

REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA

ANTI CORRUPTION DIVISION, AT KOLOLO.

CRIMINAL SESSION CASE 9 OF 2015

UGANDA.....PROSECUTOR

VRS.

LWAMAFA JIMMY AND 2 ORSACCUSED

BRFORE: GIDUDU, J

JUDGMENT.

M/S Lwamafa Jimmy hereinafter referred to as A1, Kiwanuka Kunsu Stephen, hereinafter referred to as A2 and Obey Christopher, hereinafter referred to as A3 are jointly indicted with ten counts as listed below. A1 was the Permanent Secretary/ Accounting Officer. A2 was the Director Research and Development. A3 was the Principal Accountant. All worked in the Ministry of Public Service.

Count One: Causing Financial Loss C/S 20(1) of the ACA, 2009.

Particulars are that the three accused irregularly spent UGX 44,121,294,607 in the FY 2010/2011 knowing or having reason to believe that the act would cause financial loss to the GOU.

Count Two: Causing Financial Loss C/S 20(1) of the ACA, 2009

Particulars are that the three accused irregularly spent UGX 44,120,490,323 in the FY 2011/2012 knowing or having reason to believe that the act would cause financial loss to the GOU.

Count Three: Abuse of Office C/S 11(1) of the ACA, 2009.

Particulars are that the three accused in FY 2010/2011 in abuse of their offices made budgetary provision of UGX 44,121,295,000 as Social Security Contributions (NSSF) with knowledge that Public Service Employees are exempt from contributing to NSSF.

Count Four: Abuse of Office C/S 11(1) of the ACA, 2009.

Particulars are that the three accused in FY 2011/2012 in abuse of their offices made budgetary provision of UGX 44,121,295,000 as Social Security Contributions (NSSF) with knowledge that Public Service Employees are exempt from contributing to NSSF

Count Five: False Accounting by Public Officer C/S 22 of the ACA, 2009.

Particulars are that the three accused being charged with receipt, custody and management of UGX 44,121,294,607 as public funds knowingly furnished false statements in the quarter three progress for the FY 2010/2011.

Count Six: False Accounting by Public Officer C/S 22 of the ACA, 2009

Particulars are that the three accused being charged with receipt, custody and management of UGX 44,120,490,323 as public funds knowingly furnished false statements in the quarter three progress for the FY 2011/2012

Count Seven: Conspiracy to defraud C/S 309 of the PCA, Cap 120.

Particulars are that the three accused in the FY 2010/2011 conspired to defraud the GOU of UGX 44,121,294,607

Count Eight: Conspiracy to defraud C/S 309 of the PCA, Cap 120

Particulars are that the three accused in the FY 2011/2012 conspired to defraud the GOU of UGX 44,120,490,323

Count Nine: Diversion of Public Resources C/Ss 6 and 26 of the ACA, 2009.

Particulars are that the three accused in the FY 2010/2011 converted and disposed of public funds amounting to UGX 44,121,294,607 for purposes unrelated for which the resources were intended (Social Security Contributions, NSSF) for the benefit of third parties.

Count Ten: Diversion of Public Resources C/Ss 6 and 26 of the ACA, 2009

Particulars are that the three accused in the FY 2011/2012 converted and disposed of public funds amounting to UGX 44,120,490,323 for purposes unrelated for which the resources were intended (Social Security Contributions, NSSF) for the benefit of third parties.

Each of the accused denied the charges hence this trial.

The gist of the prosecution case is that the three accused in the FYs 2010/2011 and 2011/2012 made budgetary provisions for Social Security Contributions (NSSF) totaling UGX 88,241,784,930. This money was not paid to NSSF. It was spent by the trio on payment of ghost pensioners of the defunct EAC as gratuity and pensions.

By law, under section 8 and the first schedule of the NSSF Act, Cap 222, public servants pensionable under the Pensions Act do not contribute to the Social Security Fund.

The prosecution contends that the act of budgeting for an illegal item was abuse of office. The payment of the money to ghost pensioners caused financial loss to GOU. The act of paying money budgeted for NSSF as pension and gratuity was a diversion of Public resources. The submission of progress reports purporting to have paid social security contributions was false accounting and the actions of the three accused disclosed a conspiracy to defraud the GOU of the said money.

Each of the accused denied the charges. The common thread in their defence is that the budgetary provisions for the two FYs were okay. The error was committed by one Joses Tegyeza, PW5, the Ministry Assistant Commissioner for planning responsible for uploading budget estimates into the Output Budgeting Tool (**OBT**).

The accused claim PW5 uploaded the money as if it was an NSSF item yet it was pensions and gratuity for teachers, traditional civil servants and veterans.

The accused also relied on a letter (exhibit **D1**) by the permanent secretary/ secretary to treasury (PS/ST) which stated that the questioned funds were released to the item with the right description on the IFMS namely 212101 Social Security Contributions which caters for gratuity as well for paying bonafide beneficiaries of Pension and Gratuity and not to “ghosts”.

The burden of proof in criminal cases lies upon the prosecution throughout the trial. Except in a few statutory cases, this burden does not shift to the defence.

Further, the prosecution is required to prove the all the essential ingredients of the offence beyond reasonable doubt. **Woolmington V DPP (1935) AC 462 and Kiraga V Uganda (1976) HCB 305** followed.

Ms Acio Senior State Attorney, Ms Kauma Barbara Principal State Attorney and Mr. Bisamunyu, Senior State Attorney, appeared for the state while Learned Counsel, M/S Ochieng Evans appeared for A1, John Isabirye appeared for A2 and Nsubuga Mubiru, Fred Sentomero, Himbaza Godfrey and Osinde appeared for A3.

Counts One and Two. Causing Financial Loss.

The prosecution must prove the following ingredients beyond reasonable doubt.

- (i) That the accused were employees of government.
- (ii) That they did or omitted to do an act they had knowledge would cause Financial Loss
- (iii) That Loss occurred.

Ms Acio the lead prosecutor submitted that for the 2010/2011 and 2011/2012 FYs, the three accused made budgetary provisions of UGX 44,121,000,000 for each year as Social Contributions (NSSF). This money was released to the pension salary account of the Ministry of Public Service. The accused spent it and accounted for it as Social Contributions (NSSF) whereas not. This money was paid out as gratuities to ghost employees of the defunct EAC.

She asked court to find that accused were culpable for this expenditure as follows. A1 validated, signed off and accounted for the money. A2 was the vote holder who

initiated the budget and guided the expenditure as vote controller. A3 was the principal accountant and in that capacity was the technical officer who processed the payments and was also a co-signatory.

Ms Acio submitted that each of the accused knew that their actions would cause Financial Loss because the budget execution was at variance with the budget estimates. They had budgeted for NSSF but paid ghost EAC workers yet accounted for NSSF.

She dismissed the defence that it was PW5 that uploaded the money to a wrong item because PW5 had testified that he only followed what action officers like A2 would instruct him to do. Further, she referred to the evidence of A1 who testified that A2 was responsible for the budget, activities and expenditure of the questioned funds while A3 was responsible for preparing requisitions, schedules of payments, bank reconciliation, vote maintenance, cash book management, preparation of financial reports for accountability and making monthly reports to A2. Ms Acio concluded that the accused knew that what they were doing would cause loss.

Mr. Ochieng, learned counsel for A1 disagreed with the conclusions of Ms Acio for the DPP and only conceded that A1 was an employee of government as Permanent Secretary and Accounting Officer. It was his submission that there was no loss or act causing Financial Loss.

Mr. Ochieng referred to the elaborate budgeting process and wondered how such colossal sums could be processed for two FYs without detection unless it was a syndicate. He attributed to the uploading of funds the error in the OBT where a provision was made for Social Contributions (**NSSF**) to host money for gratuities.

He referred to the Ministerial Policy Statements (Exhibits P5 and P6) which were prepared by the Ministry and shows that the 44,121,295,000 was budgeted for gratuity for teachers, traditional civil servants, UPDF and Local Governments as seen at page 90 of exhibit P5 for FY 2010/11.

He blamed the error to the designers of the **OBT** and distanced A1 from the **OBT** because he had no access rights to use the tool. It was his view that when the issue of NSSF was raised by the late **PS/ST** Chris Kasami, a meeting was held to iron it

out although the minutes of that meeting show that the matter of **NSSF** was not discussed.

He concluded that whatever, A1 did in executing the budget was known to the Ministry of Finance and that funds could not have been released for two **FYs** if there had been a problem.

He added that the budget was okay despite the mis-description in the **OBT** for which A1 was not responsible.

Mr. John Isabirye, learned counsel for A2 also did not find any fault with the budgeting process for the questioned funds. It was his view that the accused budgeted for pension and gratuity and spent the money on those two items as they are mandated to do.

He criticised PW5 for failing to adduce evidence of chits which he said were given to him by A2 and that failure to call Nabatanda Hafisa as a witness rendered PW5's evidence hearsay.

He referred to the evidence of PW1, Mr. Mutegeki, who compiled **exhibit P15** where he notes at pages 15 and 16 that the questioned funds were actually released on the pension account in **BOU** to cater for pensions and gratuity. It was not paid to **NSSF**. He wondered what the problem was in faulting the accused when they spent the money as per their mandate.

It was his view that if the money had been paid to **NSSF** then that would have been a problem. He concluded that there was no loss because even the **PS/ST** wrote to Parliament **exhibit D1** clearing the accused of any wrong budgeting.

On the contrary evidence adduced by the **PS/ST** who testified as PW3 and indicated that **exhibit D1** contained errors in paragraphs 5 to 7, Mr Isabirye asked court to invoke sections 92 and 114 of the evidence Act which exclude oral evidence from contradicting a written agreement and estop a person from changing position after leading another to believe and act on another thing.

He concluded that Cairo Bank is the criminal which should have returned the money it received on behalf of the ghost pensioners.

Mr. Nsubuga Mubiru learned counsel for A3 contested the issue of loss submitting there was none.

He referred to exhibit D1 written by PW3 to Parliament exonerating the accused from any wrong doing and wondered why the accused were in court. He asked me to find that PW2, formerly director budget and the one who drafted exhibit D1 owned it as correct. He criticised the prosecution from failing to adduce evidence regarding the exit of the money through BOU into Cairo Bank which in his view would have exonerated the accused from these charges.

He attributed the fraud to Cairo Bank which in connivance with officials of the former EAC employees even opened bank accounts before the budgeting cycle had started. He contended that if the accused were convicted and asked to refund the money, Cairo bank would get off scot-free yet they were the destination and conduit of the questioned funds. He based this submission on the basis of an affidavit sworn by a police officer called Komurubuga who investigated Cairo Bank and established that the bank was complicit in the theft of the questioned funds.

It was Mr. Mubiru's submission that the payment process was proper following pension forms NS7 (exhibit D3). Further, that if Cairo Bank paid money to persons whose KYC (know your customer) details are suspect, then government should get its money back and the loser would be Cairo Bank and not government.

Mr. Himbaza also learned counsel for A3 added that there was no proof of actual loss on money. He referred to the cases of **Kassim Mpanga V Uganda criminal appeal 30 of 1994 and Uganda v Moses Kisembo and 3 Ors criminal case 8 of 2014.**

Mr. Osinde learned counsel for A3 also weighed that it is the Accountant General who should be blamed and not the accused because he is by law (Public Finance and Accountability Act) the custodian of government funds.

Resolution of Counts One and two.

I have carefully addressed my mind to the submissions of learned counsel for both sides and reviewed the record and a host of exhibits tendered by both sides. It is not in dispute that the accused were employees of government in the Ministry of Public Service.

What is in contention is whether the accused budgeted for Social Security Contributions (NSSF) and instead paid out the money to ghost pensioners as pension and gratuity.

The prosecution contends that the trio budgeted for Social Security Contributions (NSSF) which was illegal since civil servants do not contribute to NSSF. Once the money was deposited on the pension salary account, the accused processed it for payment as gratuity and pension.

The accused deny budgeting for Social Security Contributions (NSSF) and blamed it on Mr. Tegeza, PW5, for uploading the money on the OBT that made it appear as if they had budgeted for NSSF whereas not.

In another breath, the accused relied on the letter by Mr. Muhakanizi, PW3 which stated that money was uploaded on the right **code 212101** Social Security Contributions which caters for gratuity as well. (See Para 7 of **exhibit D1**).

Mr. Tejeza was in court as PW5. His role in the Ministry of Public Service was to compile budgets from internal departments in the Ministry and upload them on the OBT. He would provide drafts to the heads of departments to proof read and make any corrections. He insisted A2 gave him the figures for Social Security Contributions **NSSF** and even offered to defend that item in Parliament if the need arose. Indeed that need arose and according to PW5 and Ms Ada Muwanga, PW6, both A1 and A2 under took to furnish parliament with details when the matter arose. The two accused justified the item as Social contribution for scientists on contracts.

In his evidence A1, testified that he first learnt of the matter of **NSSF** when the PS/ST wrote to him in January 2011 as per exhibit P28 to explain why the budget estimates for FY 2010/2011 had 44.12billion of pension funds reflected as social security contributions. He consulted his technical team and PW5 informed him he had uploaded it on the **OBT**.

A1 then responded to the **PS/ST** stating that it was an error to place the money under Social Security Contributions. He explained in his letter of 24th January 2011 which is part of **exhibit P15** that the 44.12 billion is part of the 193billion of current pensions.

A subsequent meeting was held to discuss this issue but strangely when the meeting was held, the issue of **NSSF** was not discussed.

A look at the Ministerial Policy Statements for FY 2010/2011 and FY 2011/2012, which contains the work plans and budget estimates for the ministry OF Public Service, reveal that for 2010/11 FY, in exhibit P5 the 44.12 billion in the work plan at page 90 is shown as gratuity for teachers, Traditional, UPDF, and local Governments yet in the same document in the budget estimates at page 51, 44.12 billion is captured under code 212101 as social security contributions.

In the FY 2011/2012, in exhibit P6, the work plans capture 44.12 billion as NSSF for Scientists at page 95. In the same document, the budget estimates at page 50 capture the 44.12 billion as social security contributions NSSF.

In other words the Ministerial Policy Statements for the 2 FY's by the Ministry of Public Service show a mismatch between the work plans and the budget estimates. It is strange that money should have been released at all on this item in view of this mismatch which seems not to have been captured in the various internal meetings held at the Ministry of Public Service and later with the Ministry of Finance.

At the police, A1 in one of his statements tendered as exhibit P44 he explains that Social security contributions would refer to Government Institutions whose employees contribute to NSSF such as URA, Human Rights Commission, Civil Aviation Authority etc.

He states further that, that item is not applicable to traditional civil servants who are pensionable. He indicated that that item should be explained by A2 and the staff in the Pension Department since A2 had defended it in the Budget conference and in the Parliament.

In his Audit Report contained in exhibit P15 the Auditor General notices between pages 10 to 14 that there were inconsistencies in the budget estimates book for the 2 financial years in regard to this item of 44.12 billion per financial year.

In the summary of estimates for statutory charges, and detailed estimates for FY 2010/2011 at page 46 of exhibit P18 which is compiled by the Ministry of Finance the 44.12 billion is reclassified and indicated as gratuity for civil service, teachers and Veterans.

The same is repeated in the statutory charges and detailed estimates for 2011/2012 at page 47 of exhibit P16 where the 44.12 billion is broken down as gratuity for civil service, teachers, Veterans.

According to the Auditor General through the evidence of PW1 Mr. Mutegeki, the output lines were re-categorized to conceal the fact that funds had been allocated to social security contributions. According to the report in exhibit P15, Mr. Tegyeza (PW5) when interviewed about this re-classification stated he was not aware of where the Ministry of Finance derived the new classifications which he had uploaded on the OBT as social security contributions NSSF.

The Auditor General in his report interacted with the budget officers in the Ministry of Finance and concluded that these re-classifications were deliberate. They were made to conceal an illegal item.

The Auditor General faults the desk officers at the Ministry of Finance for allowing this to happen and notices that money would be released irregularly without the Director Budget writing to the Accountant General advising the availability of funds on each item, program and vote.

The Auditor General notes that the Accountant General released funds as and when they would be available provided the budget ceiling of 44.12 billion of this item had not been busted.

The Auditor General concluded that funds budgeted for as Social security contributions NSSF were actually released on the pensions salary account in Bank of Uganda and spent as pensions, gratuity, and pension arrears instead of being paid to NSSF which was the budget item. According to the Auditor General these funds were expended on other items contrary to regulation 39 of the Public Finance and Accountability regulations 2003. Authority to spend on the pensions EFT salary account was given by A1 and A3, and that an expenditure of up to 165 billion was made on non-existent pensioners.

The long and short story of my analysis of the Ministerial Policy Statements prepared by Ministry of Public Service, and the Budget Estimates captured by the Ministry of Finance on the item of 44.12 billion shillings, reveals a syndicate at

play. This syndicate was crafted in the Ministry of Public Service modified in the Ministry of Finance, smoothened in Bank of Uganda and perfected in Cairo Bank.

The ministry of Public Service played the role of originating an illegal budget item because under **Section 8 and schedule 1of the National Social Security Act Cap 222** pensionable civil servants are exempt from contributing social security.

In view of this legal position, A1's testimony on oath that pensionable officers contribute except that Government is the sole contributor is of no legal consequence.

The Ministry of Finance played the role of reclassifying the illegal budget item to hide this money under items such as gratuity for civil servants, teachers and veterans in order to make it appear lawful since the Ministry of Public Service cannot budget money for NSSF legally.

In his testimony the PS/ST Mr. Muhakanizi admitted signing exhibit **D1** which would essentially clear the accused of any wrong doing. During his testimony he stated that there was no need to budget for NSSF by Ministry of Public Service because it was not one of the items the ministry is mandated to do. He explained that the item of NSSF was put in the OBT tool by the consultants to be used by those agencies that are mandated to contribute to NSSF and not the Ministry of Public Service. In cross examination, regarding Paragraph 7 of his letter he stated it was wrong to state that the Ministry of Public Service could budget for NSSF.

He stated that if you budget for NSSF but end up using that money to pay genuine pensioners then you could not have caused loss but you are classified as indiscipline. He clarified that the letter in exhibit D1 was prepared for him by his Director of Budget Mr. Ocailap (PW2) and stated that paragraph 7 should be corrected to read that incase of the Ministry of Public Service there was no need for budgeting for this item.

He concluded that there were errors in paragraphs 6 and 7 in exhibit D1 and that the Ministry of Public service had no mandate to budget for social security contributions under code 212101.

In re-examination the PS/ST noted the contradictions in the approved estimates contained in exhibit 18 which I have already alluded to in my judgment above. At

page 46 the 44 billion is broken down as gratuity for teachers, veterans and civil service, and yet at page 121 of the same estimates the same money is coded on item **212101** social security contributions. He faulted his Director of budget for this anomaly and concluded that A1 as Accounting Officer should have written to **PS/ST** for reallocation of this money from social security contributions to gratuity and pension so that the money is put to the correct codes.

It is clear to me that PW5 ably explained his role in this matrix. He would only upload what he is given to do. This item was part of the work plans of the Ministry where A2 was the responsible officer. A1 and A3 signed off requisitions and payments for this money which had been reclassified in the budget by the accomplices in the Ministry of Finance and eventually paid out to what PW9, Dr. Makanga from the Auditor-General's office described in the Auditor-General's report (exhibit.P40) at page 10 as gratuity to nonexistent pensioners.

I would not fault PW5 of any wrong doing because in this process, he had no capacity to benefit from wrong entries. He availed the results of his work to the accused who did not correct him. Even when Finance and Parliament raised the red flag, the accused pushed forward to defend this illegal item. The letter by PW3, which they relied on as a magic wand to defend the budget not only offends the law in section 8 of the NSSF Act, Cap 222 but was also corrected by its author (PW3) when he testified that the Ministry of Public Service has no mandate to budget for NSSF.

Mr. Isabirye asked me to hold that PW3 should be stopped from denying his letter under sections 92 and 114 of the Evidence Act. With respect, I do not agree for two reasons. The first is that the **PS/ST** cannot clear what the law prohibits and secondly, the letter in question is not a deed or agreement within the meaning of section 92 of the Evidence Act.

Did the accused know or have reason to believe that the act of budgeting and spending this **44.12** billion for the two FYs would cause loss to government?

On the available documentary evidence, I find that the accused budgeted for Social Security Contributions **NSSF** without the mandate to do so. They defended this item before Finance and Parliament. They knew it was wrong to do so. A1 in his letter to **PS/ST** calls it an error but does not seek to have the item reallocated. He

faults A2 for defending this item in Parliament when the police asked him to make a statement.

A2 also denied ever being involved in budgeting **88.2** billion for **NSSF** because it was not a pensionable expenditure. He blames it on A1 as accounting officer and A3 as the finance manager because these two have roles on the **IFMS** through which invoices are uploaded and approved. See **exhibit P33** dated 12th February 2013.

There is a blame game between A1 and A2 on this issue which confirms that they both understand the illegality of this budget item. They were aware that it would cause loss to government otherwise A1 as accounting officer would have sought re allocation soon after getting a query from the then PS/ST. Instead A1 wrote a casual letter of 24th January 2011 merely calling this an error.

Strangely, a meeting called to sort out this issue ended without discussing. A1 said he first made a courtesy call on the **PS/ST** before the meeting and when the meeting started, no mention was made of the Ministry of Public Service budgeting for NSSF. A1 testified that the **PS/ST** understood that the error was on the **OBT**. I do not agree. The **OBT** had provision for general pensions and gratuity under codes **212102, 212103 and 212104** where lawful funds were budgeted for pension and gratuity. **Code 212101** was just used to fleece government.

I was asked by defence counsel to find that the accused alone could not budget and access money without the involvement of others because budgeting is a process with many stake holders. I agree. This money was lost through a syndicate of fraudsters in the Ministry of Public service, Finance and Cairo Bank. It is no defence to say the accomplices in the Ministry of Finance and Cairo Bank are not in the dock. That is the discretion of the **DPP**.

I was also asked by Mr. Mubiru for A3 to find that the money was paid to people whose identification Cairo Bank was not sure about. It was submitted that Cairo Bank opened accounts for recipients even before the money was put in the budget and should be held liable to refund it to Bank of Uganda. This submission confirms the prosecution case that the budget was made falsely. Accounts on which to host the money were opened before the money was sourced. This is what I call a syndicate.

Money is budgeted for NSSF by the Ministry of Public Service; it is re classified for gratuity for teachers, traditional servants and veterans by the Ministry of finance without adjusting the work plans of the originating Ministry or a request for reallocation and paid to persons without records in the Ministry of Public service. The role of A1 as Permanent Secretary and Accounting officer is to protect the resources of government under his charge. A2 was the action officer responsible for the compensation budget. He approved the claimants and filed accountability for the expenditure. A3 was the technical person advising A2 on budget preparation and execution. He prepared schedules of payments which he cosigned with A1. All these three failed in the performance of their duties leading to loss of funds to fraudsters.

Mr Isabirye asked me to find that failure by the state to produce the chits on which PW5 received the budget from A2 rendered the testimony of PW5 false. Further, that failure to adduce evidence of Nabatanda rendered allegations of A2 budgeting using chits hearsay.

But PW5 testified that what he was give is what he produced in the Ministerial policy statements that were discussed internally by the Ministry. That product is exhibits P5 and P6. None of the accused corrected those documents before they were submitted to Parliament. Those documents capture budget item for NSSF. The accused have not challenged those exhibits as being false. They are the documents they submitted. It was not necessary to bring chits when the documents have NSSF in them. Exhibits P5 and P6 talk for themselves. If there was no complicity by the Ministry of Finance, that item would have been rejected upon being sighted.

The two gentlemen assessors advised me to find that there was no criminality on the part of the accused because PW3's letter cleared the budget. I have already held that PS/ST cannot legalise what is illegal under the NSSF Act. Pensioners do not contribute to NSSF by law. No civil servant can clear that illegality.

The two gentlemen assessors also advised that because that money kept flowing means all was okay. With respect, I do not agree. This was a syndicate. If Finance had been honest, it would have blocked this budget item. On the contrary Finance

officials reclassified it without authority to reallocate and released the money on it as accomplices.

The two gentlemen assessors also advised me that the investigations did not go to Cairo Bank where the eventual thieves of this money are and like defence counsel advised that government should look for its money there. Again with respect, I do not take that advice. The accused are not facing charges of embezzlement. They are being charged for exposing their employer to financial loss as a result of abuse of their offices. They were paid to protect government resources from ending up in wrong hands. They failed to do so. They had several opportunities to rectify this budget if they were not culpable but went all the way defending it and cannot run away after the loss has occurred. Payments made to ghosts are a loss to government. The defence submission supports the finding that money was paid to ghosts.

With great respect to the two gentlemen assessors, I am un-able to follow that advice. The documents in form of exhibits and the law do not support that advice.

The prosecution has proved all the essential ingredients of the offence of causing financial loss against each of the accused in counts one and two to the tune of **88,241,784,930=**.

Resolution of counts three and four. Abuse of office

The trio are accused jointly of making budgetary provisions of 44,121,295,000 in each **FY 2010/11 and 2011/12** for Social Security Contributions (**NSSF**) in abuse of their authority which was prejudicial to the interests of their employer with the knowledge that Public Service employees are exempt from contributing to **NSSF**.

The prosecution is required to prove the following ingredients.

- I. That the accused are government employees.
- II. That they did or directed to be done an arbitrary act prejudicial to the interests of the employer.
- III. That they abused the authority of their office.

There is no dispute that the three accused are government employees in capacities mentioned in the indictment and repeated in the introduction above.

The prosecution submitted that by including an item for Social Security Contributions in the Ministry budget was an act prejudicial to the employer because the Ministry of Public service has no mandate to make contributions to NSSF. The trio abused the authority of their office when they did so and money was lost on an illegal item.

Mr Ochieng for A1 agreed that the Ministry of Public Service has no mandate to budget for NSSF and that the accused did not do so. They budgeted for pension and gratuities only as per their mandate. He referred to the evidence of A1 who testified that there was nothing wrong by hosting the **44.12** billion per FY on code 212101 because government pension is also a contributory scheme only that government is the sole contributor. He wondered how funds could be released in the budget for two FYs if the item was wrong.

Mr. Isabirye for A2 also concurred that the trio never budgeted for **NSSF** and did not pay **NSSF**. He referred to the Ministerial Policy Statements at page 90 of exhibit P5 and page 46 of **exhibit P6** which he said contain budgets for gratuity and not **NSSF**.

I have considered these submissions and reviewed the documents which form the gist of the evidence relied on by both sides.

I have already stated that the two policy statements were a mess. They could only be the work of fraudsters. Exhibit P5 which is the Ministerial Policy statement for **FY 2010/11** at page 90 contains work plans and the **44.12** billion is stated as gratuity for teachers, traditional, UPDF and LGs. Yet in the same document in the budget estimates at page 51 the 44.12 billion is stated or recorded as Social Security Contributions (**NSSF**) on **code 212101**. This is a contradiction because teachers, soldiers, and other pensionable staff do not pay **NSSF** contributions? In the same vein, **exhibit P6** which is the Ministerial Policy statement for **FY 2011/12** at page 95 contains work plans where the figure of **44.12** billion is for NSSF for scientists. In the same document at page 50 is a budget for the same **44.12** billion for Social Security Contributions **NSSF on code 212101**. This renders Mr. Isabirye's submission relying on these exhibits futile because **NSSF**

still appears as a budget item rendering the denials by the accused a total lie. An attempt was made by A1 to justify the hosting of money on **code 212101** by saying government contributes Social Security for its employees but the **PS/ST** and deputy **PS/ST** were clear that that code was not for Public Service employees. Besides, the proper codes like **212102, 212103 and 212104** were available. Why host money where it is suspect and illegal? The letter by PW3 went up in flames the moment he clarified that paragraphs **6 and 7** of **exhibit D1** were wrong. I have already held that the PS/ST could not clear what the law contained in section 8 of the **NSSF Act** prohibited. A1's justification in his defence was more in desperation. The law prohibits what A1 wants court to believe. Besides his own letter of 24th January 2011 where he called it an error leaves his testimony wanting. He betrayed every undertaking he made to **PS/ST** in the contract of 1st June 2010 which required him to protect public funds by controlling expenditure and accounting for the same.

The term arbitrary is an English word defined in the 7th edition of Oxford learner's dictionary as:-

“ an action, decision or rule not seeming to be based on reason, system, or plan and at times seems unfair or breaks the law”.

The budget provision for NSSF broke the law. If PW5 had uploaded money on this item by error as A1 indicated in his letter of 24th January 2011, he should have moved the **PS/ST** to have it reallocated to the correct item. He went for the meeting with the **PS/ST** but ended it without seeking a reallocation. A2 defended the matter despite objections from Parliament disguising it as contributions for scientists on contract. A1 dismissed the talk about such contracts for scientist. The accused were shooting at each other in their defence.

A3 was the technical officer to advise on the budget according to the testimony of A1 but went ahead to prepare schedules draining money originated as an illegal item to pay what turned to be ghosts according to the two audit reports on record.

In conclusion on counts three and four, it is my finding that the prosecution has proved beyond reasonable doubt that each of the three accused did an act prejudicial to their employer. They abused their respective offices by causing the drain of funds on an illegal item.

Resolution of counts five and six. False Accounting by Public Officer.

The prosecution is required to prove that the accused are public officers charged with receipt, custody or management of public revenue who knowingly furnished false statement or return of money entrusted to them.

Ms Acio for the State submitted that A1 and A3 were custodians of the money disbursed to the Ministry. A2 was the vote controller. They received money which they accounted for as having been spent on NSSF in exhibits **P24 and P25** whereas not. She also referred to documents such as the Financial Accounts ending 30th June 2011 by the Ministry in exhibit P7 which reported that the Ministry had received and spent 44.12 billion on Social Security contributions whereas not.

A trial balance extracted on the IFMS by PW9 tendered as exhibit P39 also captures expenditure of **43,968,908,857** as Social Security Contributions.

She submitted that the accused knew this was false because they never paid any money to NSSF.

Mr. Ochieng faulted the **OBT** for the reporting. He contended that the reporting had to follow the configuration on the **OBT** to report this questioned money as Social Security Contributions even if it was spent on gratuity.

Mr. Isabirye defended A2 against the charges contending that he was not responsible for making the reports and never signed them.

It is not in dispute that all the accused are public officers. A1 was the Accounting Officer for all funds disbursed to the Ministry. A2 was the vote controller for all pension funds to the Ministry and was charged with approving all claimants as part of his schedule. A3 was the technical officer responsible for generating schedules of payments after verifying the supporting documents.

I have read the reports in exhibits **P24, P25, P7, P39**. It is clear that accountability for the **44.12** billion for each FY was accounted for as Social Security Contributions. The accused deny paying money to NSSF. It is a fact that the accused did not pay any money to **NSSF**. On the face of it the returns for the money is false.

I have been asked to consider that the reporting had to follow a format on the **OBT** which recorded the funds as Social Security Contributions whereas not.

Granted, I have already found and held that budgeting for this item was illegal. The fact that it was defended and accountability made to follow that defence rendered the report not only false but also illegal.

This money was not uploaded on NSSF **code 212101** by accident. It was deliberate. The Ministry kept quiet about it. When **PS/ST** raised a query, he was silenced. The matter surfaced in Parliament and the technocrats in the Ministry of Finance who must have helped reclassify this item as gratuity for teachers etc drafted a letter for PW3 to sign claiming the money was correctly itemized on **code 2121201** only for PW3 to deny that in court. Besides the budget offends the **NSSF Act** which exempts pensionable employees from contributing to **NSSF**.

The accused knew this was an illegal item. They knew the return was false. They did not even pay the teachers or UPDF who were disguised recipients but paid this money to ghosts purporting to be former employees of the EAC. The return is certainly false. A1 and A3 signed it off while A2 provided the accountability uploaded on the **OBT**. To argue that A2 was not a signatory and so was innocent is to miss the point that pensions could not be processed for payment without his approval. PW4 was in court and was not challenged when he attributed all approvals to A2. The allegation that PW4 was the approver of payments to former **EAC** staff is an afterthought.

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

Resolution of counts seven and eight. Conspiracy to defraud C/S 309 PCA

The Prosecution is required to prove the following elements:

- I. That two or more people had an agreement to do an unlawful act.
- II. That they had the intent to defraud.

Ms Acio for the state submitted that the 3 accused committed acts of fraud in budgeting, requisitioning and disbursing the 44.12 billion in each **FY (2010/11 and**

2011/12). Their actions revealed a conspiracy to defraud government of that money.

Mr. Ochieng for A1 disagreed and contended that there was no meeting by the accused to do an unlawful act. Mr Isabirye for A2 was of same view that what the accused did was lawful. They budgeted for pension and gratuity and paid it out. There was no conspiracy or fraud. Counsel for A3 also shared the same view.

I have already found in counts 1, 2,3,4,5, and 6 above, that the item of Social Security Contributions (**NSSF**) was deliberately originated in the budget, defended, requisitioned and disbursed to ghost employees of the defunct **EAC**. I have already stated that the item was illegal under the **NSSF Act**. I have also stated above that both A1 and A2 wrote letters stating it is not the mandate of the Ministry of Public Service to budget for contributions to NSSF. They were aware of its illegality but chose to defend it in Parliament and Finance. In meetings with the PS/ST, the matter was swept under the carpet in what I believe was connivance with the Treasury. In the budget estimates by finance the money was disguised as gratuity for teachers, UPDF, traditional and LGs in **exhibit P19 (FY 2010/11)**. But the following **FY 2011/12** in exhibit P17, the money was captured on **code 212101** for NSSF and disbursed. No doubt, the Treasury wrote exhibit D1 to the Public Accounts Committee of Parliament (**PAC**) defending the item only for the **PS/ST** who had signed **exhibit D1** to deny paragraph 6 and 7 of that letter thus betraying the accused defence.

In a conspiracy, it is trite law that the prosecution does not have to prove that a formal meeting was held. All that is required is evidence to prove actions from which an agreement to commit fraud would be inferred. In this case, the evidence of PW5 was elaborate on how this issue was contested by Finance and Parliament but A2 as the vote holder stood his ground promising to provide answers to **PAC**. Luck smiled on them when the Treasury wrote **exhibit D1** which clearly contained an illegal statement that the Ministry of Public Service could upload gratuity funds on **code 212101** for Social security Contributions (**NSSF**). I have held that that is illegal and the **PS/ST** cannot clear an illegality. In court he apologized for that error leaving the accused guilty of their actions.

It is my conclusion that the failure to discuss the **NSSF** issue in the Ministry yet the Policy statements clearly stated that **NSSF** was an item on which the Ministry had budgeted funds was an inside game or conspiracy to steal the money by the accused since they were aware they had no mandate to pay **NSSF** anyway.

Despite opportunities along the way to seek reallocation of the funds to the correct item, the accused were adamant. They requisitioned for it through A1 and A3 and disbursed it to what the defence submissions acknowledge were ghosts in Cairo bank. These actions by the accused reveal their criminal intentions to defraud government of 88.4 billion in the two **FYs (2010/11 and 2011/12)**

The common thread in the defence submissions and the accused's own testimonies was the question:- **If it was illegal to budget and requisition for the questioned funds on the Social Security Contribution Code 212101, how come the Treasury went ahead to honour the several requisitions in the two FYs by releasing the money and accepting the accountabilities?** The answer is not hard to find. The Treasury that was supposed and indeed first objected to this kind of illegal budgeting in a communication of 7th January 2011 (**exhibit P28**) later became part of the scheme to drain the money fraudulently. No doubt **exhibit D1** was prepared by the Treasury to cover that illegality. That is my finding and conclusion. The money was smoothed through the government financial system by way of syndicate corruption.

The prosecution has proved the essential elements in counts seven and eight against each of the accused persons.

Resolution of counts Nine and Ten. Diversion of Public Resources C/Ss 6 and 26 of the ACA, 2009.

The prosecution must prove the following ingredients.

- I. That the accused converted, transferred or disposed of public funds.
- II. That the purpose was unrelated to that for which the resources were intended.

The state adduced documentary evidence that money in the work plans and the approved budget was for **NSSF**. It is not in dispute that the money was released but not paid to **NSSF** however illegal it would be.

It was submitted that the money was paid to alleged pensioners of the defunct **EAC** instead of **NSSF**. I was asked to find that this was a diversion of public resources.

The defence was in unison that there was no diversion and no need for reallocation because the money was budgeted and paid on the right item.

The evidence of PW2 was that he developed the **OBT in 2009/2010**. The purpose was to capture the activities in Ministries for each FY. The **OBT** had a unique Code for each activity and the expected outputs. He testified that **Code 212101** was for **NSSF** while gratuity was to be uploaded on code **212104**. It was his testimony that if a Ministry budgeted for **NSSF**, it was to pay **NSSF**.

He was showed progress reports exhibits **P24 and P25** which he interpreted to mean money was paid to **NSSF** as per work plans and budget by the Ministry of Public Service. Accountability he said must match the budget.

The truth is that no money was paid to **NSSF**. This is not disputed by the defence. It means the reporting in exhibits **P24 and P25** is false. It means that money for **NSSF** was diverted for the purpose unrelated to that for which the resources were intended. PW2 stated in cross examination that the accused budgeted for a need they did not have.

PW3, in cross examination testified that paragraphs 6 and 7 of his letter contained errors because the Ministry of Public Service had no mandate to budget for **NSSF**. I have already held that he had no authority to clear an illegal item in the budget.

He testified that the accused should have sought reallocation in writing from the **PS/ST** in order to requisition and spend the money. I was asked by the defence to find that the accused were not users of the **OBT**. Granted but what was uploaded on the **OBT** by PW5 was given to them. It is what they submitted and when red flags were raised, instead of seeking a reallocation chose to hold onto it. They neither paid **NSSF** nor did they pay teachers, traditional and **UPDF** as their budgets indicated in some respects.

The accused are experienced public officers who knew what they were doing. A1 has been a Permanent Secretary superintending pensions for close to 20 years since 1996. A2 is a trained pension expert. That is why even when he was promoted, he

was retained in pensions. He made the costings and work plans for the compensation department. A3 was the principal accountant. He had held that post in pension department since 2002. He was experienced. He was the technical officer to guide A2 and A1 on matters finance. In one breath the accused blame PW5 for uploading money on a wrong item and even A1 writers to the Treasury calling it an error but in another breath, A1 justifies the item on **code 212101** calling pension a contributory scheme where only government contributes. In law one cannot blow hot and cold at the same time. That was contradictory.

I have no doubt that on the evidence on record the execution of the budget on the item on **NSSF** by paying other persons than **NSSF** without authority in writing from the **PS/ST** amounted to diversion of Public funds. I find that the prosecution has proved beyond reasonable doubt the ingredients in counts nine and ten.

Conclusion.

In view of the findings I have made above, I have come to the conclusion that the prosecution has proved beyond reasonable doubt the charges of Causing Financial Loss in counts 1 and 2; the charges of Abuse of Office in counts 3 and 4; the charges False Accounting by Public officer in counts 5 and 6; the charges of conspiracy to defraud in counts 7 and 8 and Diversion of Public Resources in counts 9 and 10 against A1, A2 and A3.

I accordingly find each of the accused guilty on each of the charges listed above and convict each accused on each charge.

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GUDUDU

JUDGE

11TH NOVEMBER, 2016.

REASONS AND SENTENCE

Upon conviction on 10 counts, the prosecution asked me to impose deterrent sentences against each of the accused persons on grounds that the loss caused to the state involves large sums of money amounting to 88.2 billion shillings.

It was also submitted that the accused as senior officers breached the trust of Government in them to protect public resources under their control and charge.

Ms. Barbra Kawuma principal state attorney, asked court to send out a clear message that corruption is risky business and invited court to follow the sentencing patterns in cases such as Uganda versus John Kashaka and others and the case of Uganda versus Teddy Szezi Cheeye where this court imposed 10 years imprisonment against each convict yet the sums involved were much less than in this case.

Ms Kawuma also asked Court be pleased to order compensation in favor of the Government pursuant to article 126 (2) (c) of the Constitution and section 126 (1) of the TIA.

Mr. Ocheng for A1 asked court to impose a fine instead of a term of imprisonment on grounds that, the convicts are 1st offenders and have had a long illustrious carrier which was only dented by this case.

I was asked to consider that A1 has been on remand for more than 1 year and is aged 64 years with heavy family responsibilities. It was submitted that sending A1 to prison would be sending him to early death. Mr. Ochieng also asked me to consider that the cases of John Kashaka and Teddy Cheeye involved embezzlement of money yet in this case the convict has not been proved to have benefited from the lost funds. He therefore asked that the court imposes a fine and dismisses the request for compensation because the money has not been proved to have been stolen by A1.

For Mr. Kunsu (A2) Mr Isabirye agreed with Mr. Ochieg on the general mitigating factors and added that A2 is a sickly person who has been to prison for over a year, has family responsibilities with dependent sons and daughters and also asked that a fine be imposed instead of imprisonment.

A2 in person referred to several community services he renders as a good catholic inside and outside of prison. He asked me to consider this community service as a strong mitigating factor that he is a responsible citizen.

For Mr. Christopher Obey A3, Mr. Nsubuga Mubiru adopted the submissions of his 2 colleagues adding that since the court has found that this crime was committed in a syndicate manner, then it would not be fair to ask the convicts to compensate the state for monies they never personally benefitted from. He asked court to find that A3 who is aged 48 years has young children between nursery and the age of 16 and he is the sole bread winner who has been in prison for over a year and should be sentenced to a fine to enable him return to look after his family.

I have given anxious attention to the submissions by the prosecution and defence counsel.

I have also perused the sentencing guidelines which guide court in finding an appropriate sentence in specific offences. I have also perused the law creating the offences the accused are indicted with .

I have considered the circumstances surrounding this case and the effect it has on the financial management in Government.

The fact that the accused persons are first offenders and have been in prison for about 14 months, are factors that I consider in favor of the convicts. I also take into account the fact that the accused persons are family heads with great responsibilities to their spouses and their children and other dependants.

I will therefore temper justice with mercy considering these mitigating factors. On the other hand I have to balance the mitigating factors with aggravating factors such as the loss of colossal sums of money amounting to 88.2billion shillings through the fraudulent dealings of the convicts and their accomplices.

I was asked to consider that the state has not proved personal benefit of the lost funds but I would ask a question, why would the state pay the convicts salariesto cause it to loose the money they were mandated to protect? It would be naïve to consider that the convicts caused loss for two financial years through several requisitions and approvals just to benefit ghosts and not themselves. Why would

the convicts act so recklessly or negligently to pay out public resources without minding who takes it unless they also had a personal benefit at the end of the day.

Considering that this crime was committed over a period of 2 financial years by very senior public servants, it would be a mockery of the fight against corruption if this court indulged in imposing fines and letting the convicts walk away unscathed .

The enactment of the Anti-corruption Act 2009 coupled with the setting up of the Anti-Corruption Division of the High court meant that an infrastructure had been established with a loud message that corruption is a risky business.

I am therefore going to impose sentences that reflect the balancing of applying justice with not just mercy in favor of the convicts, but also with firmness to fight corruption in society.

Balancing the mitigating and aggravating factors which have been brought to my attention by both sides, and considering the need to punish corruption as a serious offence, I impose the following sentences on each of the convicts.

A1- considering his advanced age of 64 years, and status as the Accounting Officer, who is accountable for funds deployed to his Ministry under Article 164 (1) of the Constitution, and taking into account the fact that he has been in prison for 14 months, I sentence him as follows

- (i) A1 is sentenced to 7 years imprisonment on Counts 1 and 2
- (ii) A1 is sentenced to 3 years imprisonment on Counts 3 and 4
- (iii) A1 is sentenced to 3 years imprisonment on Counts 5 and 6
- (iv) A1 is sentenced to 3 years imprisonment on Counts 7 and 8
- (v) A1 is sentenced to 7 years imprisonment on Counts 9 and 10

A2- considering that A2 is a sickly person even by looks in court, and like others has been on remand for 14 months. He was the action officer responsible for the activity which resulted in originating a budget the Ministry was not mandated to execute ,and considering that he was not an approver on the IFMS I sentence A2 as follows

- (i) A2 is sentenced to 5 years imprisonment on Counts 1 and 2
- (ii) A2 is sentenced to 3 years imprisonment on Counts 3 and 4
- (iii) A2 is sentenced to 3 years imprisonment on Counts 5 and 6
- (iv) A2 is sentenced to 3 years imprisonment on Counts 7 and 8
- (v) A2 is sentenced to 5 years imprisonment on Counts 9 and 10

A3- considering that he is aged 48 years with young children, and was the technical officer responsible for advising both A2 and A3 on the budget formulation and execution, and further considering that he generated the schedules through which the funds were drained, where he was a co-signatory, I take a serious view that he did not deploy his professional mandate to advise A1 and A2 against this illegal activity. Considering that he has been on remand for 14 months, I take this into account and sentence him as follows

- (i) A3 is sentenced to 10 years imprisonment on Counts 1 and 2
- (ii) A3 is sentenced to 3 years imprisonment on Counts 3 and 4
- (iii) A3 is sentenced to 3 years imprisonment on Counts 5 and 6
- (iv) A3 is sentenced to 3 years imprisonment on Counts 7 and 8
- (v) A3 is sentenced to 10 years imprisonment on Counts 9 and 10

A3 has taken the biggest sentence on the basis of being the generator of the schedules which the audit reports found to be containing ghosts. He is the manipulator and center man in this scam.

The sentences for each accused person shall run concurrently.

The provisions of Article 126(2) (c) of the Constitution read together with section 126 (1) of the TIA and section 7 of the Anti-corruption Act 2009 mandate this court to mitigate the loss to an aggrieved party through an order of compensation. Having established as a fact that the convicts could not have managed to commit this crime without assistance of others deployed at various points in the criminal chain, I hereby make an order that the convicts shall jointly compensate the Government of Uganda to the tune of 50 billion shillings, a sum I consider reasonable in the circumstances of this case.

Each accused person has a right of appeal against the conviction and sentence within 14 days.

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LAWRENCE GIDUDU

JUDGE

11/11/2016