

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**  
*Coram: Kakuru, Mutangula Kibeedi & Mulyagonja, JJA*  
**CRIMINAL APPEAL NO. 149 OF 2015**

5  
1. DR. YOVANTINO AKII AGEL  
2. OMONGOO GEOFFREY } ..... **APPELLANTS**

10  
**VERSUS**

**UGANDA ..... RESPONDENT**

15  
*(Appeal from the decision of Hon. Lady Justice Catherine Bamugemereire, J, dated 23<sup>rd</sup> April 2015, in High Court Anti-Corruption Division Case No. 0203 of 2011)*

**JUDGMENT OF THE COURT**

**Introduction**

20 This is an appeal against the decision of the High Court Anti-Corruption Division sitting at Kololo, Kampala, dated 23<sup>rd</sup> April 2015 in which the trial judge convicted the 1<sup>st</sup> appellant of Abuse of Office contrary to section 11 (1) of the Anti-Corruption Act and the 2<sup>nd</sup> appellant of Embezzlement contrary to section 19 (b) of the Anti-  
25 Corruption Act (ACA). She sentenced each of the appellants to 30 months' imprisonment.

The facts that were accepted by the trial judge were that in the Financial Years 2008/2009 and 2009/2010, the government of Uganda allocated Gulu Regional Referral Hospital (Gulu RRH) UGX  
30 1,850,000,000/= and 1,750,000,000/=, respectively. The said amounts were capital development funds for the two financial years, making a total of UGX 3,600,000,000, for the rehabilitation of Gulu RRH.

*Levan.*

*[Signature]*

*[Signature]*

Dr Yovantino Akii Agel, the 1<sup>st</sup> appellant, was that Medical Superintendent and therefore the Director of Medical Services and the Accounting Officer. Geoffrey Omongoo, the 2<sup>nd</sup> appellant, was the Principal Accounts Assistant for the Hospital.

5 It was the case for the prosecution that the two appellants misappropriated UGX 3,621,415,000 by diverting sums of money to purposes for which it was not intended. Further that they made variations to contracts without following procedures laid down in the law and purporting to allocate and utilize funds on activities which  
10 were already financed from other sources.

The prosecution also claimed that the two appellants furnished false accountabilities and filed false reports relating to accountability and financial statements. Further that the 2<sup>nd</sup> appellant embezzled UGX  
15 135,710,624 by banking it on his personal account, withdrawing it and spending it on his own personal needs. That in addition, the 2<sup>nd</sup> appellant received UGX 141,397,715 on his account, which belonged to the Government of Uganda and did not account for it.

The appellants denied the charges in the indictment and the prosecution called 24 witnesses to prove its case. The trial judge  
20 found sufficient evidence and convicted that appellants of abuse of office and embezzlement, respectively, and sentenced them, to 30 months' imprisonment each. Being dissatisfied with both conviction and sentence, the appellants appealed to this court on 4 grounds which were set out in their Memorandum of Appeal filed in this court  
25 on 19<sup>th</sup> January 2019, as follows:

1. The learned trial judge erred in law and fact when she relied solely on the prosecution evidence to convict the (1<sup>st</sup>) appellant

of the offence of abuse of office without regard and/or consideration of the appellant's defence thereby arriving at wrong conclusions.

5 2. The learned trial judge erred in law and fact to convict the 2<sup>nd</sup> appellant of embezzlement when she summarily dismissed the appellant's defence simply because funds had been found on his personal account, without due regard as to why it had been put there and how it had been spent.

10 3. The learned trial judge erred in law and fact to convict the 2<sup>nd</sup> appellant of Embezzlement in the absence of evidence from the hospital that it had suffered a theft.

15 4. The learned trial judge erred in law and fact when she sentenced each appellant to 30 months' imprisonment which was excessive in the circumstances.

20 Counsel proposed to seek orders that this court quashes the conviction of each of the appellants and sets aside the sentences against each of them, or in the alternative that the sentences be reduced.

The respondent opposed the appeal.

### **Representation**

25 At the hearing of the appeal on 8<sup>th</sup> April 2021, Mr MacDusman Kabega, learned counsel, represented the appellants. The respondent was represented by Ms Harriet Angom, Chief State Attorney, Ms Jackie Kyasimire, Senior State Attorney and Mr David Mugamba, State Attorney. The appellants were both out of prison on

bail pending the disposal of their appeal and they both attended the hearing.

Counsel for both parties proceeded by written submissions as instructed by court. When the appeal was called for hearing Counsel for both parties addressed court orally, very briefly. This judgment was therefore prepared largely on the basis of the written submission but the oral submissions were also considered.

### **Consideration of the Appeal**

The duty of this court as a first appellate court is stated in rule 30 (1) of the Court of Appeal Rules (SI 13-10). It is to reappraise the whole of the evidence before the trial court and draw its own inferences of fact. The court then comes to its own decision on the facts and the law, but must be cautious of the fact that it did not observe and hear the witnesses testify. (See **Bogere Moses & Another v Uganda, Supreme Court Criminal Appeal No. 1 of 1997**).

That being the duty of this court, we proceeded to re-appraise the whole of the evidence on record with regard to the grievances that the appellant set out in their memorandum of appeal. We have considered the submissions filed by counsel, the authorities that they cited and others not cited that were relevant to the case. The grounds of appeal are resolved in the same order that counsel for the appellant structured his submissions. The submissions of counsel on each ground of appeal are summarised immediately before disposing of particular grounds of appeal.

*Ikur*

*Amu*

*Weldon*

## Ground 1

This was the grievance that the learned trial judge relied solely on the evidence adduced by the prosecution to convict the 1<sup>st</sup> appellant without regard to or consideration of his defence. That as a result,  
5 she arrived at a wrong conclusion.

### Submissions of Counsel

In this regard, counsel for the appellants stated that in her judgment, the learned trial judge reproduced the submissions of counsel for both the prosecution and the 1<sup>st</sup> appellant. Without first evaluating  
10 the evidence adduced by the appellants she concluded that the money in issue was utilised on imaginary unauthorised items called “*emerging issues*.” This, in her view, amounted to abuse of office on the part of the 1<sup>st</sup> appellant.

Counsel then singled out the testimonies of PW19 who stated that  
15 the 1<sup>st</sup> appellant did many good things for the hospital. Further that some money was diverted but it was used on “*emerging issues*.” Counsel also pointed us to the testimony of PW20, the District Engineer for Gulu District, who explained that the plan for rehabilitation of the medical and surgical wards did not take into  
20 account the fact that the buildings to be renovated were built in the 1930s. That as a result of this, when renovations began, it was discovered that the structures were weak and could not take the weight of a new roof as had been planned. He thus recommended that the walls of the buildings be demolished and rebuilt, which  
25 necessitated extra works that had not been included in the original Bills of Quantities (BOQs).

*L. Kar*

*AMU*

*Weldon*

The appellants' counsel further submitted that the same witness testified that further works not included in the BOQs included the walkway between the theatre and maternity ward, toilets, a generator house and electrical rewiring. That PW20 made the  
5 recommendations for these extra works to a variation committee which then made submissions to the Contracts Committee and a Board. That both bodies approved the implementation of these extra works.

The appellants' counsel also referred us to the testimony of PW21,  
10 Ogwal Tom, the Secretary to the Contracts Committee which considered the variations but pointed out that the minutes could not be produced in court because police took them during their investigations and did not return them. Neither did the prosecution adduce them in evidence. Counsel also pointed us to the testimony  
15 of PW20 in cross examination where he stated that it was the Supervising Engineer and the contractor who generated the variations, drawings and quantities of works for the consideration of the Variation Committee.

The appellants' counsel further referred us to the testimony of PW4  
20 who enumerated a list of emerging issues which were not part of the original plan. He asserted that these extra works were carried out and the hospital benefited from them. He further referred us to the testimony of PW3, Patrick Ocailap, the Director for Budget in the Ministry of Finance, who in cross examination stated that before  
25 money was released for projects such as this one by Government, the Accounting Officer had to produce a progress report to show that implementation of the work plan was satisfactory. And that in the

*Iron.*

*[Signature]*

*[Signature]*

absence of such a plan, no release of funds would be made to the entity in question.

The appellants' counsel finally submitted that the trial judge did not carry out a holistic and judicious evaluation of the evidence. He  
5 concluded that had the trial judge considered the evidence referred to above, she would not have faulted the 1<sup>st</sup> appellant leading to convicting him of Abuse of Office. He invited us to allow this ground of appeal.

In reply, counsel for the respondent submitted that the trial judge  
10 evaluated all the evidence adduced by the prosecution and appellants. That the trial judge considered the evidence about the variations and their approval and devoted 4 pages of her judgment to pointing out the defences proffered by the appellants and all the evidence adduced by the prosecution that appeared to be in favour  
15 of the appellants.

The respondent's counsel urged us to reappraise all the evidence, if we find that the evaluation by the trial judge was insufficient. The respondent's counsel further pointed out that the case hinged on the report of the Auditor General which summarised all the faults of  
20 appellants, like the suspicious contract variations of up to 75% of the original amount without appropriate authority and smuggling in of unplanned items without the requisite authority, which was contrary to section 31 of the Public Procurement and Disposal of Public Assets Act (2003) and the Regulations under it.

25 Counsel further submitted that the learned trial judge pointed out the failure to pay contractors which resulted in them abandoning the work; the inclusion of VAT amounting to UGX 62,140,031 paid to

*Ukon*

*AMK*

*W. J. J. J.*

contractors in respect of public works that were exempt and incurring extra expenditure amounting to UGX 77,509,551 on services which were not approved by Parliament; unsupported tax deductions and poor record keeping as well as questionable  
5 accountabilities.

Regarding the defence that the variations were done in good faith and out of necessity and for the benefit of the Hospital, counsel for the respondent submitted that this was discredited by the fact that the proper procedures for variations were not followed and so the  
10 variations were done contrary to law. That the accountability for the money released was fraudulent; P19 told court that payment of contractors was from other sources. That for example the renovation of the toilets according to **PEX25** was UGX 426,420,000 but the actual payment to the contractors was UGX 222,510,443, creating  
15 an unexplained variance. Further that withholding tax of up to 6% was accounted for but no money was remitted to Uganda Revenue Authority.

Counsel further submitted that although the variations, on the face of it, appeared to have benefited the hospital, and the process had a  
20 semblance of good faith, the variations were not done in good faith. That the motive was to spend less money from the funds released for capital development so that the balance is swindled. That the variations were a camouflage to misappropriate public funds in the guise of emerging issues which were not part of the initial plan for  
25 the rehabilitation of the Hospital. Further that this explained why the 1<sup>st</sup> appellant strategically bypassed and conveniently avoided the lawful procedure and opted to consult some of his acquaintances for recommendations for approval of an otherwise illegal venture.

*Tuan*

*[Signature]*

*[Signature]*



The respondent's counsel finally prayed that this court re-evaluates the evidence and comes to the same conclusion, that the 1<sup>st</sup> appellant is guilty of abuse of office, and so upholds the decision of the trial judge.

## 5 **Resolution of Ground 1**

We observed that before the trial judge commenced to evaluate the evidence before her, she correctly pointed out that in order to prove the offence of Abuse of Office contrary to section 11 (1) of the ACA, four ingredients must be present to constitute the offence: i) that the  
10 offender was an employee of government or a public body or company in which government had shares ii) the offender did or directed to be done an arbitrary act; iii) that such act was done in abuse of authority of his/her office and iv) that the arbitrary act was prejudicial to the interests of his/her employer.

15 The trial judge then stated that in this case, the act complained of was "*whether there was diversion of public funds,*" and if so, whether this was unlawful. She correctly defined diversion of funds as "*a rerouting or altering of the natural course or route of a thing or matter,*" and that with regard to funds, it applied to the unauthorised change  
20 or use of funds or resources for reasons for which they were not anticipated. The trial judge also pointed out that diversion of funds is an offence in its own right, which is provided for by section 6 of the Anti-Corruption Act (ACA), section 17 of the Public Finance and Accountability Act (PFAA), and section 32 of Public Procurement and  
25 Disposal of Public Assets Act, 2003 (PPDA Act). She summarised the complaint of the prosecution being that the appellants did arbitrary acts by directing the budget of UGX 3.6 billion allocated for capital development to purposes for which it was not intended.

The trial judge then exonerated the 2<sup>nd</sup> appellant from this offence because it was not his remit to make management decisions and so acquitted him of the offence of Abuse of Office. Regarding the 1<sup>st</sup> appellant, she found that he neglected to ensure that the Procurement and Disposal Unit (PDU) and Contracts Committee carried out their duties, which led to a flawed procurement process. She also found that the accounting officer usurped the roles of these two bodies and conducted public procurement in an *ad hoc* manner. And that as a result, the firms contracted did not obtain reliable budget estimates and were irregularly paid. That they were incapable and inept providers not vetted by the Contracts Committee.

The trial judge then found that out of the UGX 3.6 billion that was planned and budgeted for, only UGX 1,714,410,078 was spent on planned capital development projects; the balance was used on activities that were not planned or budgeted for. The trial judge finally found and held that:

*“The renovation of the medical ward and its extension was undertaken after a contract variation which represented almost 75% of the original contract price. There was no PPDA waiver sought to extend the services of the firm for the extra works. This equally applied to the renovation of the surgical ward which was varied by approx. 55% which was over and above the 25% allowed by the PPDA Act.*

*In this case now before me I find that it was an arbitrary act for the Accounting Officer, A1, to convert money meant for the capital development and caused such money to be utilised **on an imaginary and unauthorised item called emerging issues**. The usurping of all the powers of the PDUs and CCs was an act in abuse of office of the Medical Superintendent which act was prejudicial to the interests of the MOH, the Gulu RRH and the citizens who use the facility; and it led to lack of proper utilization of public funds meant for Gulu RRH. I find that Exh P48, the audit report set the figure of diverted funds at Uganda Shillings One Billion Nine Hundred and Seven Million Four*

Thousand Nine Hundred and Twenty-Two shillings, UGX 1,907,004,922/=.

*I find that the prosecution has proved Count No 1 against A1 beyond reasonable doubt and I convict A1 accordingly.”*

5 We must point out that from the onset, the trial judge appears to have misdirected herself when she digressed from the offence that was before her for trial, abuse of office under the ACA, to a different offence, diversion of resources under section 6 of the same Act. This could have been the reason why she evaluated the evidence in  
10 respect of the various ingredients of the offence of Abuse of Office, which she ably set out to guide her in evaluation of the evidence, in the manner that she did. The trial judge also seems to have misunderstood the term “*emerging issues*” which she perceived to be separate and apart from the process of capital development.

15 Having made those preliminary observations, we shall proceed to re-appraise the evidence on the record to establish whether the prosecution proved all the ingredients comprised in the offence of Abuse of Office for which the 1<sup>st</sup> appellant was indicted, convicted and sentenced.

20 Section 11 (1) of the Anti-Corruption Act provides for the offence of abuse of office as follows:

25 **(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.**

*Leon*

*[Signature]*

*[Signature]*

The ingredients that make up the offence of abuse of office were correctly set out by the trial judge and we need not repeat them here but they will guide us in the reappraisal of the evidence before us.

5 With regard to the 1<sup>st</sup> ingredient, there is no doubt that the 1<sup>st</sup> appellant was an employee of the government of Uganda employed as the Medical Superintendent and Accounting Officer for Gulu RRH. That ingredient was therefore proved.

10 Regarding whether the 1<sup>st</sup> appellant did or directed that arbitrary acts be done during the implementation of the plan to renovate Gulu RRH, Black's Law Dictionary (9<sup>th</sup> Edition) defines the word "arbitrary" to mean "*Depending on individual discretion, determined by a judge rather than by fixed rules, procedures, or law.*" With regard to decision making, the Cambridge Online Dictionary<sup>1</sup> defines "arbitrary" to mean "*a decision based on chance rather than reason.*"  
15 It is also explained to infer "*using unlimited personal power without considering other people's rights or wishes.*"

20 With these definitions in mind, we reappraised the evidence to establish whether Dr Yovantino Agel acted in arbitrary manner, first of all, by usurping the powers of the Procurement and Disposal Unit (PDU) and the Contracts Committee by awarding contracts, and awarding contracts to his cronies who were inept, converting funds meant for capital development and causing the money to be used on an "*imaginary and unauthorised item called emerging issues.*" Further, whether he arbitrarily approved variations in the plans that  
25 were above the percentages or levels set by the PPDA Act of 2003.

---

<sup>1</sup> <https://dictionary.cambridge.org/dictionary/english/arbitrary>

*Im*

*Am*

*Weldon*

With regard to the award of the contracts, PW9 Michael Bitu, the Assistant Procurement Officer at Gulu RRH in FY 2008/2009, testified about how the contracts in issue were awarded. He explained to court that his duties were managing all contracts, accepting adjudication and award of contracts, preparing bid documents, advertising bid opportunities, supporting functions of the Contracts Committee, making monthly reports of the Contracts Committee and other duties assigned to him.

He went on to state that in FY 2008/2009, the Hospital had a work plan which included the construction of a staff house, stores and an administration block. That with regard to the staff house, he awarded the contract to Lubra Construction Services and by the time he left, they had just handed over the site to the contractor. He explained that the award was the result of open bidding; the works were advertised in the newspapers, evaluation of bids was done and then handed over to the Evaluation Committee. Further that the contract was submitted to the Solicitor General for clearance after which it was signed.

Michael Bitu further testified that the PDU also awarded a contract for renovation of the Surgical and Medical Wards and that the correct procedure was followed during the award. He clarified that though he was not a member of the Evaluation Committee, he attended meetings as a technical person. That he did not sit on the Contracts Committee but the contract for the surgical ward was awarded to Lubra Construction Company while another was awarded to ZIP Contractors. He seemed not to be sure which contract was awarded to each of the companies but he stated that by the time he left the Hospital the works had not been completed.

*Iskar*

*Amk*

*W. J. O. O.*

The witness further testified that he participated in the award of contracts for the stores and the administration block and it was awarded to Block Technical Services. Further that by the time he left Gulu RRH, the contractor had not yet completed the works in that  
5 the roof was not yet on the building.

Regarding variations in the contracts, he testified that they were supposed to be submitted to the Contracts Committee which would then determine the percentage of variation. And that according to the PPDA Act, they were not supposed to go above 25% of the total  
10 contract price.

Asked about the fencing of the Hospital, Michael Bitu said he did not participate in the award of that contract. Further that it was not in the work plan. That however, some work was done but "*there was no procedure.*" He explained how the construction of the fence came  
15 about as follows:

*"I do not know how it came about maybe the Accounting Officer knew. What he told me one time, he directed that he wanted an LPO (Local Purchase Order) in the name of fencing but I was against it because we needed at least to ask for ... quotations from other providers to compete. Since he directed that he wanted that LPO, I just left it."*  
20

He explained that he did give the LPO to Dr Yovantino Agel but did not know what happened after that. However, he later saw construction of the fence going on. Michael Bitu was cross examined about the procurement for the wall fence. He stated that he informed  
25 the Accounting Officer that the issuing of the LPO was irregular but the latter insisted that he needed it. And that since the Accounting Officer was his direct supervisor, he could not argue with him; he let it pass without any contest.

*Leon*

*[Signature]*

*[Signature]*

Tizomu Andrew, PW10, was the Procurement Officer after Michael Bitu. He stated that when he joined Gulu RRH in October 2009, he found most of the activities he could have implemented in the work plan had been procured and work were already in progress. That construction of the staff house had stalled due to lack of payment of the contractor. But the construction of the medical store and administration block were completed to roughly 90%.

PW10 further testified that while he was at the Hospital, construction of the fence and walkway was going on but there was no file for the contract. Further that he participated in the procurement of the staff van by drafting the agreement for the award which had been given to Nippon Parts. However, by the time he left, the van had not been delivered, though the supplier used his own money to import the van. In cross-examination, Tizomu clarified that the contract that he participated in drafting and others were all taken to the Attorney General's office for approval.

The prosecution also called Stephen Obongo Gates (PW13), a businessman and proprietor of Stivola Investments Ltd., the company that constructed the wall fence and walkway. He testified that he was a prequalified contractor for FYs 2008/9 and 2009/10, for construction works, following an advertisement by the Hospital. That he received a pre-qualification invitation for those two years and he got it from the procurement officer. That he accepted the offer for pre-qualification in writing. Further that the procurement officer later called him to carry out construction of the fence and walkway. That he picked up a request for a bill of quantities and he duly presented the bill to the procurement officer. And that since it was a selective bid, all he had to do was present a bill of quantities, which



he did. Further that after a week, he was informed that only he presented a bid.

He further testified that after a discussion with the Procurement Officer and the Accounting Office, the 1<sup>st</sup> appellant, it was agreed  
5 that because the works were worth less than UGX 50 Million, an LPO could be issued. That in addition, he was informed that the construction of the wall fence was urgent because theft was rampant and dead bodies were being dumped in the hospital compound. That  
10 as a result, an LPO signed by the 1<sup>st</sup> appellant was given to him but this was at the PDU. He was instructed to start on the works for the wall fence and walkway; for which he quoted UGX 40 million and 11 million, respectively.

PW13 stated that he was never given a contract for the works but his company constructed the wall fence and walkway. That in the  
15 process he had site meetings with the Hospital Monitoring Committee, the Engineer from the Department of Works and monitors from Ministry of Health, Headquarters. But that by the time he testified he had only been paid part of what was due for the works.

In cross examination, PW13 stated the he was paid all that was due  
20 for the walkway, UGX 11,000,000. But that there was an outstanding payment which he thought it was due to the fact that the PDU did not prepare a contract for the works. That during the construction, he dealt with the Hospital Administrator, one Wolimbwa, and a procurement officer called Bithugu Michael.

25 With regard to the construction of the medical store and the administration block, PW18, Innocent Rujero, testified that he was a building contractor and the Managing Director of a company called





Block Technical Services. He stated that in May 2009 his company signed a contract with Gulu RRH to construct a medical store and administration block at UGX 879,009,694, for a period of 6 months. That immediately after signing the contract, the company began the works.

Further that immediately after they began the project, they found a sewage line and a water system in an inconvenient place on the site. That there was also an 11 KVA power line running along the proposed building that made their work difficult. Further that after they brought these issues to the attention of management of the Hospital, a site meeting was held. The service providers, National Water and Sewerage Corporation and power company were thereafter requested to carry out diversions of the services which cost about UGX 60,000,000.

PW18 further testified that after the diversion of services was done, Block Technical Services embarked on construction and it went well with payment being done according to their claims, till December 2009 when UGX 400,000,000 was paid when the works were at about 90%. When they made a demand for further payment, of UGX 480,000,000 in January 2010 they were not paid, because the Hospital Administration were waiting for money from Government. Further that UGX 100,000,000 was paid in August 2012 leaving a balance of UGX 380,000,000. He further testified that because the execution of the contract was delayed for lack of payment, he wrote to inform the hospital that because of the delay there was need to issue a new quotation due to inflation which resulted in an increase in prices of materials. It was then agreed with the Hospital Director that the contract be terminated and it was.



According to PW18, the works were re-advertised. His company placed a bid and was successful. He also explained that at that point in time, there were only small fixtures left to be done, like electrical fittings. However, the Hospital also varied what was supposed to be medical stores to make them offices. Further that there was a request to extend time for completion of the works due to the relocation of sewerage, water and power lines.

In cross examination, PW18 said that his company was not paid all that was due to them for the works, though he made claims for payment upon which the supervising engineer prepared certificates. He confirmed that his company completed all the work they were contracted to do at the Hospital. He explained that the power line that was relocated was on the side of the road near the building and dangerous. That it was absolutely necessary to deal with the water and sewerage pipes and power line before continuing with the building and this necessitated a variation of the contract. That they were paid for the amount of work that they carried out, which was 90%. But there was no provision for inflation in the contract. That in spite of this, the works were delayed for 2 years for non-payment so they made further claims due to inflation of up to UGX 459 million, but this was not granted.

Olal Andrew Obong testified as PW20. He was the Acting District Engineer for Gulu District Local Government and in charge of coordinating all infrastructure development in the District. He stated that in the FYs 2008/2009 and 2009/2010 he coordinated development activities for Gulu RRH.

The evidence of PW20 is very important in disposing of whether the actions the 1<sup>st</sup> appellant regarding procurement of contractors and



variations were arbitrary or not. Olal Andrew Obong stated that he was released by the Chief Administrative Officer, Gulu, to go and coordinate and manage the rehabilitation projects in Gulu Hospital. That he did a detailed assessment of the infrastructure that was supposed to be rehabilitated, prepared the designs, bills of quantities and the technical drawings required for the project. He submitted them to the hospital administration for action and the Hospital advertised the project to source for contractors for implementation.

Olal Andrew explained that there were a number of projects that were advertised for which they prepared technical documents, viz: the administration block, staff houses, wall fence, installing the gates and the walkway. That however, he got technical support to do the drawings for the walkway. He also testified about the procurement of contractors as follows:

*"When the project was advertised a number of bidders submitted the bids. I was involved in the evaluation of bids in which I was the Chairperson Evaluation Committee. The Committee had a number of technical staff from the district and hospital. We prepared the technical evaluation report and submitted to the Contracts Committee of the hospital to take action based on our recommendations. When the Contracts Committee of the Hospital awarded contracts I came in to implement the project. My role was to guide the contractor, in the construction work and rehabilitation, (it) was to prepare technical reports, measure the work done at every stage, prepare payment certificates and records to guide the hospital to pay for work done and this was the first project of medical ward and surgical ward. At the time of implementation, we realised that the building was very weak.*

...

*The medial ward and surgical ward, these were buildings that were constructed in 1934 and during the assessment we did not determine the structural strength of the wall. (sic) I recommended (that) the wall be destroyed and a new one constructed and this was an extra work (sic) which was not captured in the bills of quantities during our*

assessment and therefore it would be considered as variations. I valued the extra work, made a report, and submitted to the hospital for action. The variation report ten (sic) submitted to the Contracts Committee to approve.”

5 Regarding the procedure for variations, he explained that variations do not go through the Evaluation Committee. He said, they are scheduled and verified by the Supervising Engineer, submitted to the Accounting Officer and it is he/she that submits to the Contracts Committee. He confirmed that the two projects that he supervised  
10 were successfully completed in FY 2009/2010. He further explained that with regard to the walkway and fence, he did not participate in the procurement, but assumed that it was properly done when he saw “the way things were being done.”

Variations were not provided for by the PPDA Act, 2003, but in  
15 section 35 (d) of the Act, it was provided that the User Department had the power to issue change orders in accordance with the terms and conditions of the contract.

Variations were recognised as necessary and provided for in the PPDA Regulations, 2003, where regulation 261 provided for  
20 variations or change orders to contracts as follows:

- 25 **(1) A contract variation or change order is a change to the price, completion date or statement of requirements of a contract, which is provided for in the contract to facilitate adaptations to unanticipated events or changes in requirements.**
- (2) A contract variation or change order may be issued with the approval of the contracts committee.**
- 30 **(3) Notwithstanding sub regulation (2), any additional funding required for a variation or change order shall first be committed.**

*Team*

*[Signature]*

*[Signature]*

(4) A contract may be varied in accordance with a compensation event or the issue of a variation, change order or similar document, as provided in the contract.

5 (5) A variation or change order shall be in accordance with the terms and conditions of a contract and shall be authorised by a competent officer.

(6) A contract which provides for a variation or change order shall include a limit on a variation or change order which shall not be exceeded without a contract amendment.

10 (7) A competent officer, for purposes of this regulation, shall be defined in the contract.

We find that the changes that occurred due to the weakness in the walls of the medical and surgical wards that were discovered after commencement of the works fall within the ambit of variations under  
15 sub regulation (1) above. They were unanticipated and PW20, the District Engineer admitted that during the assessment, they as project owners, did not determine the structural strength of the walls. That it was he that recommended, as a result of the omission by his team, that the walls be destroyed and rebuilt leading to new  
20 and extra works for the contractor. Clearly this was not the result of choice of an incompetent and inept contractor by the 1<sup>st</sup> appellant, as the trial judge found.

However, it needs to be determined whether the provisions of sub  
25 regulation 3 above, relating to the funds required to implement the variation were also met.

As to whether variations were limited to 25% of the contract, we are of the view that there could have been some misinterpretation of the law in this regard. Variations and change orders are different from contract amendments which according to section 29 (a) (v) of the  
30 PPDA Act, 2003, could only be authorised by the Contracts

*Handwritten signature*

*Handwritten signature*

*Handwritten signature*

Committee, unlike variations that were authorised by a designated officer named in the contract. Regulation 262 of the PPDA Regulations, 2003 defined and provided for contract amendments as follows:

- 5       **(1) An amendment to a contract refers to a change in the terms and conditions of an awarded contract.**
- (2) Where a contract is amended in order to change the original terms and conditions, the amendment to the contract shall be prepared by the procurement and disposal unit.**
- 10       **(3) A contract amendment shall not be issued to a provider prior to—**
  - (a) obtaining approval from a contracts committee;**
  - (b) commitment of the full amount of funding of the amended contract price over the required period of the revised**  
15           **contract; and**
  - (c) obtaining approval from other concerned bodies including the Attorney General, after obtaining the approval of a contracts committee.**
- 20       **(4) A contract amendment for additional quantities of the same items shall use the same or lower unit prices as the original contract.**
- (5) No individual contract amendment shall increase the total contract price by more than fifteen percent of the original contract price.**
- 25       **(6) Where a contract is amended more than once, the cumulative value of all contract amendments shall not increase the total contract price by more than 25 percent of the original contract price.**

30       However, it was not possible for us to tell whether the contracts in issue provided for variations. This is because the contracts were not placed before us. They were not included in the Record of Appeal.

With regard to the component of staff houses, PW20 explained that though the Evaluation Committee recommended a particular

*Tison.*

*[Handwritten signature]*

*[Handwritten signature]*

company for the construction of the staff houses, the Contracts Committee did not follow their recommendation. It instead awarded the contract to the lowest bidder contrary to the recommendation of the Evaluation Committee that this would cause financial loss to government. That because he, as a professional, observed that this bidder would not be able to carry out the project, he *"pulled out."* He did not supervise the construction of the staff houses. He explained that the bidder chosen by the Contracts Committee failed to implement the project because his costing was very low.

10 During cross-examination, PW20 identified minutes of a Committee that approved the variations for the renovation of the medical and surgical wards (**ExhD1**). The minutes showed that a meeting of the Evaluation Committee on variations was held on held on 28<sup>th</sup> June, 2009. The 1<sup>st</sup> appellant was not a member of the Committee but  
15 PW20 attended as a technical advisor. He confirmed this in cross examination. He further explained, in re-examination, that this was not the Evaluation Committee that sat to consider award of the contract at the onset, but another committee constituted by the Accounting Officer to consider the variations in the original works  
20 and establish whether it is necessary or not. He further stated that UGX 67,239,000 was recommended as the cost of variations, part of which would be furnished from contingency funds approved for the works.

In view of the testimony that part of the money required for the variation was not included in the contingency funds and had to be sourced from elsewhere, it the appears that this was a case where the contract had to be amended. The variations had to be placed before the contracts committee for it to award a new contract

*Tom*

*[Signature]*

*[Signature]*

specifying the works that had been identified as required to be implemented in order to achieve what had already been agreed upon.

The 1<sup>st</sup> appellant also testified about the processes above. He reiterated how the procurement for the constructions of the buildings and the need to move the electricity line and the sewerage and water pipes which were not anticipated and planned for.

The contract that seemed to have been awarded arbitrarily, that is, without open bidding and intervention of the Evaluation Committee was that which related to the construction of the walkway and the wall fence. The testimony of the 1<sup>st</sup> appellant in-chief included this issue and he explained how it came about and how it was handled.

Dr Yovantino Agel stated that the walkway was constructed to join the Medical Ward to the Surgical Ward and the latter to the Operating Theatre. That the walkway was designed to allow smooth movement of patients, particularly from the Maternity Ward, about 100 meters from the Theatre. That this was a priority because before these walkways were constructed there was an open rough surface on which it was difficult to roll a stretcher. As to why it was a priority that had to be met, though not budgeted for, the 1<sup>st</sup> appellant explained that as a medical doctor, it would have been unprofessional of him and abusive if he did not give the staff the walkway to ease their work.

About the wall fence, he stated that it was necessary because initially, the hospital was in an open space. It was a security risk because anybody had access to the hospital and the patients. That in addition, dead bodies were dumped in the hospital compound, especially at night because during this period there was an

*Item.*

*AM*

*W. J. J.*



insurgency of the Lords' Resistance Army in Northern Uganda, particularly in Gulu, which continued up to 2009.

Regarding the procurement of the contractor for the walkway and wall fence, he stated that it all started in the PDU which was responsible. That one Pithan identified the appropriate procurement method to secure the services. That the Procurement Unit advised the issuance of an LPO and he had no objection as these were technical persons. That the PDU advised a process in which 4 contractors were invited. That out of the four, Stivola Investments Ltd was identified as the best bidder. He asserted that he could not have taken part in the procurement process because he was the head of the institution; he could not be part of the procurement unit. He referred to the testimony of Olango (PW13) about the procurement process.

He admitted that Stivola Investments the company procured to carry out the works carried out the first phase and they were paid for it. The outstanding works were carried out by another company which too was fully paid. That the two facilities were completed successfully and the walkway was in use.

It was the 1<sup>st</sup> appellant's testimony that the emerging issues that he referred to were the contingencies that had not been planned for, like the demolition and rebuilding of the weak walls of the medical and surgical wards, and building the walkway and wall fence, among others. He explained that he used the term "*emerging issues*" to describe works that were raised after rehabilitation began, not emergencies like Ebola outbreaks, as some witnesses for the prosecution seemed to imagine and testified.

The evidence on record points in an opposite direction to the findings of the trial judge. The 1<sup>st</sup> appellant was the Accounting Officer of the Hospital. He therefore could not have and did not participate in the award of contracts because it was clearly done by the PDU. That the various contracts were awarded after bidding by various contractors, evaluations by Evaluation Committees of which he was never a member, and awarded by the Contracts Committee. The same applied to the variations; they were approved by a Committee which he specifically put in place for the purpose.

- 10 We therefore find that though the necessary processes under the law were not followed during the process of variations, which actually should have been amendments of the contracts, the trial judge erred when she found that the 1<sup>st</sup> appellant directed or did arbitrary acts in the procurement processes for the rehabilitation of Gulu RRH.
- 15 With regard to the ingredient, whether the 1<sup>st</sup> appellant abused the authority of his office, it is clear that the 1<sup>st</sup> appellant did not award contracts. As Accounting Officer, he made payments to the contractors. However, PW20 stated that such payments were made after he issued certificates in respect of the work that the contractors completed. The delays in releases by Government that resulted in the stalling of the contracts cannot be attributed to him alone. The variations and further works were approved by the PDU, not the Accounting Officer who could not be a member of either the evaluation committees or the contracts committee. We therefore find that the third ingredient identified by the trial judge was not proved against him either.

Finally, we examined whether the award of contracts and their implementation for prices that were above the amounts that were

budgeted and released were prejudicial to the hospital, users of the facility and the Government of Uganda, the 1<sup>st</sup> appellant's employer.

The word "*prejudice*" infers "*damage or detriment to one's legal rights or claims.*" (See Black's Law Dictionary, 9<sup>th</sup> Edition; West Publishing Company). In her judgment, the trial judge found that the diversion  
5 of funds led to lack of proper utilisation of the funds, as indicated in the Audit Report. It is not clear what absence of proper utilisation meant because the evidence on the record points in a different direction.

10 According to PW15, Ndarushinze Judah, an Auditor from Office of the Auditor General (OAG), they began an Audit in November 2010. He said that he met the 1<sup>st</sup> appellant only once, at the beginning of the Audit. That otherwise they carried out the exercise with the Accounts Department. And that the audit, OAG issued a  
15 management letter spelling out the anomalies found. But by that time, the 1<sup>st</sup> appellant had been transferred and replaced by Dr Onyaki Nathan as Acting Director of the Hospital.

PW15 testified that Dr Onyaki delivered the response to the management letter but he informed the members at the exit meeting  
20 that it was provided to him by Dr Agel, the 1<sup>st</sup> appellant. That the Office of the Auditor General in Gulu found that the responses were not satisfactory and that is what was included in the Audit Report.

However, PW15 admitted that equipment that was meant to be delivered to the Hospital was delivered, the medical and surgical  
25 wards had been renovated, VIP toilets were built, a walkway to the surgical and maternity ward done, the hospital fence was in place with a gate, partitioning of the mess for intern doctors was

completed, a generator house was also completed and furniture was procured. He was not able to recall whether the wiring of the extension to the Outpatients Department and the water sewerage system had been completed.

5 The Audit Report from OAG pointed out that there was a mixing of funds for recurrent and development expenditure in one account. PW15 stated that management of the hospital operated a single account for recurrent and development expenditure. That this made it difficult for auditors to trace what was meant for capital  
10 development and recurrent expenditure. It was therefore not clear, according to PW15, whether there was an actual loss of funds. In his view, management ought to have prepared different books of accounts but it was not done. However, he concluded by stating that there were activities that were carried out which were not planned or  
15 budgeted for. He admitted that the activities were necessary for improved and proper management of the Hospital.

Dr Nathan Onyaki, PW19, was the Hospital Director since January 2011. He testified that before he became Director, he was at the Hospital as Head of the Department of Surgery since March 2007.  
20 That he went away for further studies and returned in November 2009. He stated that when he returned he was appointed Director but found some challenges at the beginning of his term as such. That there were outstanding payments to intern doctors and debts of UGX 384 and 177 million, for the administration block and the staff block  
25 respectively. And that in order to clear these debts for the projects, Ministry of Finance had to release more monies to cover them.

PW19 explained that the OAG queried these debts but the response that he got from the outgoing Director about monies not accounted



for and unfinished projects was that there were *emerging issues* during construction that had been done, such as during the renovation of the medical and surgical wards. That there were variations that required extra funding and the money was used to cater for them. However, staff of OAG were not satisfied with these responses and they were presented to the Public Accounts Committee of Parliament (PAC) in the Report of OAG.

He further testified that when they appeared before PAC they could not properly explain what happened. He also explained that he was informed that a number of documents relating to the accounts for capital expenditure had been taken away from the Hospital by the Health Monitoring Unit and not returned. And that he also had information that some documents were stolen from the Motor Vehicle used by the former Director while in Kampala, from whence he had retrieved them. That this matter was at the time of his testimony still in the hands of police investigators, and they hoped that the team would come up with information about the documents.

In cross examination, PW19 stated that when he returned to the Hospital after further studies, he found when several development projects were going on, commenced under the administration of the 1<sup>st</sup> appellant. He confirmed that the surgical ward was renovated and this was necessary. That the medical ward was also renovated/modified as an absolute necessity, and a walkway was constructed between the medical and surgical wards and the operating theatre. That for the two wards, VIP toilets were constructed. Further that the generator house too was renovated.

PW19 added that he found when the doctors' mess had been partitioned to form a section for the intern doctors and completed



during his administration. He also confirmed the building of the wall fence, purchase of a station wagon motor vehicle and medical equipment. In his view, Dr Yovantino Akii Agel did a *good job* when he was Hospital Accounting Officer. PW19 stated that although he  
5 appeared before the PAC, it did not require prosecution of the appellants in court.

In his sworn testimony before court, the 1<sup>st</sup> appellant listed the works that were carried out under capital development funds in FYs 2008/2009 and 2009/2010, similar to what had been identified by  
10 the witnesses above. But most importantly, he pointed out from his handover report, **PEX49** that the population in the area had its trust in the hospital increased due to the rehabilitation of the structures and improvement in the facilities availed to them. Further that the level of service delivery in the area increased as a result of the  
15 rehabilitation and construction of facilities in FY 2009/2010 as compared to 2008/2009, as follows:

<b>Services</b>	<b>2008/2009</b>	<b>2009/2010</b>
Outpatient contacts	47,459	73,609
Overall admissions	12,414	18,929
Surgical operations	5,309	7,610
Specialised services	35,285	75,000

The figures above do not indicate that the beneficiaries of the project were prejudiced; instead, they benefited from the works, though some of the processes were flawed.

20 While it is clear that completion of some of the works stalled because some contractors were not fully paid during the term of the 1<sup>st</sup> appellant, there is also evidence that there were variations, which

ought to have led to contract amendments, and which led to increase in the cost of the developments. Further that the variations and extra works that were done were absolutely necessary to enable improved delivery of services.

5 We therefore find that although the 1<sup>st</sup> appellant authorised spending of monies from the capital development fund on activates that had not been budgeted for and without approval of the Ministry of Finance, the use of the funds was not prejudicial to any person named in section 11 (1) of the Anti-Corruption Act, but instead  
10 beneficial. So was the increased expenditure that led to the Ministry of Finance allocating more funds to the project than was initially budgeted and planned for. We therefore find that the trial judge erred when she convicted the 1<sup>st</sup> appellant of abuse of office.

As a result, the conviction and sentence of the 1<sup>st</sup> appellant for the  
15 offence of abuse of office is hereby set aside

Ground 1 of the appeal therefore succeeds.

### **Grounds 2 & 3**

Counsel for the appellants argued these two ground together. The grievances in these grounds were that the learned trial judge erred  
20 in law and fact when she convicted the 2<sup>nd</sup> appellant of embezzlement, after summarily dismissing his defence because funds were found on his account, without regard to the reason why the funds were on the account. Further that there was no evidence on record from the hospital that it suffered theft.

25

*Tobin*

*[Signature]*

31

*[Signature]*

## Submissions of Counsel

In this regard, counsel for the appellants submitted that the 2<sup>nd</sup> appellant testified that he was a cash agent for the Hospital authorised to withdraw cash from its bank accounts. That there was  
5 a circular from the Ministry of Finance and Economic Development dated 14<sup>th</sup> April 2009 (**DEX9**) stating that any monies in excess of UGX 20,000,000 had to be banked on the account of the person heading the activity. That the money UGX 135,710,624 was for facilitating a workshop in Kampala for Hospital Staff. That he used  
10 some of it to purchase tyres for a hospital vehicle which had been impounded and parked at a Police Station in Kampala.

Counsel for the appellants referred us to that part of the judgment where the trial judge made a finding that the money could be traced to the 2<sup>nd</sup> appellant's account. Further that the money got onto his  
15 account by virtue of his employment as Hospital Accountant, a signatory to its accounts, and its Bank Agent. That it was on this basis that she convicted the 2<sup>nd</sup> appellant of embezzlement.

He went on to argue that nowhere in her evaluation of evidence did the trial judge consider the 2<sup>nd</sup> appellant's evidence on record. He  
20 submitted that it was the 2<sup>nd</sup> appellant's defence that most of the vouchers and cashbooks were taken by the investigating team. Further that the 1<sup>st</sup> appellant also stated in his defence that many account documents for the Hospital went missing when thieves broke into his motor vehicle while he was in Kampala. That he made  
25 a report about the incident at Kira Road Police Station.

He further submitted that it was curious that the trial judge acquitted the 2<sup>nd</sup> appellant on Counts 7 and 8. That having done so,

*Imr.*

*[Signature]*

*Weldon*



it was not justifiable to convict the 2<sup>nd</sup> appellant on Court 6. Counts 7 and 8 related to the alleged causing of financial loss by the 1<sup>st</sup> appellant, while Count 8 was an allegation that the 2<sup>nd</sup> appellant stole UGX 141,397,700, the property of Guru RRH.

5 The appellant's counsel finally submitted that had the trial judge considered the evidence of the 2<sup>nd</sup> appellant, she would have come to a different finding; she would not have convicted the 2<sup>nd</sup> appellant of the offence of embezzlement.

10 In reply, counsel for the respondent submitted that though counsel for the 2<sup>nd</sup> appellant submitted that the circular dated 14<sup>th</sup> April 2009 authorised the banking of more than UGX 20,000,000 for activities on his personal account, as a Bank Agent of the Hospital, this was a twisted interpretation of the Circular to justify the banking of money on his account. That the directives of the Ministry of  
15 Finance in that Circular were different; the Circular directed the Director of the Hospital to reject any cash withdrawals in excess of UGX 20,000,000, unless prior express authority was obtained. That there was no directive that money could be put on the account of the head of the activity.

20 Counsel went on to submit, in the alternative, that the 2<sup>nd</sup> appellant did not head any activity so as to warrant money being banked on his personal bank account. That being designated as Bank Agent did not mean that government funds should be banked on his personal account since Gulu RRH had a recognised bank account on which  
25 public funds were deposited.

Counsel went on to submit that though the 2<sup>nd</sup> appellant stated in his unsworn statement, that the money was meant to facilitate a

*Sum.*

*[Handwritten mark]*

*Wagon*

workshop in Kampala for Hospital Staff and purchase only 4 tyres for a motor vehicle, he did not produce evidence of this, like receipts and vouchers. He instead claimed that these were taken by detectives and never returned to the Hospital. Counsel then drew it  
5 to our attention that the trial judge extensively evaluated the appellant's defence vis-à-vis the evidence adduced by the prosecution, at pages 759-763 of the record of appeal, before she arrived at the decision to convict the 2<sup>nd</sup> appellant of embezzlement.

Counsel went on to submit that with regard to the missing receipts  
10 and vouchers that the 2<sup>nd</sup> appellant claimed were taken by detectives, PW22 testified that he was part of the team of investigators that went to the Hospital. That he signed for some documents from the appellants to help in their inquiry. That the documents he got from the 2<sup>nd</sup> appellant were tendered in evidence  
15 in court. Counsel then referred us to pages 625-627 of the Record of Appeal for the analysis of the entire evidence by the trial judge.

Counsel for the respondent further pointed out that some of the withdrawals of money were made from Automatic Teller Machines (ATM) by the 2<sup>nd</sup> appellant, which led to the conclusion that he used  
20 the money for his personal gain. That the trial judge believed the prosecution case that at the time of his arrest there was only UGX 360,000 left on his Bank Account. Counsel then concluded that the defence furnished by the 2<sup>nd</sup> appellant could not absolve him because there was enough evidence that he spent the said money.  
25 Further that the theft happened at the ATMs where he periodically withdrew money and therefore, the trial judge was correct when she convicted the 2<sup>nd</sup> appellant of embezzlement.

As to whether there was theft proved against the appellant, counsel for the appellant referred us to the end of FY Reports of the OAG for Gulu RRH for the years 2008/2009 and 2009/2010, **PEX 48** in which it was discovered that the Hospital suffered massive theft.

5 Counsel went on to submit that the theft was not known to the public since the releases were also not in their knowledge. He asserted that the fact that nobody from the Hospital complained of the theft was immaterial because the only people who knew about the funds were the appellants who could not complain against themselves. Counsel

10 then prayed that this court finds that this ground of appeal also fails.

### **Resolution of Grounds 2 & 3**

In order to resolve these two grounds, there was need to establish whether money was credited to the 2<sup>nd</sup> appellant's account, as he admitted and whether he withdrew it for his own personal use, other

15 than what he stated; payments for a workshop of staff of the Hospital in Kampala, and purchase of tyres for motor vehicles. The prosecution did not call any witness from the Accounts Department of the Hospital to testify about how the money left the Hospital Account to get into the 2<sup>nd</sup> appellant's personal account. But they

20 called Tito Saaka (PW24) who was an employee of Stanbic Bank, Gulu Branch and in charge of authorising transfers and Real Time Gross Settlements (RTGS) in the bank in FY 2008/2009 and 2009/2010.

PW24 testified about how he retrieved various documents and

25 statements from Bank records as follows: Bank statement of Gulu RRH; specimen cards of signatories to the account; statement of the personal bank account of Omongo Geoffrey and samples of specimen cheques kept by the bank.



Michael Musani Sabila, PW23 was the main witness called to prove the theft of money by the 2<sup>nd</sup> appellant from the account of Gulu RRH. He testified that he was attached to the Medicines and Health Services Delivery Unit and detailed to carry out an investigation.

5 That the investigation was to establish whether the allegations in the Auditor General's Report (**PEX48**) were true. He further testified that he went to the Hospital and retrieved various documents. That the documents that he received from Omoding Joseph, an Accountant at the Hospital, were vouchers, files, and cash releases. That as a  
10 result, he opened a file for the investigation. He scrutinised documents and compared with the Auditor General's Report and found that there were anomalies.

PW23 further testified that one of the anomalies that he found was that money was paid directly from the account of Gulu RRH to the  
15 personal account of Omongo Geoffrey. That as a result he decided to inspect the accounts of the appellants so he applied for court orders to do so. With regard to monies transferred to the 2<sup>nd</sup> appellant's account he testified as follows:

20 *"The cheque no in the cash book and in the vouchers and Omongo's account were the same. In the cash book it was National Water and Sewerage. In the cash book they reflected different. (sic) This was about 135,000 (sic).*

**I never talked to him. He had no explanation since I did not hear it.**

25 *I was able to retrieve bank statements from hospital accountant. I also applied for court orders to inspect the hospital account.*

*We confirmed the entries which went to Omongo's account. He even cashed the payments. The bank had all this documentation. I retrieved all these cheques, bank statements, specimen signature  
30 cards. I exhibited the documents I retrieved. One Omara Patrick got 20 million but no document was proof of which done. (sic)*

*Iron*

*AW*

*Weldon*

...

*Yes, I retrieved cash books. The cash books related (sic) as follows: Financial year 2008/2009/, 2009/2010, lastly cash book for 2010/2011.*

5 The cash books were admitted in evidence as **PEX 57-59**. PW23 identified several other cheques which he said did not reflect what they were meant for on the corresponding vouchers, but they amounted to UGX 25,571,624. He also referred to **PEX59**, a cheque for 50 million and said that the funds from the cheque were reflected  
10 in the 2<sup>nd</sup> appellant's account as paid to him, whereas in the cash book it was indicated that the money from that cheque was paid to other people. He detailed further cheques that were paid to the 2<sup>nd</sup> appellant as follows: 30<sup>th</sup> July 2010 – 50 million; 31<sup>st</sup> December 2010 – 65 million; 24<sup>th</sup> November 2009 – 20 million. He stated that the  
15 figures tallied with entries in the cash book.

PW23 further testified that monies in respect of these cheques were withdrawn from the account of Gulu RRH. That cheques were signed by the 2 appellants, but it was the 2<sup>nd</sup> appellant who withdrew the money from the bank, according to the waste cheques that he  
20 retrieved from Stanbic Bank in Gulu.

We singled out the cheque for 50 million in respect of which PW23 stated that these monies were reflected in the cash book as having been paid to other people. PW23 did not state who these other people were in his testimony. As is shown in his testimony reproduced  
25 above, he stated that he did not interview the 2<sup>nd</sup> appellant about his findings while he was investigating the matter. There was no reason why he did not interview the 2<sup>nd</sup> appellant when he found anomalies in the accountability submitted with regard to the funds in issue. He

*Item .*

ought to have done so in order to get clarification from him about the missing accountability documents.

On the other hand, the 2<sup>nd</sup> appellant stated that as the Bank Agent for the Hospital, he sometimes had money banked on his account which was paid to other employees of the hospital, if the remittances were to go beyond UGX 20,000,000. He referred to the Circular from the Ministry of Finance dated 14<sup>th</sup> April 2009, which prohibited withdrawals of more than UGX 20,000,000 at ago, in order to minimise fraud. He testified that UGX 135,000,000 which he was alleged to have stolen related to payments for attendance of a workshop by Hospital staff in Kampala, and purchase of tyres for 2 motor vehicles that had been impounded by Police in Kampala. He clarified that the tyres had to be bought so that the vehicles are released because they carried medicines whose destination was Gulu RRH.

The testimony of PW23 that monies banked on the 2<sup>nd</sup> appellant's account, that is UGX 50,000,000, was reflected in the cash book to have been paid to other people lends credence to the 2<sup>nd</sup> appellant's defence that the practice of banking money on his personal account for onward transmission to other persons actually did take place, and seemed to be common place at the time. On the other hand, the fact that PW23 did not identify the persons said to have received portions of the UGX 50 million results in doubt in our minds as to whether monies transferred to the appellants account from Gulu RRH accounts actually ended up in the 2<sup>nd</sup> appellant's pockets for his own personal use.

We observed that the prosecution laboured to produce the cash books from the hospital and the statements from Stanbic Bank Ltd

*Isom.*

*[Handwritten signature]*

*Weldon*

in Gulu, both for the Hospital account and the 2<sup>nd</sup> appellant's account. However, it was not evident to us from the conclusions drawn by the trial judge that she analysed these documents in order to arrive at her decision, that the prosecution indeed proved beyond  
5 reasonable doubt that the 2<sup>nd</sup> appellant stole the money. For clarity of our findings in respect of these 2 grounds of appeal, it will be useful to reproduce part of what we think could have been the analysis by the trial judge of the evidence with regard to Count 6. It was as follows:

10 **The prosecution submitted** that the money was traced to A2's account, its origin being the hospital accountant. A2 according to the prosecution did not deny and confirmed that the money was on his account. According to the defence there was no accountability, there  
15 was no documents (sic) and the vouchers supporting payments and that the police traced the payments to the cash books but (they) had been falsely recorded as payments to National Water and Sewerage Corporation and that a number of people were listed.

The prosecution relied on one cheque, which did not have a record of the payee on the cheque book. The prosecution added that there was  
20 evidence that the money in question was paid to accused no.2 in the cash book maintained by A2. **It was further submitted that** there was only Uganda shilling three hundred sixty thousand UGX 360,000 left on the account as of 30<sup>th</sup> July 2020. Fifty million had been credited to this account by cheque No. 4705 and thirty-five million was  
25 withdrawn on 3<sup>rd</sup> July 2010 and the balance was withdrawn on various dates in small amounts at different Automated Teller Machines (ATMs). These withdrawals were never recorded in the cash book of Gulu RRH.

The prosecution evidence was that on 16<sup>th</sup> April 2010 there was only  
30 thirty-nine million shs left on the account and the sixty five million seven hundred ten and six hundred twenty four shs (UGX 65,710,624) was credited from the hospital account vide cheque no 7329 while on 18<sup>th</sup> February 2010 forty five million was withdrawn by A2.

35 **It was the submission of the state** that on the 23<sup>rd</sup> of February 2010, nineteen million was withdrawn and then the rest was

withdrawn in smaller amount on various dated by ATM. Exhibit 36 (3) the bank statement of the account.

5 **The state then submitted** that there was no cashbook to prove that the recipients signed acknowledging receipt of the money. **The offence of theft is proved by the withdrawals well-articulated in the financial transactions found on this account.**

**I agree with the prosecution that all the money related to this account could be traced to A2.** This is a standalone transaction and is not related to the diversion of funds under the first five counts.

10 **I further agree and wish to state that the accused no. 2 had access to the money by virtue of his employment as the hospital accountant, signatory and bank agent to the hospital accountant and thus he had access to the account.**

We are of the view that the trial judge ought to have pointed to  
15 specific documents produced by the prosecution and given details from them that showed that the prosecution proved that it was indeed the 2<sup>nd</sup> appellant who stole the money. The exhibits that the prosecution laboured to produce also ought to have been employed by the trial judge to show that what was contained in the cash books,  
20 specific references to the contents, indeed proved that monies were paid to the 2<sup>nd</sup> appellant but he produced no accountability for it, or that he produced questionable accountability.

It is also our opinion that the waste cheques and the account statements of the 2<sup>nd</sup> appellant and the Hospital were important  
25 documents to prove the offence against him but they were never analysed. This is evident from the reliance of the trial judge on the submissions of the prosecution as opposed to the evidence that was placed before the court.

In addition, the 1<sup>st</sup> appellant stated that there were insufficient  
30 documents available to account for the money said to have been embezzled because accountability documents were taken from the

Im.







hospital accounts department by police investigators attached to the Medicines and Health Services Delivery Unit. PW23 acknowledged this in his testimony, though he also claimed he brought all the documents that he had retrieved related to the case to court as  
5 evidence for the prosecution. However, counsel for the appellants complained that crucial documents to prove the case against his client were not produced in evidence.

We observed that in his testimony, the 1<sup>st</sup> appellant complained that accountability documents were taken from the Hospital without  
10 informing him. That he had authorised the release of particular documents in a letter dated 14<sup>th</sup> July 2010 (**DEX7**). He went on to state that after that, people attached to the Health Monitoring Unit took more documents from the Accounts Department, release of which he did not authorise. He stated thus:

15 *“The documents were taken and brought to office in Ntinda and kept for months and later handed over to the Auditor Mr Joseph Omoding who went there with me. Thereafter I was handed 4 box files and cheque books and the rest remained with the service monitoring team. The box files contained personal documents.*

20 *I parked my car at a supermarket, when I went into the supermarket and came out, the documents had been stolen. I reported the theft to the police station at Bweyogerere attached to criminal investigations department (CID) at Kireka. Reference No. report of stealing (from) motor vehicle UG 4835M CRB 109/2011 written by Matovu Nathan I.P (Inspector of Police).”*  
25

Evidence about a report to Police about the stolen documents was admitted as **DEX8**. Attached to it was a General Receipt No. **Y0824009**, issued in respect of payment for a report in **CRB 109/2011**.

*Dean.*

*AM*

*Matovu*

In the Auditor General's Report "Special Audit of Capital Development Expenditure for the Financial Years Ended 30<sup>th</sup> June 2009 and 30<sup>th</sup> June 2010" (**PEX48**), the basis upon which the Health Monitoring Unit carried out the investigation headed by PW23, the lost documents were mentioned at page 15 as follows:

*"Cheque book counterfoils could not be traced at the time of audit as the cheques were purportedly stolen. There was no evidence of a loss report contrary to the requirements in paragraph 390 and 391 of the Treasury Accounting Instructions 2003.*

10 *Although management in their response explained that the cheque book was part of the documents that were stolen from the Hospital Official Vehicle No UG 845M as they were being transported back from the President's Office and that a police report had been made, I was not provided with the report to enable verification. I advised*  
15 *management to trace the report and avail it for audit."*

The OAG Report was dated 1<sup>st</sup> March 2011. On 10<sup>th</sup> February 2011, management obtained a Police Report stating that a complaint about the theft of documents was made to Police at Bweyogerere (**DEX8**). It stipulated that the theft involved loss of:

- 20 1. Toshiba laptop, valued at 1.8 million shillings
2. Stanbic Bank cheque
3. Stamp
4. Modem
5. Vouchers compiled in a box belonging to Gulu hospital
- 25 6. Centenary bank cheque and a Crane Bank Cheque, and
7. UGX 1.7 million cash

The letter was addressed to the Manager Stanbic Bank Gulu Branch. In the same letter, the Officer in Charge of the Police Station at Bweyogerere stated that all possible inquiries were made to establish  
30 the culprits but in vain, because the culprits fled unrecognised.



statements of Gulu RRH and the 2<sup>nd</sup> appellant that PW23 retrieved from Stanbic Bank in Gulu, and which it was very clear were admitted in evidence. Neither did we see the cash books that were admitted in evidence as **PEX 57-59**. It was therefore not possible for us to reappraise the evidence and confirm that the prosecution proved, beyond reasonable doubt, that the 2<sup>nd</sup> appellant indeed stole UGX 135,710,624 from Gulu RRH.

Nonetheless, we also need to consider the submission of counsel for the respondent that the audit carried out by the OAG which resulted in the Report of the Auditor General (**PEX48**) found that “*Gulu RRH suffered massive theft.*” We carefully perused the Report of the Auditor General in issue. We found that nowhere in the Report did the Auditors state that there was theft of funds at the Hospital in FYs 2008/2009 and 2009/2010, massive or otherwise. The nearest that the Report came to reporting on theft, or crimes akin to it, was at page 16 where the Auditors observed that there was an apparent loss of funds related to tax payments. The Auditors stated thus:

*“Public works related to the health sector are exempt under the second schedule, paragraph 1 (aa) of the Value Added Tax (VAT) Act 1997 (as amended). However, it was observed that VAT amounting to Shs 62,140,031 was paid to contractors and yet the supplies provided by these contractors were exempt. I consider the payment irregular.*

*Management was advised to recover this money from the respective contractors. In addition, administrative action should be taken against the officers responsible of (sic) the irregular payment of VAT.”*

At this point, it is pertinent to point out that the Special Audit that was carried out could not have established that funds were stolen from the Gulu RRH in the two financial years in question. This is because a special audit is defined as a tightly-defined audit that only

*Jean*

*AM*

*Weldon*

looks at a specific area of an organisation's activities. This type of audit may be initiated by a government agency, but it could also be authorised by any entity, even internally.<sup>2</sup> Special audits are called for when it is suspected that the laws and regulations have been overlooked pertaining to finances or financial management within the organisation. They are not restricted to fraud but can also be conducted when there are other institutional violations that might include duties, authorisations, internal control procedures or responsibilities of senior management.<sup>3</sup>

10 In this case, according to the Auditor General's Report (**PEX48**) the Permanent Secretary/Secretary to the Treasury requested OAG for a special audit on the utilisation of capital development funds in Gulu RRH. This followed findings of the Budget Monitoring Unit of the Ministry of Finance which revealed a number of improprieties in management of the funds disbursed to the Hospital in FYs 15 2008/2009 and 2009/2010.

We carefully perused the recommendations of the BMU report referred to above, (**PEX36**). We established that one of the recommendations, at page 211 of the report and 872 of the Record of Proceedings, was that:

*"A forensic audit is done at Gulu Regional Referral Hospital. This will help confirm the magnitude of loss of public funds allocated to the hospital."*

Forensic audits are recognised and employed in financial investigations in Uganda, though there is no specific provision for

---

<sup>2</sup> <https://accountingtools dot.com/articles/2017/5/16/special-audit>)

<sup>3</sup> <https://www.wikiaccounting.com/special-audit/>

*Lean*

*AW*

*Weldon*

them in the National Audit Act. They are universally employed in financial investigations. In his definition of the term “forensic audit” Zbyslaw Dobrowolski<sup>4</sup> states that:

5           “... there are many interpretations of what this type of audit is. Depending on the scientific discipline they represent, they define forensic auditing from an accounting or legal perspective. Akenbor and Ironkwe (2014) state that a forensic audit usually examines allegations and complaints about wrongdoing involving significant federal funds or assets. The audit procedures ensure that any  
10           evidence of wrongdoing may ultimately be presented in administrative, civil, or criminal proceedings.”

Black’s Law Dictionary (Free online dictionary, 2<sup>nd</sup> Edition)<sup>5</sup> explains that

15           “Forensic audits are used wherever an entity’s finances present a legal concern. For instance, it is used in cases of suspected embezzlement or fraud, to determine tax liability, to investigate a spouse during divorce proceedings, or to investigate allegations of bribery, among other reasons.

20           Forensic audits are performed by a class of professionals with skillsets in both criminology and accounting who specialize in following a money trail, keeping track of fraudulent and actual balance sheets, and checking for inaccuracies in overall and detailed reports of income or expenditures. If they find discrepancies, it may be the auditor’s job to investigate and determine the reason for it, or  
25           it may be the job of a separate financial investigator.”

If the intention of the PS/ST was to establish whether there was fraud or theft of money intended for capital development at Gulu RRH, he ought to have requested for a forensic audit, not a special audit as he did. In view of the definitions of the various audits  
30           referred to above, it was not possible to establish fraud or theft of funds by merely carrying out a special audit into “improprieties in the

---

<sup>4</sup> Forensic Auditing and Weak Signals: A Cognitive Approach and Practical Tips; European Research Studies Journal Volume XXIII, Special Issue 2, 2020 pp. 247-259 (retrieved on 28/8/2021 from <https://www.researchgate.net/publication/347520338>)

<sup>5</sup> <https://thelawdictionary.org/article/what-is-a-forensic-audit/>

*management of the funds,”* as was done before preparing **PEX48**. A forensic investigation was required for that purpose. We therefore find that the OAG Report, **PEX48**, could not form the basis for the conviction of the 2<sup>nd</sup> appellant for theft of the money in issue.

- 5 In conclusion, we find that the trial judge had insufficient evidence to establish whether there was embezzlement of funds at Gulu RRH or not. Consequently, the trial judge erred when she found that the 2<sup>nd</sup> appellant stole UGX 135,710,000 from Gulu RRH.

As a result, the conviction and sentence that was imposed upon the  
10 2<sup>nd</sup> appellant for the offence of embezzlement is hereby set aside.

Grounds 2 and 3 of the appeal therefore also succeed.

#### **Ground 4**

Ground 4 was a complaint that the learned trial judge erred when she sentenced each of the appellants to 30 months' imprisonment  
15 which was excessive in the circumstances.

This court acquitted the appellants of the offences for which they had been convicted and sentenced by the trial court. There was therefore no need for us to deal with ground 4 of the appeal. However, we found it necessary to make some important observations about cases of  
20 this nature, that is, where there is specific legislation that provides remedies for inappropriate behaviour or failure to follow the law and regulations in the management of public funds and other resources.

We reiterate that the Special Audit that was done by OAG (**PEX48**) was to establish the utilization of capital development funds. This  
25 followed findings of the BMU of the Ministry of Finance that there

*Teor.*

*[Signature]*

*Wegdon*

were a number of improprieties in the management of the funds disbursed to Gulu RRH in FYs 2008/2009 and 2009/2010.

The bulk of the OAG Report therefore focused on anomalies in accounting and procurement procedures, for which the Auditor General issued general recommendations for correction and/or training of the officers responsible for the anomalies and suspected losses. While the Auditor General pointed out that "*fraud could not be ruled out*" the report did not identify any instances of fraud because it was not its purpose to do so. At pages 4 to 5 of the Report, the Auditor General made the following general recommendations:

- *"Management should avoid utilizing public funds on activities that have not been planned. Regulations provide guidance relating to changes in work plans reallocations/virements that should be followed. Failure to abide by the regulations is an offence and therefore the Accounting Officer is liable to penalties under provisions of section 42(h) of the PFAA 2003.*
- *Shs 62,140,031 paid to contractors in respect of VAT for public works related to the health sector are VAT exempt and should be accordingly recovered from the contractors. The Accounting Officer should consider administrative action against officers responsible for irregular payment of VAT.*
- *The procurement and disposal Act lays down procedures relating to the procurement of goods and services, fraudulent intentions could not be ruled out. Management disregarded these rules and regulations in a number of instances. Management should review the skills of staff in the PDU with a view to identifying any skills gaps and addressing them. In future all procurements should be undertaken using the PPDA Act and regulations. In the meantime, management should organise and arrange all the procurement files as there were not provided during my review. In case of failure to provide the required documentation, penalties should be instituted in accordance with section 37 (1) and (3) of the National Audit Act 2008.*
- *Management should also regularly collect and file away all receipts relating to disbursement/payment of taxes for purposes of accountability and also avoiding tax penalties during tax audits. Failure on the part of the accounting officer to remit taxes is an offence*



*punishable in accordance with the provisions of sections 137 and 142 of the Income Tax Act. Any penalties arising out of non-remittance of Taxes should be borne by the Accounting Officer.*

- 5 • *Management was advised to operate bank accounts in such a way as to separate capital development and recurrent funds in a bid to ensure efficient management of the Hospital funds and to avoid diversion of funds. Maintenance of vote books would be appropriate in monitoring expenditure.*
- 10 • *The accounting records should be updated on a regular basis to facilitate reconciliations and detection of any errors that may have occurred. In particular, separate cash book for recurrent and development funds should be maintained to avoid comingling which may lead to diversion of funds.”*

We also observed that within the main Report, the Auditor General  
15 made specific recommendations in respect of breaches of the PPDA Act and the PFAA with regard to most of the anomalies that were established in his investigation.

For example, with regard to the diversion of UGX 1,907,004,922 which was utilized on activities that had not been budgeted for with  
20 no evidence that authority was obtained to vire the expenditure, the Auditor General found that this was done in contravention of section 17 of the Public Finance and Accountability Act (PFAA). He also found that the Accounting Officer was liable under section 43 (2) of the PFAA. The same applied to the diversion of funds in respect of  
25 construction of the staff house.

As was stated by the Auditor General in the Special Audit Report, the Public Finance and Accountability Act, 2003, which was repealed and replaced by the Public Finance Management Act, had specific provisions in respect of excess expenditure in votes and the  
30 procedures for dealing with them where they occurred. Section 17 of the PFAA provided that:

*Tuan.*

*[Signature]*

*[Signature]*

**“(1) Where at the close of accounts of any financial year, it is found that moneys have been expended-**

**a) on any expenditure vote in excess of the amount appropriated for it by an Appropriation Act;**

**b) for a purpose for which no moneys have been voted or appropriated or**

**c) in excess if the sum assigned to an estimate forming part of an expenditure vote in the estimates of expenditure approved by Parliament for the financial year, and to which no further sum has been applied under this Act or any regulations issues under it,**

**d) the amount in excess expended or not appropriated, as the case may be, shall be included in a statement of expenditure in excess which shall be laid before Parliament and referred to the appropriate Committee of Parliament.**

**(2) The appropriate Committee in subsection (1) shall report to Parliament on a statement of expenditure in excess referred to it under subsection (1) of this section within six months after it is referred to it.**

**(3) Where on receiving the report of the Committee mentioned in subsection (1), Parliament, by means or motion, allows the excess or the amount expended but not appropriated, to stand charged to public funds, the sum required to meet the excess or that amount as shall be allowed shall be included in a Supplementary Appropriation Bill for appropriation.**

**(4) Any excess or any amount expended but not appropriated and which is not allowed in terms of subsection (2) shall be treated as a loss of public moneys and dealt with in accordant with subsection (2) of section 43.”**

30 The provision above was replaced by section 18 of the PFMA, which provides for Supplementary expenditure. Section 43 (2) of the Act then provided for penalties and surcharge as follows:

**“(2) Where-**

**(a) a loss or deficiency of public money or other money occurs that has been advanced or was under the control of a public officer, or**

**(b) a loss of deficiency or damage to public property or other property occurs while in the care of a public officer,**

*Tesan*

*[Signature]*

*Weldon*

**and the Minister is satisfied after due enquiry, that negligence or misconduct of the public officer caused or contributed to the loss or deficiency-**

**i) the amount of loss or deficiency**

5 **ii) the value of the property lost or destroyed, or**

**iii) the cost of replacing or repairing the damage to that property;**

10 **as the case may be, shall be a debt due to government, and may be recovered from the public officer either administratively or through a court of competent jurisdiction.”**

This provision was replaced by section 80 of the Public Finance Management Act, 2015, which is couched in exactly the same terms.

Dr Nathan Onyaki, PW19, the Accounting Officer who was appointed Director of Gulu RRH after the 1<sup>st</sup> appellant was cross-examined  
15 about the whether he had ever appeared before a Committee of Parliament inquiring into the utilization of funds at Gulu RRH in FYs 2008/2009 and 2009/2010. He stated that though the matters raised by the Auditor General in his report were taken before the Public Accounts Committee of Parliament, and that he appeared  
20 before the said Committee, no report of the Committee had been issued before the case was filed in court. However, the prosecution claimed to have brought this case against the appellants on the basis of the OAG Report (**PEX48**).

We are therefore of the view that the investigation that was initiated  
25 by the Medicines and Health Services Unit of the Office of the President was premature. In addition, the special audit was not requested by this Unit but by the PS/ST. There was no evidence that the PS/ST requested the Medicines and Health Services Unit of the Office of the President to carry any investigations in the matter. The  
30 Unit therefore appropriated the report to carry out a criminal

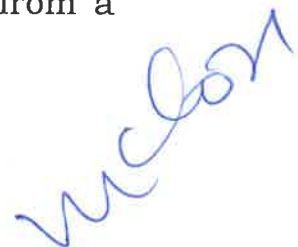
investigation yet that was not what the report was intended for. The report had insufficient information to facilitate such an investigation by persons who were not forensic auditors, or auditors at all.

In view of our observation that the investigation that was carried out  
5 by the Medicines and Health Services Unit was premature and  
lacking in the necessary details required to support the investigation,  
we are of the view that there was need for a forensic investigation by  
the OAG or an independent audit firm. In the absence of such  
evidence, this matter ought to have been dealt with under the laws  
10 specified in the OAG Report: viz; the Public Finance and  
Accountability Act and the Public Procurement and Disposal of  
Public Assets Act, and the Regulations thereunder. The two laws had  
sufficient remedies, as was proposed in the Auditor General's Report.  
Those should have been applied instead of filing a premature  
15 prosecution in the Anti-Corruption Court.

In conclusion, this appeal substantially succeeds. The convictions  
and sentences that were imposed upon each of the appellants are  
therefore each hereby set aside.

But before we take leave of this matter, we would like to observe that  
20 the practice of criminalising every irregular administrative act has  
no legal basis at all. In such cases, Accounting Officers and other  
public servants are entitled to administrative hearings before  
criminal charges are brought against them. This ought to be a  
prerequisite to a police complaint and or/an investigation by any of  
25 the relevant bodies.

Secondly, where money is found to have been "lost" the Public  
Service Standing Orders provide for recovery of the money from a



public officer through deductions from their monthly salary. Not every wrong decision is necessarily criminal. Why would a doctor be sent to prison for having used money for staff houses to build an Intensive Care Unit? That officer should face only administrative disciplinary measures such as demotion, not criminal proceedings for alleged corruption.

Dated at Kampala this 17<sup>th</sup> day of September 2021.

10



Kenneth Kakuru

**JUSTICE OF APPEAL**

15



Muzamiru Mutangula Kibeedi

**JUSTICE OF APPEAL**

20



Irene Esther Mulyagonja

**JUSTICE OF APPEAL**