

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**ANTI CORRUPTION DIVISION**

**CR.SC 002 OF 2010**

**UGANDA :::::::::::::::::::::::::::::::::::::: PROSECUTOR**

**VERSUS**

**1. CHEMISTO ALFRED MASHANDICH**

**2. SAMMY NELSON . ::::::::::::::::::::::::::::::: ACCUSED**

**3. SWAMI MARTIN**

**4. KULANY ANDREW**

**BEFORE: HON. JUSTICE P.K. MUGAMBA**

**JUDGMENT**

Chemisto Alfred Mashandich (A1) was Town Clerk of Kapchorwa Town Council. Sammy Nelson (A2) was Town Treasurer of Kapchorwa Town Council, Swami Martin (A3) was at one time acting as Treasurer of Kapchorwa Town Council and Andrew Kulany (A4) is a businessman and contractor in Kapchorwa and elsewhere. The indictment under which they are all charged comprises nine Counts. Count 9 is preferred against A4 alone. Count 5 and Count 6 are preferred against A1 and A3 jointly. Others of the charges are preferred against A1 and A2 jointly.

The offences charged include Causing Financial Loss, contrary to sections 269 (1) and 270 of the Penal Code Act, Abuse of Office, contrary to section 87(1) of the Penal Code Act and Theft, contrary to sections 253, 254 and 261 of the same Act, Counts relating to Causing Financial Loss are 1, 3, 5 and 7. Those relating to Abuse of Office are 2, 1, 6 and 8. Count 9 is on theft.

At the outset I must deal with several preliminary issues raised by the defence regarding the

suitability of the indictment. Thereafter I may deal with the merits of the case with relative ease of mind.

It was urged by the defence that the Inspectorate of Government could not prosecute offences under section 269 of Penal Code Act given that the institution could only prosecute offences under the repealed Prevention of Corruption Act, chapter 212 and section 269 of the Penal Code Act did not fall under that ambit. It was further argued that powers of the Inspectorate of Government could not be exercised to prosecute the offence of causing financial loss after the commencement of the Anti Corruption Act 2009 which commenced 25<sup>th</sup> August 2009, prior to the taking of pleas in November 2009. It was contended also that with the coming in force of the Anti Corruption Act section 269 and 87 of the Penal Code had been repealed under section 69 of the Anti Corruption Act and as such the offences that had been preferred against the accused belong to a non-existent law.

Article 230 clause 1 of the Constitution provides:

“The Inspectorate of Government shall have power to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office.”

Section 1 of the Inspectorate of Government Act 2002 defines corruption:

“...means the abuse of public office for private gain and includes but is not limited to embezzlement, bribery, nepotism, influence peddling, theft of public funds or assets, fraud, forgery, causing financial loss or property loss and false accounting in public affairs”,

The above definition encompasses not only abuse of office but also causing financial loss and as such it cannot be gainfully argued that the Inspectorate of Government lacked jurisdiction to prosecute as the defence urges.

The defence also alluded to consent of the DPP provided for under the repealed section 88 of the Penal Code Act. There is no doubt while the DPP had powers to prosecute, the Inspectorate of Government also had powers to prosecute. Section 13, sub-section 8 of the Inspectorate of Government Act reads:

“Notwithstanding the provisions of any law, the Inspectorate shall not require the consent or

approval of any person or authority to prosecute, or discontinue proceedings instituted by the Inspectorate”.

I need not add that the Inspectorate of Government never required and does not require the consent of anyone, let alone the DPP, to prosecute. That explains why the indictment does not bear that familiar consent earlier on associated with section 88 of the Penal Code Act. For the record, that section also has been repealed under section 69 of the Anti Corruption Act, 2009.

The defence argued also that the offence of theft brought against A4 should not have been prosecuted by the Inspectorate of Government. A4 is alleged to have stolen from Kapchorwa Town Council which is a public body and theft of public funds is one of the attributes of corruption the Inspectorate of Government is mandated to investigate and prosecute. In my view there is nothing amiss with it.

It is beyond dispute section 69 of the Anti Corruption Act repealed, amongst others, section 269 and 87 of the Penal Code Act, However section 13 of the Interpretation Act deals with the effect of repeal and provides for ongoing proceedings to continue. As a matter of fact the accused persons had taken pleas before a Magistrate’s Court n Kapchorwa back in 2008. It was committal to the High Court which ensued in November 2009, in the life time of the Anti Corruption Act. Suffice to say at the inception of the Anti Corruption Act proceedings were on going and that is in concert with section 13 of the interpretation Act which allows for them to continue even when the old law is repealed; as section 269 and 87 of the Penal Code Act were. That objection should fail.

There was another objection regarding the framing of the charges. It was argued on behalf of the defence that the charges were duplex that they did embarrass the defence and inevitably led to a failure of justice. The defence argued that each cheque leaf should have constituted a separate count given that the leaves were made at different times and for different purposes. A misjoinder of charges was said to have taken place. In my view what is duplex and what is not duplex is subject to interpretation of the surrounding circumstances of a given situation. At the heart of it all is the question whether the accused clearly understands the case against him or her and can

see through the allegation to prepare his or her defence. In **Nyanga Manyika Vs Republic** [1980] Tanzania Law Report Page 141, the High Court of Tanzania opined:

“There is a rule of practice, which has crystallised into a rule of law, that a charge should not be duplex, which is to say that a single count should not charge the accused with commission of two or more offences. There is however, a limitation to the application of the rule. When a series of acts which constitute a series of the same offence are committed in such circumstances as to amount to one single transaction then, in reality, there is committed one offence which ought to be charged in one count”.

The Court of Appeal of Tanzania, sitting in Arusha concerning the case of **Kasmiri Joseph Aridai Vs Republic** [1980] Tanzania Law Report page 210 quoted with approval a decision by the Supreme Court of Kenya in **Shah Vs Republic** [1969] East Africa Low Reports page 197 to the effect that provided an accused person knows clearly what case he has to answer he cannot be embarrassed in his defence, Section 25 (k) of the Trial on Indictments Act should drive this matter home. It states:

“When a person is indicted for any offence under section 268, 269, 270 and 271 of the Penal Code Act, it shall be sufficient to specify the gross amount of property in respect of which the offence is alleged to have been committed without specifying particular items or exact dates....”  
In view of the persuasive authorities I have cited above as well as section 25 (k) and having sat in at the trial, I am positive the defence was in no way prejudiced, not to say embarrassed, by the way the indictment was framed. This objection also has no merit.

I now turn to the merits of the charges. To support its case the prosecution called 10 witnesses. PW1 was Chelimo Alex, PW2 was Siwa Shaffic, PW3 was Cheptoyek Michael, PW4 was Nelsom Maunya, PW5 was Michael Chepkruui, PW6 was Yesho Jimmy Chemtai, PW7 was John Tijoy, PW 8 was Wilfred Kulany, PW9 was Mangusho Difas, PW10 was Geoffrey Mwanga,

PW11 was Francis Chemonges, PW12 was Musobo Patrick, PW13 was Steven Chelimo, PW14 was Higaye James while Erute Nacklete testified as PW15.

For the defence all accused persons gave unsworn statements. A1 testified as DW1, A2 testified as DW2, A3 testified as DW3 while A1 gave his evidence as DW4. There were two other persons who testified for the defence. Kusuro Bonny was DWS. DWS was Sukuton Subairi.

The onus is on the prosecution to prove all the ingredients of the offences charged beyond reasonable doubt in order to secure conviction. Any doubt is to be resolved in favour of the accused.

Where causing financial loss is the charge, the prosecution ought to prove that the accused person was employed in a public office, that there was loss of money and that the accused caused that loss. Abuse of office will be proved where accused was employed in a public office, where the accused did the act complained of arbitrarily, where the act complained of was prejudicial to his employer or another person and the act was in abuse of the authority of his office, The offence of theft on the other hand will be complete if the prosecution proves that the accused fraudulently and without claim of right took the money in issue or converted it depriving the owner of the same.

Count 1 and count 2 relate to similar transactions. The accusation is that A1 and A2 authorized and caused payment of Shs. 19,380,000= to KK Business Lines Limited, Myembea Enterprises Limited, Kween General Enterprises, Elgon BC, Quick Inter Services Contractors and Maunya Nelson for allegedly working on Kapenguria road, Kokomurya road, Barawa road, Amizi Kewengwa road, Nyerere road and Cheborion road, respectively. It is the contention of the prosecution the said roads, between July 2005 and July 2006, were never worked on. Hence the charge in count 1 that Kapchorwa Town Council vies thereby caused financial loss of Shs. 19,380,000= the two accused (A1 and A2) knew or had reason to believe would result. Count 2 on the other hand charges A1 and A2 with abuse of office in that the two accused in abuse of authority of their offices acted arbitrary when they did an act prejudicial to their employer, Kapchorwa Town Council. PW4 was Town Engineer, Kapchorwa Town Council. He testified

that he once received payment from Kapchorwa town Council after due authorization by A1 and A2. He stated that the money was part payment of his salary arrears. He was emphatic he never received payment related to road construction or maintenance. Exhibit P10 is a payment voucher to PW4. it is dated April 2006 and is endorsed as payment for rehabilitation of Cheborion road. The voucher refers to an attached certificate and shows the cheque under which payment was to be effected as number 005092. The voucher was for payment of Shs. 1,000,000 for work on the road. PW4 admitted he never did that work. There is also exhibit P11, a payment voucher showing it was for payment to PW4 'to meet construction of Cheborion road'. The voucher refers to a claims certificate said to be attached. The cheque referred to in the voucher as the one to be used to effect payment is shown as number 005128. The date on the voucher is JanLiary 2006. Significantly the voucher does not bear the signature of the payee, unlike exhibit P10 which does. No evidence was led on behalf of the defence of A1 and A2 that PW4 did the work for which payment was made. According to PW4 he was on study leave at the time and did not engage in the work he is alleged to have been paid for. In the event Shs. 1,000,000= was paid for no work done.

Exhibit P12 is a payment voucher showing it was made to meet maintenance of Nyerere road, The voucher had an endorsement to the effect that the claim and certificate were attached. The voucher was dated 23<sup>rd</sup> September 2005 and was for payment of Shs. 3,000,000= to Quick Inter Service Contractor Limited. PW5 testified that he got instructions to prepare the voucher, not from A2, but from A3. PW5 added that at the time he got those instructions A3 was acting as Town Treasurer but that A3 did not show him attachments such as a claim certificate or a certificate of completed works. The cheque which was made for payment in that transaction is number 005289. The cheque was not drawn in the names of the enterprise related to in the voucher. It was drawn in the namcs of PW4 and was duly deposited on his account number 0140045607101, The transaction led to the loss of Shs. 3,000,000= to the Kapchorwa Town Council. It was authorised, not only by A3 but also A1 but there is no value for money.

Exhibit P13 is a payment voucher to Muyembea Enterprise Limited. According to endorsement on the voucher it was payment for rehabilitation of Kokomurya Chepgat road. The endorsement

stated also that a claim certificate was attached. The sum involved was Shs. 1,800,000= . The voucher indicated a cheque which was to be used for payment as number 005165. The voucher, dated 201'. May 2006, had no attachments to it. Cheque 005165 was indeed paid from the account of Kapchorwa Town Council to Sammy Nelson (A2) whose names appear on the cheque as payee, not Muyernbea Enterprise Limited appearing on the payment voucher. The payment was authorised by A1 and P2 for a purpose different from what it was allegedly meant for. Exhibit P14 is a payment voucher dated June 2006. It is for Shs. 1,650,000= and relates to payment to Elgon BC Enterprises for work on Amizi Kewengwa road. Exhibit D3 is evidence of a claim and payment certificate. No evidence was adduced by the prosecution to show there was anything amiss with the transaction.

Exhibit P15 is a voucher written in favour of Kween General Enterprises Limited for construction work on Barawa road. The amount Involved appears as Shs. 2,855,000=. Cheque serial number 005161 is shown on the voucher as the cheque through which payment was to be effected. That cheque was actually paid to no otherthan Sammy Nelson (A2).

Exhibit P16is a voucher written in favour of Muyembea Enterprises Limited, It is said to be payment for maintenance of Kokomurya road and involves Shs. 1,000,000=. That amount was to be paid by cheque number 005125 It was duly paid to Muyembea Enterprises Limited.

Nevertheless though endorsement on the payment voucher mentioned there were attachments, none are in place.

Exhibit P17 is a payment voucher written in favour of Nluyembea Enterprises Limited also. The endorsement on the voucher shows payment was to meet periodic road maintenance for Kokomurya Chepgat road. Amount involved was Shs. 2,075,000=. The voucher showed payment was to be effected through cheque number 005132. Cheque number 005132 was actually written in favour of Sammy Nelson (AZ), to whom payment was made.

I find amusement relating to the payment to KK Business Lines for work said to have been done for Kapenguria road. On 14th March 2006 KK Business Lines was paid Shs. 4,000,000 on

cheque number 005135, That amount was drawn from account 0145508801 of Kapchorwa Town Council. The date on the cheque is the same as the date the account was debited, 14<sup>th</sup> March 2006. The payment voucher, exhibit P1, has the details of the cheque, besides the signature of the payee. That payment, curiously rose out of a claim made by KK Business Lines dated subsequently on 18 March 2006. The claim was for Shs. 4,075,619. Much earlier in time, on 10<sup>th</sup> January 2006 KK Business Lines had acknowledged payment. That is not all, a payment certificate was tendered as 'Payment Certificate 1'. It is contained in exhibit P39 and was dated 23<sup>rd</sup> March 2006. A1 and A2 clearly authorised payment of Kapchorwa Town Council money in the absence of any claim. This payment occasioned Kapchorwa Town Council loss of Shs. 4,000,000=.

There was no disagreement between the prosecution and the defence concerning the process of payment for work on the roads, A contract was awarded first. When a person awarded a contract did some work that person raised a claim. The Town Engineer inspected the work and gave a payment certificate off completed work. On the basis of the claim and a payment certificate for completed work, a payment voucher was prepared. Both the Town Clerk and Town Treasurer were involved in the processing off the payment voucher as well as cheques if payment was by cheques. Their signatures attended the two documents authorising payment. According to Siiwa Shaffic, PW2, he was a cashier with Kapchorwa Town Council under A2 during the period 2005/2006. One of the duties of PW2 was to prepare payment vouchers. He testified that he was instructed by A2 to prepare exhibits P1 and P2.

He said however when he prepared the payment vouchers comprised in those exhibits there was neither a claim nor a certificate of payment for completed works the two exhibits allege were attached. He testified that despite absence of the attachments A1 and AZ went ahead to approve payment. It was also the evidence of PW2 that he wrote some of the words in exhibit P10 after he was instructed to write on the voucher by A1 but added that others of the words were written by PWS who went ahead to alter some of the serial numbers on the vouchers. In his turn PW5 testified that he wrote some of the words on the vouchers in addition to what had been written there by PW2 and that he altered serial numbers on some of the vouchers in order for them to appear to have been written before July 2006. It was his evidence that at the time he worked for



Kapchorwa Town Council as a volunteer engaged by A1. It was his further evidence he did not see payment claims or payment certificates attached to the payment vouchers as indicated on the vouchers. PWS referred also to exhibit P11. He said he prepared it on AZ's instruction and that at the time he saw neither a payment claim nor a certificate for payment for completed work. While the voucher shows its date as January 2006, PWS testified that he wrote it in July 2006 at the time they expected supervisors from the Ministry of Local Government. It was his evidence the voucher was approved by A1 and A2 long after payment had been effected. He said also that he altered serial numbers on a number of vouchers in order to have the payments appear like they had been made before July 2006. He said it was all in anticipation of supervisors from the Ministry of Local Government.

In his defence A1 was emphatic that all vouchers he approved for payment had attached to them payment claims and payment certificates. He said he could not have signed the vouchers without those attachments. He added that Maunya Nelson (PW4) had been paid an advance for work done on Cheborion road and at the time he sanctioned payment of the voucher it had attachments including the list of workers to be paid. It was his further evidence Kapchorwa Town Council paid Quick Inter Services Contractors for civil work they did represented by Chetimo, a director, even though the director denied it. He added that Elgon BC was paid for work on Amizi Kewengwa road. In this respect he proffered exhibit D3 which included a claim and a payment certificate. This was despite denial by the Acting Engineer of the transaction ever having taken place. A1 testified that Muyembea Enterprises Limited did work on Kokomurya road and that no other than the Acting Engineer had supervised that work. He admitted however that the grader used in the exercise was hired by Muyembea Enterprises Limited. He added that at the time he approved payment to Muyembea Enterprises Limited the necessary documents were attached to the voucher. He said the attachments must have been removed later. It was his evidence he never instructed Siiwa Shaf-fic (PW2) to write vouchers, saying PW2 was under Accounts Department.

The defence of A2 is that all payments he had processed originated with a claim which was supported by a payment certificate. He said the claim and certificate were later attached to the voucher in every instance. He agreed the payment vouchers which were exhibited did not have

attachments to them. He complained that although he was Town Treasurer he was not consulted when officials from the Inspectorate of Government accessed the documents in issue. He said besides having no search warrants they left behind useful documents. In this connection he tendered as an exhibit an ideal voucher containing the necessary attachments. It is exhibit D4. While he conceded PW2 worked under him he denied ever giving instructions to Micheal Chepkruui (PWS). A2 denied any wrong doing.

DW5 testified that in financial year 2005/2006 he was chairman of Kapchorwa Town Council Tender Board and in that capacity he was involved in awarding contracts. It was his evidence many of the roads in issue were contracted out to be worked on at the time, However he admitted that as Chairman he did not get copies of letters of award afterwards.

DW6 was the next witness for the defence. He said he got a contract from Kapchorwa Town Council to put murram on Kokomurya Chepgat road for Shs, 5,335,202=. This transaction was never in issue.

I do not agree with the prosecution that no work was done at all on all the roads mentioned in the indictment. Admittedly it is not easy to make out what contracts were given out and whether the payments were duly made, given the dearth in documents supporting payments. That is brought home by the absence of contract agreements, claims and payment certificates. It is the state case that payment vouchers were not supported by necessary attachments and the defence contention that initially they were but were removed later on. Indeed the documents relied on in this case were taken into the custody of the Inspectorate of Government, which is in order. But no search warrant exists to this end; which renders it impossible to know which documents were available at the time the Inspectorate of Government made the seizure. It is the word of the accused against that of the Inspectorate of Government and in the event I have to resolve the matter in favour of the accused given the burden of proof on the prosecution. In the event the fortunes of this case cannot be determined on the controversial attachments. It behoves the inspectorate of Government to exercise professional probity in the way investigations are done and failure to issue a search warrant was an unfortunate slip. Nevertheless even in the absence of those documents which could not be traced, a look at exhibit P10, P11, P12, P13, P15, P17 and

P39 reveals loss of money to Kapchorwa Town Council in payments for road works. A1 was involved in the approval in payments, in all Shs. 15,730,000= . As noted earlier, A2 was not involved in the payment relating to exhibit P12. He was therefore involved in the loss in equal measure with A1 save for Shs. 3,000,000=. A2's responsibility is for Shs. 12,730,000=.

Throughout the transactions examined A1 and A2 knew or had reason to believe financial loss would result to their employer, Kapchorwa Town Council.

The assessors in their joint opinion advised me to find both accused persons not guilty of the charge of causing financial loss in count 1. For the reasons I have given I do not agree with their advice. I find A1 and A2 guilty of the charge and convict them accordingly.

Regarding count 2, both A1 and A2 as Town Clerk and Town Treasurer respectively on different occasions examined abused the authority of their offices when they effected arbitrary payments at times to persons not entitled to be paid such as A2 which was prejudicial to the interest of their employer, Kapchorwa Town Council. In the process over Shs, 13,000,000= was lost.

The assessors in their joint opinion advised me to find both accused persons not guilty of the offence under count 2. I do not agree with their advice for the reasons I have given. I find A1 and A2 guilty on count 2 and convict them accordingly.

Count 3 and count 4 relate to purchase and supply of water materials. It is the state case that between July 2005 and July 2006 A1 and A2, when performing their duties as Town Clerk and Town Treasurer respectively, authorised and caused payment of Shs. 15,681,000= allegedly to KK Business Lines, Mwanga Geoffrey, Chemonges Francis and Chelangat Fred for allegedly supplying water materials to Kapchorwa Town Council. According to the prosecution the materials alleged to have been procured were never received by the Town Council and the payment made resulted in a financial loss of Shs. 15,681,000= which A1 and A2 knew or had reason to believe would result. That is the charge in count 3. On the other hand count 4 charges that the act alluded to in Count 3 above was done in abuse of the authority of the offices of A1 and A2 respectively and was arbitrary and prejudicial to the interest of their employer, Kapchorwa Town Council.

in support of the prosecution case relating to count 3 and count 4 exhibits were tendered in the order following.

1. Exhibit P4 was cheque number 005069 for Shs. 100,000= and payment was to Shaban Quality Shop.
2. Exhibit PS cheque 005186 for Shs. 3,500,000= to Chemonges Francis.
3. Exhibit P6 cheque 005032 for Shs. 1,973,000= to KK Business Lines.
4. Exhibit P1 cheque number 005035 for Shs. 630,000= to KK buSineSS Lines.
5. Exhibit P19 cheque number 005146 which reads Shs. 2,400,000= to Mwanga Geoffrey,
6. Exhibit P20 cheque number 005046 for Sbs 2,400,000= to Mwanga G.
7. Exhibit P21 cheque 005073 for Shs. 2,250,000= to KK Business Lines.
8. Exhibit P27 cheque 005178 for Shs. 2,000,000= to Kapchorwa Technical Services Limited.

Mwanga Geoffrey testified as PW10 and agreed he received payment of Shs. 4,800,000= from Kapchorwa Town Council. He said payment was done in two equal installments. Relating to the two payments in exhibit P19 and exhibit P20 where payment was said to have been for procurement of water materials, PW10 said it was in payment of a loan A1 and A2 had got from him on behalf of Kapchorwa Town Council. He said his loan had been Shs. 4,000,000= and that it had attracted an interest of 20%, He was emphatic he sold nothing to the two accused or, for that matter, to the Town Council. Chemonges Francis testified as PW11. He said he was a proprietor of a shop known as Shahan Enterprises. It was his evidence Kapchorwa Town Council bought water materials from his business in two consignments. One consignment was worth Shs. 1,500,000= and in respect of that A1 had given chits to councillors who had collected pipes from his shop over a weekend. It was his evidence A2 had collected the other consignment of material which was worth Shs. 3,500,000= from his shop. As a witness PW12 was comical. He stated that he possessed a Diploma in Business Administration and that he was a Stores Assistant with Kapchorwa Town Council. In examination in chief he said no purchases had been made by Kapchorwa Town Council during the financial year 2005/2006. He said he was sure of that statement because he was the only person in charge of stores and he kept notes for goods received as well as the stores edger. It was his evidence the stores ledger contained several columns showing date of receipt, quantity received and, at the end of it all, balance. In cross

examination the worthy witness said he had received materials From KK Business Lines and that he had received other materials from Chemonges Fred in addition to stationery. He concluded that he did receive items in his stores during the period in issue, financial year 2005/2006. 01 all the payments in issue only exhibit P5 had attachments to it. The testimonies of PW2 and PW5 regarding preparation of payment vouchers wore akin to what they stated concerning payment vouchers for payment in respect of road works.

In his defence A1 stated that all payment vouchers he approved for payment of water materials had payment certificates besides Local Purchase Order and approval by the Accounts Department. He stated that he signed the vouchers because they had the necessary attachments to them. Regarding collection of water materials by councillors, it was his evidence the Town Council or office of the Town Clerk had authorised councillors to take materials required for water to the LC1 where they were meant to be taken. He said where fittings were installed taps are running. He added that he never picked any materials from PW11. Regarding the evidence of PW15 that no materials were taken to the Stores, A1 said PW15 never asked him about water materials. He said however PW12 was correct to state that some materials were in fact received in the stores. It was his evidence the water system had broken down and Council had authorised him to get material from any supplier, hence his acquisition of a loan facility from PW10. It was his evidence there was a mere audit query and that an audit query should not have been relied upon to prosecute him.

The defence of A2 agreed with that of A1 that an audit query should not have been relied upon to bring charges against them as it could have been possible for the heads of departments to answer to the audit queries. He added that the Inspectorate of Government should have instead employed an external audit. He was definite he never picked any water pipes from PW11, saying his office dealt only with payment. In this respect he said he never gave instructions to PW5 to prepare payment vouchers. He added that PW5 worked under a cashier.

I have already related to the missing attachments and the weight to be attached to evidence of their absence, At issue is Shs. 15,681,000. The eight exhibited payments amount to Shs. 14,653,000 The prosecution has a duty to prove the charge against any accused person beyond

reasonable doubt. It is not for the accused a burden to prove his or her innocence. It is a prosecution case water materials were never bought. PW12 testified that he did receive some materials in his stores. No data was forthcoming from the prosecution regarding what was received and what was not received. PW11 testified that water materials were indeed purchased from his shop. The only person who testified that water materials were not purchased from him is PW10 who was paid Shs. 4,800,000= for a purpose which was clearly not actual. Town Council money was paid to him and this was a loss occasioned by both A1 and A2. In this respect I would find A1 and A2 liable for this ascertained and proved loss.

Both assessors in their joint opinion advised me to find A and A2 not guilty of the charge of causing financial loss under count 3. For the reasons I have given elsewhere in this judgment I do not agree with their opinion. I find A1 and A2 guilty in count 3 and convict them.

As for count 4, A1 and A2 as Town Clerk and Town Treasurer respectively did abuse the authority of their offices when they arbitrarily approved and paid Shs. 4,800,000= to Mwangi Geoffrey for a purpose other than that the payment was meant to be made for, an arbitrary act which was prejudicial to the interest of Kapchorwa Town Council, their employer.

The assessors in their joint opinion advised me to find A1 and A2 not guilty of the offence of Abuse of Office under count 4. For the reasons I have given in the course of this judgment I do not agree with their opinion. I find both A1 and A2 guilty of the charge of Abuse of Office under count 4.

Counts 5 and 6 relate to A1 and A3. Count 5 alleges that A1 and A3 as Town Clerk and Acting Town Treasurer, respectively, authorised and caused payment of Shs. 12,850,000= allegedly to Kapchorwa Agricultural Technical Services Limited without the engineers certificate of measured works on poorly built public toilets at the taxi park when they knew or ought to have known that such an act would result in financial loss of Shs. 12,850,000=. Count 6, on the other hand, states that by the acts related to in count 5 A1 and A3 had abused the authority of their

offices, something arbitrary and prejudicial to the interest of their employer Kapchorwa Town Council.

It was the case for the prosecution that save for exhibit P8, which is cheque number 005293 for Shs. 1,700,000=, other payments did not have necessary attachments to back them up. It was the evidence of PW3 that he prepared Bills of Quantities for construction of the toilets and that the same were costed at Shs, 8,000,000=. The voucher was prepared in the names of Chepkwurui C.S but the cheque was written in favour of Kapchorwa Agricultural Technical Services Limited. Available waste cheques show that only two are written in names similar to those that appear on the vouchers which generated them. Cheque number 005058 for Shs. 500,000= agrees with exhibit P26, Cheque number 005154 for Shs. 1900,000= agrees with exhibit P30. This is not so in the case of cheque number 005037 for Shs. 600,000= where voucher exhibit P24 is written in the names of Kamatei Stephen but the cheque shows Kapchorwa Technical Services as the payee. The voucher in exhibit P28 is written in the names of Chepkwurui Chr but the payee on cheque 005285 related to in the voucher is Kapchorwa Technical Services Limited. The amount involved is Shs. 1,600,000=. The voucher in exhibit P7 is written in the names Siiwa Shaffic but the payee appearing on cheque number 005081 is Kapchorwa Technical Services Limited. The cheque is for Shs. 1,900,000=. In addition to the above the prosecution produced payment vouchers as exhibit P25, P29, P9 and P27 but no waste cheques were available, Inclusive of exhibit PS the total payment on vouchers is alleged to be Shs. 12,850,000=. PW2 and PW5 in their evidence testified that at the time the vouchers were prepared necessary attachments such as payment claims and payment certificates were not available. In his evidence PW3 stated that he had not approved any payment claims and that the work done on the toilets was shoddy. The evidence of PW3 is supported by that of PW1S who visited the site of the public toilets in October 2006. He said there was no proof.

A voucher for payment is exhibit PS and has a claim attached to it. It is dated 23<sup>rd</sup> September 2005. The claim was for advance of Shs. 2,000,000= to start roofing the building. Shs. 1,700,000 was approved and paid. The cheque number under which payment was done is 005293 and the payment was from account 0145508801 of Kapchorwa Town Council. Payment was effected to Kapchorwa Agricultural Technical Services Limited and money left the account on 26<sup>th</sup> September 2005. Evidence of the transaction is exhibit P35. As noted a year later, October 2006,

no proof was in place, according to PW15. This evidence was not controverted. In fact PW15 added that at the site there was neither a pit nor a septic tank and that one of the ring beams had broken down, In all Shs. 1 2,850,000= was paid for construction of the public toilets. There was also evidence by PW15 that no relationship existed between Kametei Stephen, who had been paid for work on public toilets at the taxi park, and Kapchorwa Technical Services Limited. He testified that Kametel was paid for no work done. This piece of evidence was never rebutted. There is no reason why a payment voucher should read different from the cheque it generates There is no reason why the amount finally paid should be Shs. 2,150,000= when the voucher has the amount as Shs. 600,000= except for shady reasons. Yet both A1 and A3 approved payment.

In his defence A1 said a good job had been done on public toilets at the taxi park and that it had reached roofing level. He was satisfied with the work done and denied any wrong doing. A3 in his defence said he was Acting Treasurer for Kapchorwa Town Council between July 2005 and December 2005. He agreed that made payments for construction of public toilets at the taxi park but added that payment was done after a claim was raised and that before payment was effected there was a process he went ahead to elaborate on. He said when a claim was made by the contractor the treasurer (which was his position as acting) checked accounts to see if funds were available. If funds were available, he forwarded the requisition to the Town Engineer who went to the site to inspect. After inspection the engineer prepared a payment certificate. The claim and certificate were submitted to the Town Clerk who sanctioned payment. It was then the Town Treasurer prepared a payment voucher, A cheque was prepared in favour of the contractor by the cashier, The cheque is signed by the Treasurer who sends it to the Town Clerk to sign. Payment to the contractor is effected by the cashier, he concluded. It was the evidence of A3 relevant documents connected with the payment were kept serially by the cashier and he was positive the necessary attachments were in place when he effected payment.

Regarding construction of public toilets there is a dispute whether the necessary attachments were on the payment vouchers at the time of payment. Here again I refer to lack of a search warrant and lament that avenue is gainless for reasons clearly expressed elsewhere in this judgment. However I note there was irregular payment to Kamatei Stephen who was paid Shs.



2,150,000= for no work done on public toilets. And this was after questionable alterations occurring between the payment voucher and the cheque. Doubtless A1 and A3 were aware of the manipulation or ought to have known before approval of payment. There was also the advance of Shs. 1,700,000= paid to the contractor to start roofing; which roofing never happened. Both the engineer (PW3) and PW15 so testified. Evidence shows roofing could not have taken place when the ring beam had broken down. A1 and A3 should be liable for the total loss of Shs. 3,850,000= they occasioned on the Town Council in a manner related to above.

The assessors in their joint opinion advised me to find A1 and A3 not guilty of the charge under count 5. I disagree with their opinion for the reason I have given above. I find A1 and A3 guilty of causing financial loss under count 5 and convict them.

A1 and A3 in their respective capacities as Town Clerk and Acting Town Treasurer abused the authority of their offices when they arbitrarily approved and paid **Shs. 3,850,000** for purposes other than what payment was meant for, which was arbitrary and prejudicial to the interest of Kapchorwa Town Council, their employer.

In their joint opinion the assessors advised me to find A1 and A3 not guilty of the charge under count 6. Respectfully I do not agree with their advice. I find A1 and A3 guilty of the charge under Count 6 and convict them accordingly.

Count 7 and count 8 concern A1 and A2. They relate to money paid out to protect spring wells in Kapchorwa Town Council, The amount involved is Shs. 4,300,000= which was allegedly paid to KK Business Lines Limited and Afro Construction 2000 Limited. In count 7 A1 and A2 are said to have authorised and caused payment of the money allegedly for protection of spring wells in Kapchorwa Town Council, an activity that never took place, well knowing or having reason to believe that such payment would cause financial loss of Shs. 4,300,000= to Kapchorwa Town Council. Count 8, arising as it does from facts similar to those related to in count 7, charges A1

and A2 with abuse of authority of their offices by an arbitrary act which was prejudicial to the interest of Kapchorwa Town Council, their employer as Town Clerk and Town Treasurer respectively. There is evidence of two payments which were made. Exhibit P3 is a payment voucher which was written for payment to KK Business Lines and was for Shs. 3,300,000=. Payment was to be done using cheque number 005069. Waste cheque 005069 shows it was written in the names not of KK Business Lines, but of Siwa Shaftic. The amount paid on that cheque on 9<sup>th</sup> January 2006 shows alteration from what was on the payment voucher. The amount on the cheque is Shs. 3,650,000=. Exhibit P31 is a payment voucher written in the names of Afro Construction 2000 Limited. It was for Shs. 1,000,000=. Payment was, according to the endorsement on the payment voucher, to be effected using cheque number 005073. Waste cheque 005073 shows it was written not in the names indicated by the voucher purportedly generating it but in the names of Sammy Nelson (A2). On 13 January 2006 payment was effected in favour of A2. All this evidence apparent in exhibits P3, P31 and P33 is supported by PW9 who at the time in issue was site foreman of Afro Construction 2000 Limited, He testified that at the time his company had no contract with Kapchorwa Town Council for protection of spring wells. PW2, PWS and PW1S also testified that there was no contract to protect spring walls during the financial year 2005/2006.

In their respective defences A1 and A2 said tenders existed for the protection of spring wells, in Kapchorwa Town Council. They both said contracts had been entered into with KIK Business Lines Limited and Afro Construction 2000 Limited for protection of spring wells.

I have referred to the payment of Shs. 3,650,000= to Siwa Shaffic and payment of Shs. 1,000,000 to Sammy Nelson (A2). None of the two persons did any work to protect any spring wells. There was no evidence of it. In the result I find that when payment for protection of spring wells was purportedly made Kapchorwa Town Council was caused loss of Shs. 4,650,000= which A1 and A2 approved and for which they should be held liable.

The assessors In their joint opinion advised me to find A1 and A2 not guilty of the charge under

count 7. I respectfully disagree with their advice owing to the reasons I have given in the course of this judgment. I find A1 and A2 guilty of causing financial loss and convict them accordingly.

A1 and A2 in their respective capacities as Town Clerk and Town Treasurer abused the authority of their offices when arbitrary they approved and paid Shs. 4,650,000= for protection of spring we Is, an activity that never took place. The act was doubtless arbitrary and prejudicial to the interest of Kapchorwa Town Council, their employer.

Both assessors advised me to find A1 and A2 not guilty of the charge under count 8 but for the reasons I have given above I do not agree with that opinion. I find A1 and A2 guilty on count 8 and convict them accordingly.

In count 9, A1 is charged with theft of Shs. 3,300,000= from Kapchorwa Town Council allegedly as payment of protection of spring wells at Kaptokwoi, an activity his company *never* carried out. The onus is on the prosecution to prove the charge against an accused person beyond reasonable doubt. In the course of the trial no evidence was led to show A4 stole anything, let alone the alleged Shs. 3,300,000=. No evidence was led even that the entity referred to as his company stole Shs, 3,300,000=. A4 is acquitted on count 9.

**JUDGE**

**P.K.MUGAMBA**

**JUDGE**

**13 / 09/2010**

**SENTENCE**

I have carefully listened to the submissions from the bar regarding possible sentences. I have heard also what the three convicts had to say on the matter. It is not disputed convict 1 and convict 3 are first offenders, There is no contention convict 2 has been convicted before. There is no denying there were more occasions alleged by the prosecution than they could prove. There is

no doubt the people of Kapchorwa Town Council and Uganda at large looked up to the three gentlemen in the dock as stewards who would appropriately work towards the improvement of their living conditions. Instead the Supposed stewards chose to fleece their flock by betraying the trust bestowed in them. They became sleaze bags. They must be held to account, personal concerns notwithstanding. Consequently Chemisto Alfred Mashandich is sentenced to 4 years' imprisonment each on count 1, count 2, count 3, count 4, count 5, count 6, count 7 and count 8. The sentences are to run concurrently. Sammy Nelson is sentenced to 5 years' imprisonment on count 1, count 2, count 3, count 4, count 7 and count 8. The sentences arc to run concurrently. Swami Martin is sentenced to 4 years' imprisonment on count 5 and count 6. The sentences are to run concurrently.

In addition the convicts are to pay compensation to Kapchorwa Town Council under section 270 of the Penal Code Act. As compensation for loss incurred under count 1 Sfls. 12,130,000= is to be recovered from C1'iemisto Alfred Mashandich and Sammy Nelson jointly. Under that samo count, Chomisto Alfred Mashandich is to pay an additional Shs. 3,000,000= as compensation.

As compensation for loss to Kapchorwa Town Council incurred under count 3 Shs. 4,800,000= shall be recovered from Chemisto Alfred Mashandich and Sammy Nelson jointly.

As compensation for loss to Kapchorwa Town Council incurred under count 5 Shs. 3,850,000r shall be recovered from Chemisto Alfred Mashandich and Swami Martin jointly.

As compensation for loss to Kapchorwa Town Council incurred under count 7 Shs. 4,300,000 shall be recovered from Chemisto Alfred Mashandich and Sammy Nelson jointly.

**P.K. MUGAMBA**

**JUDGE**

**13/09/2010**