reason, he asked this Court to quash the 2nd appellant's conviction for causing financial loss.

As regards the 2nd appellant's convictions for abuse of office, which were contested in grounds 2, 6, 7 (b) and 7 (e), counsel for the 2nd appellant made reference to the learned trial Judge's assessment that the 2nd appellant had abused his office when he appeared before parliament and defended the impugned NSSF budget, and submitted that it was an erroneous assessment because it was the responsibility of the relevant Minister to defend budgets. As such, the 2nd appellant having who was not the Minister at the relevant time, should not have been convicted.

Secondly, counsel submitted that the learned trial Judge ought not to have relied on the Minutes of F/Y 2011/12 (EXH P43) in finding that the 2nd appellant had defended the budget item NSSF. In counsel's view, the contents of EXH P43 were defective considering that while the evidence of PW10 was that a total of 17 people attended the meeting, only 12 people were recorded on the attendance list.

Thirdly, it was further submitted that the evidence on record indicated that it was the Planning Unit at Ministry of Public Service, headed by PW5 that generated the Ministerial Policy Statement and the 2nd appellant was not in charge of entering data in the OBT. The evidence of the 2nd appellant was that while his department budgeted for gratuity, for some reason the money was described as NSSF. Further, that in the Ministerial Policy Statement for F/Y 2010/11 (EXH P5) and the Ministerial

Policy Statement for F/Y 2011/12 (EXH P6), the payment was indicated as being for gratuity for teachers, traditional UPDF and Local Governments and not NSSF. Counsel further pointed out that the 1st appellant had explained in a letter dated 10th January, 2011 (EXH D2) that there was an error in description of the item and the Chart of accounts. Moreover, the 2nd appellant budgeted for gratuity and paid for gratuity not NSSF.

As regards the 2nd appellant's convictions for False Accounting by public officer, which were contested in ground 3 of his memorandum of appeal, counsel for the appellant submitted that the appellant was not a qualified accountant and was not involved in the expenditure of the statutory budget. He made reference to the evidence of PW4 that statutory expenditure was prepared by the Permanent Secretary and approved by the PS/ST. In that regard, that the 2nd appellant could therefore, not be responsible for accounting. There was no evidence on record to show that the 2nd appellant signed, authorized or submitted any accountability.

Further, that the 2nd appellant's role did not include preparing and submitting financial reports for which he was convicted. He did not furnish any false statement or return money in respect of the expenditure of UGX 88.2 Billion. Counsel contended that the approval of payments to the former employees of the defunct EAC was done by PW4 and not the 2nd appellant as per PW4's schedule of duties.

As regards the convictions for Conspiracy to defraud, which the 2nd appellant challenged in ground 5 of his memorandum of appeal, counsel submitted that there was no evidence to support the relevant conviction, which had been erroneously entered by the learned trial Judge. Moreover, PW1 had given evidence which was to the effect that the money for which the appellants were accused of mismanaging had been misappropriated by the accounting officer (1st appellant) who authorized payment in conjunction with the Principal accountant (2nd appellant).

As regards, his convictions for diversion of public resources, it was submitted by counsel for the 2nd appellant that under the Public Finance and Accountability Act, the authority to re-allocate public funds was vested in the Permanent Secretary/Secretary to the Treasury. Counsel then made reference to the Letter dated 26th June, 2015, (EXH D1) confirming that the release and payment of funds for pension and gratuity for the period in issue did not flout any procedures. In that

regard, that the above letter exonerated the 2nd appellant of any wrong doing in regard to budgeting, release and payment of UGX 88.2 Billion.

Further, that there was no evidence adduced to show that the 2nd appellant participated in the requisition and expenditure of the UGX 88.2 Billion as to having caused diversion.

As regards the sentence and compensatory orders imposed on the 2nd appellant, counsel submitted that the sentence of 5 years imprisonment imposed by the learned trial Judge was harsh and excessive in the circumstances. Counsel pointed out that while the learned trial Judge noted that the 2nd appellant was sickly and had been on remand for a period of 14 months, which amounted to mitigating factors in his favour, the learned trial Judge had failed to impose a more lenient sentence. Counsel asked this court in the alternative that if the 2nd appellant's convictions are upheld, that the Court deems it fit to impose a more lenient sentence.

As regards the compensation order where the 2nd appellant was jointly ordered with the 1st and 2nd appellants to pay compensation to the Government to a tune of UGX 50,000,000,000/=, counsel submitted that there was no evidence adduced at the trial to show that the 2nd appellant diverted the money, and for that reason, no compensation Order should have been passed against him. Therefore, in counsel's view, the compensation Order passed by the learned trial Judge against the appellant had no basis in law.

Respondent's reply

Counsel supported the convictions of the 2nd appellant on all the counts as charged. In reply to the submissions on causing financial loss, counsel for the respondent submitted that the evidence on record confirmed that the 2nd appellant was the head of the Compensation Department which was had the responsibility for making NSSF budgets, and that the submissions suggesting otherwise for the 2nd appellant that he had last budgeted for, spent and reported on gratuity in the Financial year 2010/2011 and 2011/2012, were false.

Counsel further submitted that there was evidence to show that the 2nd appellant had attended Parliament, as part of the relevant Ministry officials after it had queried the NSSF item appearing in the draft Policy Statement for 2011/2012 (EXH P43). The Ministry officials had on that occasion explained that they had hired some scientists

on contract basis and that the funds were to cater for their NSSF and that the Permanent Secretary through the Minister promised to avail the Contracts of the said scientists. In counsel's view, the 2nd appellant being the in-charge of the Department where NSSF was housed had a duty to guide the accounting officer and the Minister, but he chose to remain silent. Further, that considering that UGX 44,121,300,000 was not a negligible figure, it was fallacy that the 2nd appellant could ignore it.

As regards the submissions that no loss was proved to have been caused by the 2nd appellant, counsel submitted that the money in issue was not on the Ministry account where it should have been, and it could be logically concluded that it had been misappropriated. Further, that while the appellants' case was that the money in issue was used to pay gratuity, it was evident from EXHs P5 and P6 that gratuity was budgeted for under a different code 203004 and NSSF was also budgeted for under code 202101. In that regard, that there was no confusion whatsoever between the two budget items and their respective codes.

In reply to the submissions on abuse of office, counsel submitted that the appellant budgeted for and spent money budgeted for NSSF, which act was arbitrary and offended the law. Further, that the 2nd appellant being the one in charge of the department responsible for budgeting, and from where an illegal item had emerged, he had an opportunity to correct the error but did not do so. The 2nd appellant did not deny that the funds were spent but on gratuity and pension, which was contrary to the approved budget in the Policy Statements (EXHs P5 and P6). In counsel's view, the act of reallocating the funds which were planned to be spent on NSSF and spending them on pensions and gratuity without authorization was an arbitrary since it offended the law.

As regards the submissions on false accounting, counsel submitted that the Ministry of Public Service had forwarded quarterly progress reports to the PS/ST as per the evidence of PW2. Counsel further submitted that by letter dated 3/5/2011 (EXH P24), which submitted the Ministry Quarter 3 Progress Report, it was indicated that item 212101 expenditure was at 89.3 %, which was payment for NSSF. That was for financial year 2010/2011. In regard to financial year 2011/2012, another quarterly report (EXH P25) indicated that the same item had been paid for in accordance to the budget at 100%. However, that no money was ever expended on NSSF as per the evidence of PW10. In counsel's view, the above was evidence of false accounting.

Counsel further submitted that the 2nd appellant being the vote controller, he could not absolve himself from responsibility for all reports and accountabilities generated by his Principal Accountant. It was counsel's submission that the 2nd appellant was responsible for reporting and there was evidence to show that money was expended on NSSF, which was not true.

In reply to the submissions on conspiracy to defraud, counsel submitted that it was not true that the 1st and 3rd appellant did not fault the 2nd appellant of any wrong doing as contended by counsel for the 2nd appellant. Counsel made reference to the evidence of the 1st appellant that the 2nd appellant was a Director and also overseeing the Department of pensions and compensations. Further, that throughout his defence, the 1st appellant points to a series of meetings held to discuss the draft work plans and budget but denies the issue of NSSF ever being raised.

Counsel further submitted that despite the PS/ST raising the issue of the NSSF item to the 1st appellant during the process of developing work plans and budgets for financial year 2011/2012, the Ministry of Public Service still included the same item under the same name and code in its Policy Statement for the same financial year. In counsel's view, this was a deliberate move and points to conspiracy.

In reply to the submissions on diversion of public resources, counsel submitted that there was evidence to support the fact that the 2nd appellant budgeted for NSSF for two financial years but spent the money on gratuity and pensions for genuine and ghost employees. This was done without the authorization from the PS/ST. For those reasons, the learned trial Judge had not erred in finding the 2nd appellant guilty of diversion of public resources.

Resolution of the 2nd appellant's appeal.

We have already given the background to the 2nd appellant's appeal and we need not repeat it. We shall also overrule the preliminary objection to the 2nd appellant's memoranda of appeal for the same reasons we gave while overruling the preliminary objection in relation to the 1st appellant. In order to determine the 2nd appellant's appeal, we shall start with an analysis of the relevant evidence adduced by the prosecution at the trial. The analysis below will also be relevant to the resolution of the 3rd appellant's appeal.

At the trial, PW10 Detective Assistant Superintendent of Police Benson Opendi, the Investigating Officer testified that he was directed to investigate the case of irregular budgeting by the Ministry of Public Service in the two financial years 2010/11 and 2011/12 involving the three appellants. PW10 testified that the investigations were prompted by reports of anomalies in the Ministry of Public Service where the 3 appellants worked. PW10 however conceded that the investigations into the matter were very technical and that the office of the Auditor General would best explain the matters.

PW1 Henry Mutegeki, a Principal Auditor in the Office of the Auditor General offered some explanations. He testified that he took part in the compilation of a report of the forensic investigation into the irregular budgeting and expenditure of the relevant monies by the Ministry of Public Service. PW1 further testified that there were instances of fraudulent budgeting and expenditure originating from the Pensions Department of the relevant Ministry which was under the control of the 2nd appellant. He further testified that fraud was borne out by some of the pension figures payable originating from the Pensions Department which were rounded and did not indicate the names of the pensioners who would be paid. PW1 further testified that although the Ministry of Public Service budgeted for NSSF funds, those funds were instead banked on the Ministry's Pension Accounts and spent as pensions. PW1 then testified that Shs. 88,242,384,930/= was paid to non-existent pensioners upon the request of the 1st and 3rd appellants who would sign requisitions asking Ministry of Finance to effect the payments they had authorized through Bank of Uganda to beneficiaries. PW1 further testified that the requisitions by the 1st and 3rd appellants were suspicious as they would only state a block figure to which they would attach a schedule of names and amounts to be paid. PW1 was emphatic that the payments made to non-existent pensioners were a scheme by the 3 appellants to misappropriate money at which they succeeded.

The testimony of PW4 Onya Martin Willy Giscard established that the 3 appellants were indeed involved with the under fire Pensions/ Compensation Department at the relevant time. He testified that the 2nd appellant was the Assistant Commissioner for the compensations Department at the relevant time and continued at pages 96 of the record that:

"We have sections in compensation dealing with accounts headed by a principal accountant assisted by Senior Accountant and accountants and accounts assistant.

PW4 further testified at page 97 of the record that the Principal Accountant (3rd appellant) reported to the commissioner compensation (2nd appellant) on administrative issues and to the Permanent Secretary (1st appellant) regarding payment issues. The testimony of PW4 further revealed that it was the Principal accountant (3rd appellant) who initiated the schedules and other inputs relating to payment of gratuity and pensions. The evidence of PW4 gave further insight about the proper payment process for pensions and gratuities at page 99 that:

"A pensioner applies to retire 6 months before 60 years. The Ministry he works for compiles his file, appointment letter, promotion, salaries etc. They are submitted to MPS.

A reference card is given. The P/S approves the computations. The security registry keeps a record. The file moves to the department of H.R.M which verifies the authenticity of the submissions in the files. The files or documents are sent to the Commissioner Compensation who directs a file to be opened and sent to the Pensions Registry for numbering.

-Pension file number.

-Pension file location number.

-Pension file identification number.

The file is then given to the Unit that computes the payments to be made. We have specialized assessors or computing officer i.e for teachers, contracts, etc.

The files are then sent to the Auditors-Internal Audit. Once approved, the files are brought back to the assessors who then forward them to the P.A for payments. The data staff are then instructed to put the pensioner on the payroll for pensions.

Physical files are on shelves while the soft copies are on Electronic computers.

The physical file not paid remains in custody of P.A until it is paid off from the Pensions Registry. Out of the 600 files needed, we only got 13. The other names did not have files with us. They checked (PIMS) and found that these names without files did not exist in PIMS.

The security Registry did not have the information in those files. The assessment Unit did not have any assessment or soft copy files for most of the names of the one on the list."

We have quoted at length from the PW4's testimony as it details the elaborate process through which genuine pensioners come to be included on the Pensions pay roll. It is glaring that the payment schedules (relating to over 40,000 pensioners) which were submitted by the 1st and 3rd appellants could not be found in the Pensions registry where they should have been kept with only about 13 files being found. The foregoing in our view, lends credence to the theory from the Office of the Auditor General that the pensioners paid by the 1st and 3rd appellants were ghosts or non-existent.

Furthermore, the testimony of PW5 Joses Tegyeza, then Assistant Commissioner Policy and Planning in the Ministry of Public Service was particularly revealing. PW5 stated that the outputs of the Ministry's budgeting process were recorded in an Output Budgeting Tool (OBT) software. Such outputs would be generated from the different departmental work plans and they followed well documented guidelines and Charts of Accounts.

It was further the testimony of PW5 that once the budget estimates are input in the OBT software tool, they would make a hard copy print out. The hard copies would be presented to the Accounting Officer and other key Ministry officials who would scrutinize the same with a view to eliminating any errors therein. PW5 further stated that after thorough scrutiny and upon satisfying himself of the contents, the budget estimates would be sent to the Ministry of Finance which would review them and thereafter write to the Ministry to prepare a Ministerial Policy Statement by 30th June. On what happens thereafter PW5 testified from page 113 of the record as follows:

"The different departments also in-put in the policy statement based on the work plans and budgets estimates. The draft policy statement is also circulated in draft for departments to satisfy themselves that their input has been captured.

We then hold a meeting with department heads, commissioners, procurement and the PS to discuss the Ministerial Policy statement.

Those in the meeting have to confirm the contents of the Ministerial Policy Statement. Those in the meetings have to confirm the contents of Ministerial Policy Statement which covers them.

The final copy is given to the accounting officer for study before passing to the Minister for signature.

Once the Minister signs, it is then printed into booklets. The Accounting Officer verifies the contents in the booklets and submits to Parliament before 30th June. Top Management receives copies of the Ministerial Policy Statement.

We would then appear before the sessional Committees to defend Ministerial Policy Statement."

The above excerpt from the testimony of PW5 show that the relevant employees in the Ministry of Public Service ought to own the budgetary inputs attributed to them because those inputs were submitted by those officials following well known procedures and guidelines and further those officials were given an opportunity to scrutinize those inputs after which they chose to approve them. For example, the relevant officials must own the fact that in the financial year 2010/11 they included Shs. 44,121,300,000/= as budget estimates for Social Security Contributions and not for pensions for which Shs. 4,649,000,000/= was included **(See: Page 51 of the 2010/11 Ministerial Policy Statement)**. However, we have noticed Shs. 44,121,295,000/= is included in the same Ministerial policy statement as budget estimates for gratuity pay for teachers, traditional, UPDF, LGs.

In the Financial Year 2011/12, Shs. 44,121,300,000/= was included in the relevant ministerial policy statement as the budgetary estimate for Social Security Contributions (NSSF) and not gratuity payments for which 4,649,900,000/= was

budgeted. **(See page 30 of the statement)**. However, there is contradiction in the same statement which showed Shs. 44,121,295,000/= was budgeted for pension and not NSSF. **(See page 90).** We note that in the two financial years, the sums budgeted for NSSF and pensions were not the same. There was a differential of about Shs. 5000 with Shs. 44,121,300,000/= and Shs. 44,121,295,000/= budgeted for NSSF and pensions respectively. Could it mean that the two sums were in respect of different budgetary heads?

The testimony of PW6 Adah Kabarokole Muwanga, who replaced the 1st appellant as the Accounting Officer in the Ministry from page 133 of the record corroborates the testimony of PW4 that of the 40000 plus pensioners files in issue, only 13 would be traced at the Ministry registry.

The testimony of PW9 Makanga Christopher was particularly damming. He testified that he was an Auditor at the Office of the Auditor General who was assigned to audit ghost pensioners relating to the present case after which he prepared an audit report (Exhibit P.40). PW9 testified that he made findings which led him to the conclusion that the monies in issue were paid to ghosts. In particular, he pointed out that although the 1st and 3rd appellants had requisitioned for pension and gratuity payments respecting to genuine pensioners, there was no physical file documenting those pensioners' particulars at the Ministry of Public Service Registry. He further pointed out that the computers at the relevant Ministry revealed that the ghosts' lists were prepared by the 3rd appellant. PW9 further testified that when they wrote to the Ministries Departments or Agencies (MDAs) where those ghost pensioners had purportedly worked those MDAs denied existence of the ghost pensioners. His evidence was largely unchallenged.

Following our scrutiny of the record, we are satisfied that the above would be the facts around which this appeal revolves and we shall proceed to determine the appeal keeping them in mind. In determining the 2nd appellant's appeal, we have formed the opinion that the grounds of appeal set forth in his memorandum relate to two questions, namely:

"1. **Whether there was sufficient evidence adduced at the trial on which the learned trial Judge could base to convict the appellant as he did.**

2. Whether the sentences and orders imposed on the 2nd appellant were justified on the weight of the evidence on record."

In determining the 1st question on whether there was sufficient evidence adduced at the trial to support the convictions in issue, we shall be guided by the findings of fact we made earlier, subject only to the 2nd appellant's defence should this Court find it believable. The 2nd appellant was convicted for the offences of causing financial loss, abuse of office, false accounting by public officer, conspiracy to defraud and diversion of public offences. We shall scrutinize those offences below:

Causing financial loss

As we stated earlier, the ingredients of the offence of causing financial loss which the prosecution had to prove beyond reasonable doubt so as to sustain the relevant convictions against the 2nd appellants are:

> **"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."**

We observe that the learned trial Judge made a finding at page 328 of the record that all the three appellants were involved in making payments to ghosts and that such payments caused financial loss. We have already found earlier in this judgment that indeed the 1st and 3rd appellants were directly implicated in the payments in issue. The 3rd appellant prepared a list of ghost pensioners and the 1st and 3rd appellants jointly signed payment schedules which included lists of ghost pensioners. We shall not repeat our detailed reasons for concluding that the lists of the pensioners were ghost lists but we shall briefly state that the relevant lists had no attendant information and no physical files. They were a fabrication.

As for the 2nd appellant, it was the testimony of PW5 that the 2nd appellant was the most senior figure in the Compensations Department from which the ghost pensioners' lists originated. Having reappraised the evidence on record, we hold the view that given the intricacies involved in the approval of eligible pensioners for payment, a function which was majorly conducted in the said Compensations Department, the 2nd appellant was involved in the preparation of the ghost lists.

We make a finding that the 2nd appellant, who supervised the 3rd appellant, and who reviewed his work in the course of the latter's duties, and the same 2nd appellant whose role it was to prepare the list of pensioners approved for payment, participated in the 3rd appellant's fraudulent conduct as an officer who would review the 3rd appellant's work in the course of his employment. Moreover, we find that the 2nd appellant's insistence on defending budgets, originating from a department under his control, well knowing that no such monies had been paid to have been quite incriminating on his part, as it was not conduct of an innocent man.

In view of the above, and as we found when analyzing the 1st appellant's appeal that the said ghost pensioners' lists had formed the basis for the loss of government money, we shall uphold the 2nd appellant's convictions for the offence of causing financial loss, as we found earlier that he participated in the creation of the ghost pensioners' lists.

Abuse of office

This was the second offence (covering counts 3 and 4 of the relevant indictment) in respect of which the 2nd appellant was convicted. We earlier said that the following are the ingredients of the offence of abuse of office:

> **"1. The accused person was employed by the government.**
>
> **2. The accused person did or directed to be done an arbitrary act in abuse of his office.**
>
> **3. The said arbitrary act was prejudicial to the interests of his employer or any other person."**

Of the above three ingredients, the 1st ingredient was sufficiently proved. Regarding the 2nd ingredient, we find just as we found for the 1st appellant that budgets were put in place by the 2nd appellant and the other two appellants relating to NSSF contributions which they had no business collecting as the law exempts officials in public service from contributing to NSSF. On the 3rd ingredient, we find just as we found for the 1st appellant that the said acts of budgeting for NSSF contributions were prejudicial to the government in that promoting fair and transparent budgeting was impeded. The government has interest in a proper and accurate budgeting process as it facilitates proper allocation of resources.

We therefore have no reason to interfere with the conviction of the 2nd appellant on the counts of abuse of office.

False Accounting by Public Officer.

As earlier found, the ingredients of the offence of false accounting by a public officer:

> **"1. The accused is an officer of the government of Uganda.**
>
> **2. He/ she was charged with the receipt, custody or management of the public revenue or property.**
>
> **3. In exercise of his/her duties, the accused knowingly furnished a false statement or return of money or property received by him or her."**

It is not in dispute that the 2nd appellant was a government official, hence proving the 1st ingredient. However, the 2nd appellant did not play any part in the receipt, custody, or management. It should be noted that the offence of false accounting concerns public officers who are ordinarily charged with the receipt, custody, or management of public property. We, therefore, make a finding that the 2nd appellant, having not being charged with the duty to account for the monies in issue could not be convicted for the offence of false accounting by a Public Officer. The said conviction is hereby quashed.

Conspiracy to defraud

For the reasons we gave while analyzing the 1st appellant's appeal, we shall uphold the 2nd appellant's convictions on the counts of conspiracy to defraud.

Diversion of Public Resources

As earlier found, the ingredients of the offence of diversion of public resources would in our view be the following:

> **"1. The accused person converted, transferred or disposed of public funds for purposes unrelated to that for which the resources were intended.**
>
> **2. The accused's actions were meant to benefit him/herself and/ or other third parties."**

In view of the above ingredients, we have formed the opinion that the 2nd appellant did not have the power and indeed could not have diverted monies from the relevant Ministry as he was not the accounting officer in that ministry and neither was he charged with distribution of the relevant monies. He therefore could not have transferred the same. Accordingly, his conviction for the offence of diversion of public resources cannot be left to stand.

All in all, the 2nd appellant's appeal against conviction would be resolved as follows:

The 2nd appellant's appeal against the convictions on the counts of causing financial loss, abuse of office and conspiracy to defraud is dismissed and the said convictions are upheld.

However, his appeal against the convictions on the counts of fraudulent false accounting and diversion of resources is allowed and the said convictions quashed, and the sentences arising there from set aside.

As regards the issue on the sentences imposed on the 2nd appellant, we have considered the submissions by the appellant that the said sentences were harsh and excessive, given that the 2nd appellant was sickly and had spent 14 months on remand, factors which should have fetched him more lenient sentences.

We have also considered the submissions by the respondent that the sentences were neither harsh nor excessive, and that at any rate, the learned trial Judge had taken into consideration the mitigating and aggravating factors prior to exercising his discretion as he did.

We observe, just like we did for the 1st appellant, that although the learned trial Judge took into consideration the relevant mitigating factors, given the circumstances, where the 2nd appellant, who was sickly had been ordered to pay a hefty compensation to the government, he ought to have imposed shorter sentences. We therefore, find that the sentences imposed were harsh and excessive. We shall set them aside, and substitute in their place the following:

> **"i. a sentence of 3 years imprisonment on the counts of the offence of causing financial loss.**
>
> **ii. a sentence of 1 year's imprisonment on the counts of the offence abuse of office.**
>
> **iii. a sentence of 1 year's imprisonment on the counts of the offence of conspiracy to defraud."**

The above sentences shall run concurrently. As regards the compensation order, we shall give our reasons later in this judgment.

3rd appellant's appeal

The 3rd appellant's memorandum sets forth the following grounds of appeal:

> **"1. The learned trial judge erred in Law and fact when he found and determined that the appellant in the performance of his duties knew and or hard reason to believe that his acts in the budget process in the financial years 2010/11 and 2011/12 would cause loss to the Government of Uganda to the tune of 44,121,000,000/= for each of the financial years.**
>
> **2. The learned trial judge erred in Law and Fact when he held that the appellant abused his office in the financial years 2010/11 and 2011/12 respectively without evidence of commission of an arbitrary act by the appellant.**
>
> **3. The learned trial judge erred in law and fact when he held that the appellant conspired with the co accused persons to defraud government in the financial years 2010/11 and 2011/12.**

4. **The learned trial judge erred in law and fact when he held that the appellant diverted funds to the tune of Shs. 44,121,000,000/= for each the two financial years by budgeting for and paying the funds as NSSF.**

5. **The learned trial Judge erred in law and fact when he held that the appellant falsely accounted for the expenditure of shs. 44,121,000,000/= for the financial years 2010/11 and 2011/12 respectively.**

6. **The learned trial Judge erred in law and fact when he imposed an arbitrary sentence of 10 years imprisonment and compensation of Ug. Shs. 50 billion against the appellant.**

7. **The learned trial Judge erred in law and fact when he failed to properly evaluate the evidence on record, and thus coming into a wrong conclusion both in law and fact."**

Without much ado, we shall strike out ground 7 in the 3rd appellant's memorandum for contravening **rule 66 (2)** of the **Judicature (Court of Appeal Rules) Directions S.I 13-10**. The said rule requires that the grounds set forth in any memorandum of appeal shall specify the points which are alleged to have been wrongly decided. The impugned ground is accordingly struck out for being imprecise and offending the Rules of this Court. We shall proceed with the appeals in relation to the other grounds of appeal. Like we observed while determining the 2nd appellant's appeal, the 3rd appellant's appeal too revolves around a determination of the following two questions:

"1. **Whether there was sufficient evidence adduced at the trial on which the learned trial Judge could base to convict the 3rd appellant as he did.**

2. **Whether the sentences and orders imposed on the 3rd appellant were justified on the weight of the evidence on record."**

We shall proceed to determine the two questions in turn.

1. **Whether there was sufficient evidence adduced at the trial on which the learned trial Judge could base to convict the 3rd appellant as he did.**

In determining this question, we shall scrutinize each of the relevant offences for which the 3rd appellant was convicted separately.

Causing financial loss

The particulars of this offence as laid out in the relevant indictment were that the 3rd appellant, along with the other two appellants had irregularly spent Shs. 88, 242, 589, 214/= (Shillings Eighty Eight Billion, Two Hundred and Forty Two Million, Five Hundred Eighty Nine Thousand, Two Hundred and Fourteen) in the two financial years 2010/11 and 2011/12. We earlier made a finding of fact that the 3rd appellant had participated in the preparation of lists relating to non-existent pensioners. We further made a finding of fact that the 1st and 3rd appellants had both jointly requisitioned for funds to pay to those non-existent pensioners. Bearing the fore going findings of fact we shall proceed to scrutinize the ingredients of the offence of causing financial loss bearing in mind the following submissions for either side:

Counsel for the 3rd appellant faulted the learned trial Judge for a failure to apply the law relating to causing financial loss. He contended that no evidence had been adduced to prove that there was financial loss occasioned to government in the circumstances. He faulted the learned trial Judge for finding that the financial loss attributable to the 3rd appellant was as a result of his abuse of office arguing that the fore going offence and the offence of causing financial loss involved different ingredients altogether. Counsel relied on the authority of **Godfrey Walubi & another vs. Uganda, Court of Appeal Criminal Appeal No. 152 of 2012** for the legal position that in law only actual loss and not potential loss was criminalized. Counsel further contended that the 3rd appellant cannot have paid money to the ghosts because there was no audit to precisely point that out. He asked this Court to quash the relevant conviction for causing financial loss.

In reply, counsel for the respondent submitted that:

The prosecution's evidence had established that the 3rd appellant had prepared the schedule of payments and that together with the 1st appellant, the two had

authorized and approved payments to be made to non-existent pensioners. Such payments to non-existent pensioners were self-evident of financial loss as only payments to genuine pensioners would be considered to have been properly spent.

As we reappraise the evidence on record, we re-iterate the following ingredients of the offence of causing financial loss:

> **"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."**

The 1st ingredient was established and in view of our analysis above, the 2nd ingredient was too as the 3rd appellant prepared payment schedules concerning non-existent pensioners on the basis of which the 1st appellant and himself requisitioned for and secured payment of the monies in issue. The foregoing caused financial loss when the government's monies intended for the benefit of genuine pensioners were taken out of the consolidated fund and used on fictitious pensioners.

We have felt it necessary to comment on the authority of **Godfrey Walubi & Another vs Uganda, Court of Appeal Criminal Appeal No. 152 of 2012** which counsel for all appellants waved around in support of a supposed proposition that where the exact loss occasioned is not quantified, the accused person shall not be convicted of the offence of causing financial loss.

The authority concerned a bank employee who had been convicted of interalia the offence of causing financial loss. The brief facts were that the said bank employee had authorized the payment of some monies out of a bank customer's account against the customer's uncleared effects. The uncleared effects were subsequently not honoured by the bank on which they were drawn leaving the relevant customer's bank account overdrawn. Following the relevant bank's complaints, the first appellant was charged, tried and convicted as stated earlier.

In quashing the appellant's conviction for the offence of causing financial loss, the Court held that since the bank had not complied with the legal requirement to report the non-performing overdraft facility to the Bank of Uganda for purposes of having it written off under the Financial Institutions Act, 2004 and the regulations made thereunder, it was difficult to ascertain the exact loss it had incurred. The Court further reasoned that the overdrawn account had not been closed and continued to attract interest. The Court further observed:

> **"Financial loss is both a matter of law and fact. As a matter of law in so far as Orient Bank Ltd had to comply with regulation 7 of SI No. 43 of 2005 with regard to reporting to the Central Bank that A2's overdrawn account was now a loss and uncollectable. Secondly the exact loss incurred by the bank has to be proved. It is not to assume as both the prosecution and the trial Judge did that it is the authorizing of payment against uncleared effects that proved the alleged loss. Authorizing payment maybe the causative fact that would eventually lead to actual loss. It is no proof of loss whatsoever. The actual loss itself would be on the banker's books of account and had to be proved. No evidence was called to establish these facts and prove this loss. It was assumed that the possible causative factors would lead to financial loss."**

The above authority is distinguishable in as far as it related to financial institutions which are legally obliged to report non-performing assets, clearly the present appeal does not relate to a financial institution. In as far as the above authority seems to suggest that the exact amount of loss (to the exact decimals and zeros) must be proved in order to convict a person accused of causing it, we think that would be reading into additional matters into the Anti-Corruption Act, 2009. Had the legislature intended that to be the case, it would have expressly stated so in that Act. In our view once it is proved that a person caused financial loss with the requisite mens rea, he or she is culpable with or without the proof of exact loss. Given the sophisticated manner of committing the offence of causing financial loss, it is almost impossible to establish the exact amount lost but that does not take away the fact that the convict caused the loss.

The relevant mens rea requirement is contained in the 3rd ingredient of the offence of causing financial loss which in our view is both subjective (the prosecution being required to show that the 3rd appellant knew that his acts of creating lists of fictitious pensioners and requisitioning payments to them would cause financial loss) or objective (the prosecution required to show that the typical reasonable man would have reason to believe that paying money to fictitious pensioners would cause financial loss). In our view, the 3rd appellant would be caught by either test. Any person who creates payment schedules of fictitious pensioners must know that his acts will cause financial loss given that only proper payments to real pensioners would not cause financial loss. We find no reason to interfere with the 3rd appellant's conviction for the offence of causing financial loss as there was evidence on record to support it. We accordingly uphold it.

Abuse of office

Relative to the conviction for abuse of office, counsel for the 3rd appellant contended that the act of budgeting for NSSF contributions was not illegal per se and only became illegal if such payments are paid to the fund with NSSF which was not the case herein. Besides, according to counsel, the budgeting for NSSF contributions was not prejudicial to the government as the act of budgeting itself did not cause any loss to government.

In reply, counsel for the respondent supported the findings of the learned trial Judge maintaining that the prosecution had proved beyond reasonable doubt that the 3rd appellant had participated in the impugned budget process which caused financial loss to the government.

We observe that the learned trial Judge in convicting the 3rd appellant for the offence of abuse of office held that the 3 appellants had illegally budgeted for NSSF contributions. He had this to say at page 332 of the record:

> **"The accused knew this was an illegal item. They knew the return was false. They did not even pay the teachers of UPDF who were disguised recipients but paid this money to ghosts purporting to be former employees of the EAC. The return is certainly false. A1 and A3 signed it off while A2 provided the accountability uploaded on the OBT. To argue that A2 was not a signatory and so was innocent is to**

miss the point that pensions could not be processed for payment without his approval. PW4 was in court and was not challenged when he attributed all approvals to A2. The allegation that PW4 was the approver of payments to former EAC staff is an afterthought.

The prosecution has proved all the essential ingredients on counts five and six against each of the accused persons."

In the above excerpt, the learned trial Judge alluded to several arbitrary acts by the appellants, namely; illegal budgeting, making false returns and paying money to ghost pensioners. In our view, the 3rd appellant could not be liable for the first two but could respecting third act. The evidence on record showed that the 3rd appellant indeed prepared and submitted payment schedules relating to fictitious pensioners. Doubtless, in our minds, that arbitrary act was prejudicial to his employer as it caused financial loss to him. We, therefore, have no reason to interfere with the decision of the learned trial Judge to convict the 3rd appellant and we accordingly uphold the conviction.

Regarding the relevant convictions of the 3rd appellant for false accounting by a public officer and conspiracy to defraud, we shall uphold them for the same reasons given for as regard the 1st appellant. This is because the 3rd appellant, too, was responsible for the receipt and custody of public resources for which he gave false returns.

Just like we found for the 1st and 2nd appellants as regards conspiracy to defraud, there was sufficient evidence on record from which a conspiratorial agreement could be imputed. We find it unnecessary to repeat the detailed discussions, which can be found earlier in this judgment.

Diversion of public Resources

For the same reasons given when upholding the 1st appellant's convictions for this offence, we shall uphold the 3rd appellant's conviction too. In our view, when the 1st and 3rd appellants requisitioned for money (which was subsequently paid) on the basis of payment schedules for non-existent or undeserving pensioners, they did the exact acts which are proscribed by the relevant section of the law.

In sum, the 3rd appellant's appeal in respect of his convictions on all the ten counts for the offences of causing financial loss, abuse of office, false accounting by private officer, conspiracy to defraud, and diversion of public resources is dismissed, and the convictions upheld

The 3rd appellant further complained in ground 6 merely that the sentences imposed by the learned trial Judge should be set aside as no offence was proved against him. On the compensation orders, counsel faulted the learned trial Judge for imposing an order yet government had not suffered any loss. He further submitted that the learned trial Judge should have apportioned some of the monies for compensation to Cairo Bank as the bank where the appellants channeled the money from.

In reply, it was submitted for the respondent that the sentence and orders imposed by the learned trial Judge were provided for under the law and should be upheld.

On the question of sentencing, we earlier made reference to the authority of **Kizito Senkula (supra)** on the circumstances under which this Court would interfere with a sentence imposed by the trial Court. In the present case, none of the grounds were alleged for the appellant, with his counsel merely stating that the sentences imposed on the appellant should be set aside as the convictions by the learned trial Judge were unsustainable. However, in view of the above analysis, the convictions entered against the 3rd appellant on all counts have been sustained, meaning that they remain unchallenged as nothing was argued for the 3rd appellant to have them set aside. We therefore uphold the relevant sentences imposed by the learned trial Judge.

Appeal against the compensation order by all the 3 appellants.

On the order of compensation, we observe that the 1st, 2nd and 3rd appellants mismanaged colossal amounts of money (this court puts the amount of monies expended at Shs. 84,987,281,403 (Eighty Four Billion, Nine Hundred Eighty Seven Million, Two Hundred Eighty One Thousand, Four Hundred and Three Shillings)). Given that of the over 40,000 pensioners whom the 1st and 3rd appellants presented for payment only about 13 were found to have been genuine, the order of the learned trial Judge was, in our view, very lenient. It is inconceivable that the 13 genuine pensioners were paid over Thirty Billion Shillings. We would have ordered the appellants to pay more compensation but as the respondent did not cross-appeal against the order of compensation, we shall uphold it.

All in all, the three appellant's appeals would be disposed of on the terms proposed above, in view of which we shall make the following orders:

a) The 1st appellant's appeal is partly allowed and partly dismissed. His convictions for the offences of causing financial loss, abuse of office, false accounting by public officer, conspiracy to defraud and diversion of public resources are upheld. However the sentences imposed on him are set aside and the following shall be substituted in their places; a sentence of 4 years imprisonment on each count of causing financial loss; a sentence of 2 years imprisonment on each count of abuse of office; a sentence of 2 years imprisonment on each count of false accounting; a sentence of 2 years imprisonment on each count of conspiracy to defraud; and a sentence of 4 years imprisonment on each count of diversion of public resources. The sentences shall run concurrently.

b) The 2nd appellant's appeal is also partly allowed and partly dismissed. His convictions for the offences of causing financial loss, abuse of office and conspiracy to defraud are upheld. However, the sentences arising from the said convictions are set aside, and the following shall be substituted in their places; a sentence of 3 years imprisonment on each count of causing financial loss; a sentence of 1 year's imprisonment for each count of abuse of office; and a sentence of 1 year's imprisonment for each count of conspiracy to defraud.

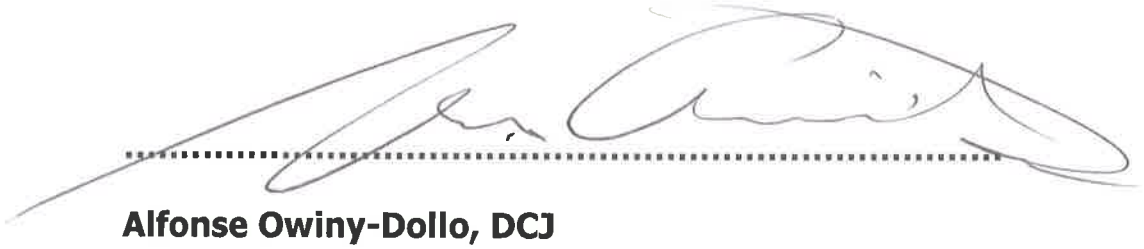
c) The 2nd appellant's appeal against his convictions for the offences of false accounting by public office and diversion of resources is allowed, the said convictions are quashed, and the sentences arising therefrom are set aside.

d) The 3rd appellant's appeal is wholly dismissed. His convictions and sentences for the offences of causing financial loss, abuse of office, false accounting by public officer, conspiracy to defraud and diversion of public resources are upheld.

e) The order of compensation for Shs. 50,000,000,000/= (Fifty Billion Shillings) against the 1st, 2nd and 3rd appellants is upheld.

We so order.

Dated at Kampala this 18th day of Feb. 2020.



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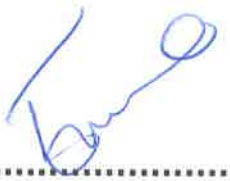
Alfonse Owiny-Dollo, DCJ

Justice of Appeal



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Elizabeth Musoke

Justice of Appeal

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Percy Night Tuhaise

Justice of Appeal